



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE 273 OF 1991

GLADYS WANJIRU KIRUBI.....PLAINTIFF

Versus

JOHN KANGETHE KIBE.....DEFENDANT

JUDGMENT

The Plaintiff is the registered owner, under the Registered Land Act (Cap. 300 Laws of Kenya) of the suit parcel of land LOC. 11/GIKANDU/195 measuring approximately six acres. But while the Defendants were in occupation of the suit parcel of land, the Plaintiff was not, ostensibly because the Defendants have prevented her from occupying the land. She therefore filed this suit seeking an order that the two defendants be evicted from the suit parcel of land. She also seeks general damages and costs of the suit.

John Kangethe Kibe is the only son of Paskuare Kibe, also written Pasquare Kibe, and the two were the only original defendants. Later Monica Mugure Kangethe applied to be joined as a defendant and she was subsequently joined as the third defendant. This is a suit filed in 1991 and by the time hearing of the main suit commenced on 18th July, 2001, both Paskuare Kibe and Monica Mugure had died so that John Kangethe Kibe remains the only Defendant to-date. Unfortunately, the parties have taken all that long to have the main suit determined yet as years passed, the parties went on conducting themselves on the suit parcel of land as if a decision in this suit can never affect them adversely.

From the pleadings and evidence as well as written submissions - not filed by Mr. Waiganjo Gichuki, Counsel for the Plaintiff, but filed by Mr. R. M. Kimani, Counsel for the Defendant, the suit parcel of land was on a first registration, registered in the name of Batista also written Baptista Kangethe on 11th May 1963. This was an educated man who was a clerk at the District Commissioner's office,

Muranga. He had two wives Teresia Muthoni or Teresia Nyakabata and Monicah Mugure, the first and the second wife respectively.

On 5th May, 1967 the said Batista Kangethe transferred the whole parcel of land to his second wife Monicah Mugure who had no children. His first wife who had children, who included Paskuare Kibe, was alive. When Batista Kangethe, his wife Teresia Muthoni, their son Paskuare Kibe, died they were all buried on the suit parcel of land. Paskuare Kibe's burial was done on a court's order. The burial of Monicah Mugure on the suit parcel of land was also disputed, this time the Plaintiff insisting that Monicah Mugure must be buried on that parcel of land. The Plaintiff succeeded. That was after Monicah Mugure had transferred the suit parcel of land to the Plaintiff on 26th March, 1985 as a purchaser.

At the time that transfer was done, the Plaintiff may or may not have been aware that the Defendant and his parents as well as children of the Defendant lived on the suit parcel of land. There is a dispute in the evidence as to whether they were in occupation or they went on the land after the Plaintiff had become the registered proprietor, the Plaintiff claiming that the prior occupation of the land by Paskuare Kibe was only for the purpose of chasing away monkeys. Nevertheless, the Plaintiff proceeded with the transaction hoping that the Defendant and his family will eventually vacate the land. But that never came to be as the Defendant and his family resisted vacating the land and instead were making a counter-claim for three acres they claim belong to them as beneficiaries from the estate of Batista Kangethe.

Attempts at arbitration failed and there appears to have been even some criminal proceedings. When the Plaintiff was forced to file this suit therefore, the Defendant, in his defence, made a counter-claim saying the Plaintiff, through Monicah Mugure, holds half the suit parcel of land as a trustee for the Defendant. The Defendant had alleged fraud in the transaction between the Plaintiff and Monicah Mugure, but during the hearing of this case the Defendant told the court that there was no fraud. The Defendant claims he and his family have no other land apart from the suit parcel of land where he has lived for all his life and that the Plaintiff has never stepped on the suit land and that when the Plaintiff obtained transfer of the suit parcel of land she knew the Defendant and his family were there, not only in possession but also as beneficiaries. Otherwise the Defendant claims title through adverse possession. However, no effort was made during the hearing to prove title by adverse possession.

Replying to the counter-claim, the Plaintiff disputes the alleged trust and does not accept the Defendant has a lawful claim over the suit parcel of land and further disputes the Defendant's assertion that they were entitled to give consent or authority to Monicah Mugure's transfer of the land to Plaintiff. Plaintiff maintains trespass by the Defendant and his family from August, 1986 and does not accept that they were on the land since born and asserts that the presence of Paskuare Kibe on the suit parcel of land, which presence she found there, was that of person under instructions to be there for the sole purpose of chasing away monkeys. Plaintiff maintains the suit parcel of land was the absolute property of Monicah Mugure with no trust attached and that the Defendant and his family having violently been resisting eviction cannot claim adverse possession, which in any event, was not disclosed in the counter-claim or evidence. She said that when the suit parcel of land was transferred to her the title was clear without any trust indicated – as the suit parcel of land belonged to the seller absolutely. She claimed that Paskuare Kibe and John Kangethe Kibe had their own piece of land which they sold. She produced a copy of land register (Exh. 3) showing the land she claimed owned by the two. It is LOC. 11/GIKANDU/196 approximately 0.40 hectare originally in the name of "Maskwele Kibe" corrected to read "Sakale Kibe" who subsequently on 28th January, 1981 transferred it to one J. Evanson Mwangi Gitau for Ksh.3000/=. The Plaintiff said that the name "Maskwele" meant same as "Paskuare".

There was also Plaintiff exhibit number 7, a copy of a land register for parcel of land LOC. 11/GIKANDU/710 measuring approximately 0.5 hectare in the name of John Babtisco on a first registration. The Plaintiff claimed that plot was owned by the Defendant in the name of John Babtisco. But the Defendant who was 18 years old as at the date of the first registration, denied that the plot belonged to him.

In any case, it is apparent the Defendant's grandfather, namely Batista Kangethe, did not own the suit parcel of land only. For example, he also owned a plot at Makuyu in Muranga Town where Monicah Mugure was living when it was being rented by the Plaintiff as a tenant.

To conclude this judgment therefore, let me repeat what I said earlier that although the Defendant said that alternatively the counter-claim is based on adverse possession, no attempt was made during the hearing to prove adverse possession. I need not say more than that.

On the issue of fraud in the transfer of the suit parcel of land by Monicah Mugure to the Plaintiff,

it was raised in the Defendant's pleadings and denied in the Plaintiff's pleadings. In In paragraph 8 of the Defendant's Statement of Defence, it is alleged that:

“the transfer of the whole land by MONICAH MUGURE to the Plaintiff was fraudulent and in breach of her (MONICAH'S) fiduciary duty as trustee.”

The Plaintiff's reply in paragraph 8 of her reply to defence and defence to counter-claim said that the transfer of the suit land was lawful and valid. Otherwise she put the Defendants to strict proof. Where is that strict proof? All that the Defendant said in his evidence on that issue in this court was:

“Monica sold the land to Gladys illegally. There was 282/95 case in Muranga. I did not say that Gladys forged Monica's signature. I checked at the Lands Office and discovered that Monica actually sold the land.”

When therefore the learned Counsel for the Defendant writes in his written submission that the transaction was fraudulent, where is the evidence of that fraud from the Defendant. When the Plaintiff could not produce the sale agreement in court, she explained why. As to payment, there was evidence from the Plaintiff and her witness P.W.2 Maula Wanjiku, who was the Defendant's aunt, that the sale price was paid cash in the chambers of advocate Karuga Wandai. The Defendant saw relevant official documents at the Land Registry where the presence of the sale agreement which the Plaintiff could not produce in this court was irrelevant and therefore not needed. In other words, the Land Registrar did not require the sale agreement in order to register the transfer of the suit parcel of land to the Plaintiff. The mere absence, from this court, of that sale agreement cannot make the sale transaction in this matter fraudulent.

As to the issue of a trust, again, it is a question of evidence. Where is that evidence from the Defendant before this court can say there was a trust? If Baptista Kangethe's

“intention and purpose was that Monicah Mugure would hold the land as trustee for her own house and for the house of Teresiah Nyakabata”

and even if Baptista had two wives and

“Traditionally a Kikuyu man's property was always divided according to the number of houses he had”

and further if

“Baptista intended that one day Monica would give Teresiah's share of the land not to Teresiah, not to Pasquare but the first

defendant, i.e. – Teresiah’s grandson, John Kangethe Kibe”,

where is the Defendant’s evidence to that effect before this court? On what basis can this court say that Monicah totally disregarded her husband’s wishes and acted “in blatant breach of trust” as it is asserted in Mr. Kimani’s written submissions?

The evidence on record is the evidence concerning a literate person, in control of all his faculties deciding to transfer the whole of the suit parcel of land to one of his two wives, namely Monicah Mugure he knew very well was childless. His elder and child-bearing wife Teresia Nyakabata or Teresia Muthoni was present. The Defendant John Kangethe Kibe and his father Paskuare Kibe were there.

John Kangethe Kibe has claimed that the land was not transferred to Teresia Muthoni because she was too old and blind. But if that were the only reason as given by the Defendant in his evidence and if it were true that indeed Batista Kangethe wanted Teresia Muthoni’s house to share the suit parcel of land, Batista Kangethe would have had no problem either including his only son, Paskuare Kibe in the transfer of the land to Monicah Mugure for the two to own the land as proprietors in common, or sub-dividing the land, at that stage, into two portions so that he could have transferred one portion to Monicah Mugure and transferred the second portion to Paskuare Kibe. Otherwise if it is true, as it has been claimed in the written submission of the Defendant’s counsel without relevant evidence on record from the Defendant, that Paskuare Kibe was a beer addict and that it was feared he could alienate the land, then instead of Paskuare Kibe, Batista Kangethe could have given Teresia Muthoni’s share to her house through John Kangethe Kibe who by then was an adult of 22 years old having been born in 1945 according to his own evidence on record.

It is worthy noting that Batista Kangethe did not undertake that transaction in secret. It was done with the knowledge of adult members of this family some of them attended meetings of the Land Control Board where consent to the transfer of the suit parcel of land to Monicah Mugure was given. What they had discussed at the Land Control Board concerning that transaction has not been revealed to this court in the evidence adduced by the Defendant; yet that was a forum which could have assisted the Defendant’s family get, directly from Batista Kangethe, the three acres they are now claiming from the suit parcel of land. There is no evidence that the trust, they now claim, featured anywhere during that time or during any other time. The Defendant has not adduced such evidence apart from his mere claim for the existence

of a trust which, he apparently wants the court to imagine without the facts of its existence being laid before the court. It follows that the learned counsel for the Defendant had no basis from which he stated in his written submissions as follows concerning Batista Kangethe and the trust:

***“His intention and purpose was that Monicah Mugure would hold the land as trustee for her own house and for the house of Teresiah Nyakabata. This could only be so since Baptista had two houses.-----Baptista intended that one day Monicah would give Teresiah’s share of the land not to Teresiah, not Pasquare but the first Defendant, i.e. – Teresiah’s grandson, John Kangethe Kibe.-----this was never to be for in March, 1985 Monicah in total disregard of her husband’s wishes and in blatant breach of trust transferred the suit land to the Plaintiff.-----
-----The defendant has demonstrated and proved that Monicah was indeed given the suit land by her husband to hold the same in trust for herself and for Teresiah’s house. In breach of that trust Monicah sold the whole land to the Plaintiff. In law the Plaintiff took the title subject to that trust. Section 28 of the Registered Land Act (Cap.300) is clear. No registered proprietor of land shall be relieved from any duty or obligation to which he is subject as a trustee. Monicah was within her right to sell to the Plaintiff her share of 3.0 Acres in the suit land. But she must be taken to have sold the other 3.0 Acres subject to the trust. The Plaintiff must now surrender the 3.0 Acres she obtained under trust to the defendant.”***

I have said the learned Defence Counsel had no basis from which he said what is in the quotes above. There is completely no evidence on record from the mouth of the Defendant and or his witness demonstrating and proving what Counsel stated in those quotes. Baptista Kangethe’s intention to make Monicah Mugure a trustee as claimed by Counsel is not demonstrated and proved in the evidence. His intention that one day Monicah would give, John Kangethe Kibe, Teresiah’s share in the suit land is not demonstrated and proved. I have said John Kangethe Kibe was by then an adult 22 years old. If the intention Counsel is claiming in his submissions was there, Baptista Kangethe would have transferred the 3.0 acres to John Kangethe Kibe directly without having to give it in trust through Monicah. But even in trust, John came to live with that transfer for 18 more years without pressing for the alleged intention to be effected by Monicah Mugure before she sold and transferred the land.

For the proviso to Section 28 of the Registered Land Act to operate, the existence of the trust must first be proved. Otherwise that proviso cannot operate in the vacuum like in this matter where the claimed trust has not been proved. A mere claim does not constitute proof.

Moreover, the proviso to Section 28 would, in this matter, apply to Monicah Mugure and not to

the Plaintiff. Section 28 is about the rights of a registered proprietor; the indefeasibility of his title; and ends by stating:

“Provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

If it were applicable in this suit, that proviso would apply to Monicah Mugure only. It would not extend to the Plaintiff who is protected under Section 126(3) of the Registered Land Act which, as is relevant, states as follows:

“Where the proprietor of land, -----is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trust, but for the purpose of any registered dealings he shall be deemed to be the absolute proprietor thereof and no person dealing with the land-----so registered shall be deemed to have notice of the trust, nor shall any breach of the trust create any right to indemnity under this Act.”

The Plaintiff was a

***“person dealing with the land-----so registered”
and shall not
“be deemed to have notice of the trust”***

even if Monicah Mugure was a trustee, which has not been established or proved in this suit.

Moreover, following the transfer of the suit parcel of land by Batista Kangethe to Monicah Mugure on 5th May, 1967, Paskuare Kibe and his son John Kangethe Kibe came to live with that transfer for 18 years without challenging it to obtain their share from Monicah. They claim to have been living there for all their lives, meaning, they were living there from the time before that transfer. The Plaintiff says they entered the land in 1986 and started putting up their houses and cutting down trees and cultivating the land, after she had bought the land and became the registered proprietor on 26th March, 1985. If indeed they were living there when the Plaintiff became the registered proprietor, she was looking at them as trespassers on Monicah Mugure’s land and not as beneficiaries under a trust held by Monicah Mugure. True they continued to live there and buried their dead there after the Plaintiff had become the registered proprietor. But some of those burials were not without disputes. Others are said to have been done without the knowledge of the Plaintiff to raise objection.

The Plaintiff’s case as exposed above is given more strength from the evidence of P.W.2 Maula Wanjiku, a biological sister of Paskuare Kibe and paternal aunt of John Kangethe Kibe. Apart from

telling the court that she witnessed sale of the suit parcel of land by Monicah Mugure to the Plaintiff at Ksh.100,000/= paid cash in an advocate's office, P.W.2 also told the court what her father, Baptista Kangethe did and said during the time he had the suit parcel of land transferred to Monicah Mugure and even before that time.

P.W.2 told the court that the suit parcel of land was not the only piece of land her father had. He had other pieces of land. For example he had a piece of land at Githima which he had registered in the name of Paskuare Kibe. Her father had another piece of land at Gitaiguru in the name of John Kangethe Kibe. An illiterate lady knew the physical location of the two pieces of land but could not know the registration particulars. John Kangethe Kibe had a kiosk on that land and his family resided there. Paskuare Kibe had sold his land.

P.W.2 said by the time her father gave the suit parcel of land to Monicah Mugure, they were living on another piece of land and therefore Monicah Mugure used only to cultivate the suit parcel of land using wives of John Kangethe Kibe and Paskuare Kibe. She stopped cultivating when those two wives left for Thika and subsequently Monicah Mugure decided to sell the land and sold it to Gladys Wanjiru, the Plaintiff in this suit. P.W.2 said:

“Prior to my father’s death he called clan members and told them Monica should not be forced to surrender anything. He referred to the land and the commercial plot. His fear was that she was childless and would be snatched her property. My father put this in writing in this Black Book which Monica then took and kept at her uncle’s home.

I produce the book.”

P.W.2 produced the book as exhibit 8 together with translations into English from Kikuyu language. She added that her brother and his son, meaning Paskuare Kibe and John Kangethe Kibe, subsequently moved onto that land, the suit parcel of land, and started putting up houses. P.W.2 added:

“Monica was not holding the land in trust. My father would have said so but he did not. Monica and my father are buried on suit land. My mother had been given a small portion by Monica to reside there. Prior to that my mother had been residing in the village. John Kangethe buried his son there by force. My brother was also buried there while the case was still going on.

I was present when the sale took place. It was in the office of Karuga Wandai Advocate. This land is close to my land. Gladys has never cultivated the land because of the case in court.”

This witness told the court the suit parcel of land had been bought by her father when she was young but

big enough to pull a goat. She said that Paskuare Kibe initially stayed on the land to help look after it as his wife was at Thika. She added, and this was during cross-examination:

“My father foresaw that Monica would be disturbed by clan members when he died as she was childless. He therefore transferred the land to her. The suit land is 6 acres. My mother was not given land by my father. He (Her) land was given to his son.

One Benson Kiingu, my brother, now dead, read what was contained in the book. I do not remember the date.”

This witness also said that John’s mother, wife, children and John himself came from Thika and found the land already sold. Paskuare had also sold other land. When John got married, he went to Thika. His mother and his wife followed them.

Looking at exhibit 8, the translation in English of a text which does not have a date. The English translation typed as the Kikuyu text from which the translation by Mr. Waiganjo Gichuki was made being hand-written. It contains other things but I think what is relevant to this case is as follows:

“I Baptista Kangethe have declared that nobody will come to tell Mugure how the old man died and nobody is supposed to come here. Whoever will break that rule will be cursed because nobody among you comes to visit me at the time of my illness. Benson Kiumu and his wife, Pasquare and his wife together with his son because they don’t come to visit me.

The land belongs to Mugure and if she wishes to evict you she can do so. No one has authority over it except Mugure. It is not acceptable for anyone to cause Mugure trouble. If you ever cause trouble to Mugure she will evict you so that you can go and build your houses in your own shambas. Because each has his own land.”

The last passage concerning land is signed by Baptista Kangethe.

That concludes my survey of the evidence adduced by both sides during the hearing of this suit, which was started by my brother judge Hon. Mr. Justice J. V. O. Juma and has been completed by me. I should point out that the Plaintiff has made no effort to prove the general damages she has claimed in the Plaintiff. On the other hand, the Plaintiff has established her case for an eviction. The Defendant’s counter-claim for three acres or any other has not been established.

Accordingly, the Defendant’s case in the counter-claim against the Plaintiff is hereby dismissed. The Plaintiff’s claim in the Plaintiff for general damages against the Defendant also dismissed; and the Plaintiff’s prayer relating to eviction granted as follows in the following terms:

The Defendant, his relatives, servants and agents be and are hereby ordered to vacate the suit parcel of land within three (3) months from the date of this judgment. In default, an order for eviction to issue. The Defendant to pay costs of the suit to the Plaintiff.

Dated this 7th day of October, 2005.

J. M. KHAMONI
JUDGE