



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE 1240 OF 1998

DAMARIS WANGECHI KARIUKI.....PLAINTIFF

VERSUS

DAMARIS NDUSYA.....DEFENDANT

AND

JAMES MAINA KARIUKI.....1ST APPLICANT

JACKSON MWAURA KARIUKI.....2ND APPLICANT

NAOMI NJERI KARIUKI.....3RD APPLICANT

JUDGMENT

The plaintiff brought this suit by way of plaint against the defendant seeking orders that the defendant be evicted from the suit land *LR NO.NKUENE/MITUNGUU/15* situated within Meru District and measuring approximately 17 acres. She also sought mesne profits dating from 1978 until the order of eviction is effected.

This claim is based on the ground that the plaintiff is the registered proprietor of the suit land.

The defendant upon being served with summons filed a defence in which she denied the plaintiff's claim. She also filed a counter claim in which she sought orders that the plaintiff do transfer the suit land to her on the ground that the plaintiff was registered as proprietor of the suit land in trust for her.

The plaintiff's case is that the suit land was registered in the name of her deceased husband Jeremy Gitau Kariuki upon his death on 26th August 1982. She filed a *Succession Cause No.262 of 1983 – NAIROBI* through which the suit land was transferred to her name among other assets of the estate of her late husband.

In her evidence she told the court that she got married to the deceased on 12th December 1963. The marriage was celebrated at Nkubu Catholic Church. She produced the certificate of marriage Exh.2 She is a teacher while her late husband was a police officer. The suit land was given to the deceased between 1964 and 1965 while he worked in Meru. By the nature of his work, the deceased was transferred to Rift Valley in 1971 and was stationed at Kericho. She also sought a transfer and joined him at Kericho. Because they were far away from Meru they decided to allow the defendant to cultivate a portion of the

suit land so that she could take care of it. She first met the defendant on the suit land in 1979. The defendant had constructed a grass thatched house on the suit land.

The defendant was requested to vacate the suit land but she requested for time to enable her harvest her crops. In 1980 the deceased started ailing. He never recovered until 26th August 1982 when he died. She visited the suit land in 1983 and requested the defendant to move out but the defendant refused to vacate. She reported the matter to police and the defendant was arrested and charged with trespass. She was convicted and sentenced to 6 months jail term but she was released on appeal. She applied for Letters of Administration in 1983 in respect of the estate of her late husband but she omitted to include the suit land as part of the assets of the estate. She said this omission was occasioned by confusion.

She said she was confused because she had not recovered fully from the shock of the loss of her husband. This is so despite the fact that in the same year which was over one year since the death of her husband, she had visited the suit land requested the defendant to vacate and when she refused, she had called the police who arrested the defendant from the suit land and had her charged with trespass. The plaintiff did not call any other witness.

The defendant in her evidence told the court that she first met the deceased in 1970 when she was introduced to him by one Makaa, her relative who was working in the police force with the deceased. They got married in 1970 through Kamba Customary Law. He took her to the suit land in 1970 when she started using it but settled on the same in 1971 when the deceased constructed a house on the suit land for her. She stayed on the suit land while the deceased stayed at Nkubu Police Station where he worked but he used to pay visits whenever he had time. Her marriage was formalized when the deceased paid dowry to her parents.

She was blessed with three issues with the deceased who were all given Kikuyu names in compliance with her husband's Kikuyu custom though she was a Mukamba herself. She produced birth certificates for the said issues namely James Maina born on 8th April 1975, Jackson Mwaura born on 12th August 1982 but she never produced any for the last born child namely Naomi Njeri. All along, she did not know that the deceased was married to the plaintiff until 1983 when the plaintiff visited the suit land and asked her to vacate but she resisted and that is when trouble started.

The plaintiff reported her to the police and she was arrested and charged with trespass upon private property. She was convicted and sentenced to 6 months imprisonment but she was released on appeal. She further told the court that when the plaintiff filed the succession case, she was not made aware and that from the records in that cause the plaintiff did not include the suit land as one of the assets of the estate of the deceased when she made the application.

The defendant called 3 defence witnesses *DW2 JOHN NDABI* who is the brother of the defendant who told the court that the defendant was married to the deceased Jeremy Gitau Kariuki and he was paid dowry according to Kamba Custom which comprised of 3 goats and cash Sh.7,000/=. He also told the court that he visited the matrimonial home of the defendant and the deceased several times and saw the three issues of the marriage being born and grow and they are all adults now. *DW3 COLUMBUS MWAJA*, a retired sub chief of the area and later a pastor. He told the court that he knew the deceased Jeremy Gitau and they are neighbours. He knew the defendant was married to the deceased Jeremy Gitau and he was the one who baptized the three issues of the defendant when he was the pastor of the local church. The deceased was always present during the baptism. *DW4 AYUB MUNGERIA* in his evidence told the court that he knew the deceased Jeremy Gitau very well as well as the defendant. He recalled that in 1985 the defendant sued the plaintiff over the suit land. The suit was filed at Meru court which later referred the same to the elders where he was one of the arbitrators. The elders awarded the suit land to the defendant Ndusya Kariuki but the decision was later reversed on the ground that the elders had no jurisdiction over registered land.

The defendant's claim that she was lawfully married by the late Jeremy Gitau Kariuki according to Kamba custom and settled on the suit land in 1970. But it is the contention of the plaintiff that the deceased was not competent to contract a customary marriage while her Christian marriage still

subsisted. There is evidence that the defendant was married to Jeremy Gitau Kariuki in 1970 according to custom. Dowry was paid to her guardian. Three witnesses testified that they knew the couple and that there were 3 children of the marriage. Evidence is there that the defendant was put on the suit land by the husband and that she has lived on the suit land with her children since birth and who are now adults and some are married. There is no dispute that the three children were sired by the deceased Jeremy Gitau Kariuki.

I concur with counsel for the plaintiff that the deceased Jeremy Gitau Kariuki having ceremonized a Christian marriage was not competent to enter into a customary law marriage – a fact which was not disclosed to the defendant. The facts of this case are very disturbing. Here is a man who portrays to the defendant that he is not married. He enters into a marriage which is ceremonized under custom. He pays dowry in compliance with the Kamba custom. He settles the family on the suit land which they call their home. The children have grown there and some have married. A happy family from 1970 until 1983 a year after the death of the husband when plaintiff emerges and claims to be the legal administrator of the estate of her late husband.

As I have stated earlier in the ***Succession Cause No. 262 of 1985***, the suit land was not included in the assets that formed the estate of the deceased and the defendant and her 3 children were not included as beneficiaries of the estate of the deceased.

The plaintiff inherited the following assets namely:

- (a) Certificate No.298 in Summer Estate Company valued at Shs.3,000/=.
- (b) Certificate No.141 Thome Farmers Ltd valued at Sh.6000/=.
- (c) Narok – LR NO. MOTIOK/369 valued at Shs.300,000/=.
- (d) L.R. NO. 8830/1248 – NGEI ESTATE – Nairobi valued at Sh.350,000/=.
- (e) Motor Vehicle registration NO. KNF 240 – Subaru valued at Sh.20,000/=.
- (f) Cash in Barclays Bank Kericho Branch – Sh.18,000/=.
- (g) Cash in Kenya Commercial Bank – Harambee Avenue Sh.45,000/=.

It was the intention of the deceased while he was alive that the defendant Damaris Ndusya and his 3 children namely James Maina, Jackson Mwaura and Naomi Njeri do settle on the suit land and he delivered possession and settled them on the suit land where they settled for about 13 years before he died.

Counsel for the plaintiff submitted that the deceased Jeremy Gitau Kariuki having solemnized a Christian marriage was not competent to enter into a customary marriage with the defendant. This is a delicate issue. First he never disclosed to the defendant that he had another wife when he married the defendant and paid the required 3 goats and cash Sh.7500/= as dowry in accordance to Kamba custom. In Kenya if this concept of marriage is adhered to strictly, many a man will be in trouble.

Polygamy is practiced in all the Kenyan Communities despite the fact that the first marriage was solemnized in church.

In conclusion, I hold that the defendant and her 3 children are entitled to inherit the suit land which is the only property left to them by Jeremy Gitau Kariuki and who had settled them there while he was alive and where they lived for 13 years before his death.

For the reason stated above the plaintiff's claim that the defendant is a trespasser on land parcel *L.R. NO. NKUENE/MITUNGUU/15* and that she be evicted together with her children is not tenable and therefore

the suit is dismissed.

The counter claim is allowed.

Consequently I make the following orders:

- (1) That the defendant be registered as the proprietor of all that piece of land known as *L.R NO.NKUENE/MITUNGUU/15* in place of the plaintiff.
- (2) The land Registrar Meru is hereby ordered to effect the above changes in the register at the Land Registry.

Lastly due to the relationship between the parties, I order that each party meets her own costs.

Delivered and dated at Nairobi this 4th day of October 2005.

J.L.A. OSIEMO

JUDGE