



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1408 OF 1976

NGUGI TICHAPLAINTIFF

VERSUS

KIRITU TICHA & 2 OTHERSDEFENDANTS

J U D G E M E N T

The plaintiff is the son of Ticha Kiritu s/o Ticha alias Kimani who died in Embu in 1955. The first defendant is his step brother while the 2nd and 3rd defendants are his step mothers.

The plaintiff is the registered proprietor of a parcel of land known as KIAMBAA/KIHARA/796 and a plot known as KIAMBAA/KIHARA/T.204. While there appears to be no dispute over the latter, the plaintiff complains that the 1st defendant has settled the 2nd and 3rd defendants and their children or the former without his consent.

On the other hand the defendants contend that though the plaintiff is the registered proprietor of the parcel of land, he was allocated and registered as such in trust for the family of the said Kirmi s/o Ticha; deceased.

This dispute culminated in the suit filed in this court on 21st June, 1976 to pray for, amongst others, a declaration that the plaintiff is the absolute and indefeasible proprietor of the parcel of land and plot, an order for the eviction and ejection of the defendants, their relatives, servants and/or agents from the parcels of land and/or plot; an injunction to restrain them from cultivating, alienating wasting and damaging the landscape, property and crops on the said parcel of land.... for removal of their property crops and coffee from the plaintiff's land.....; an order for mesne profits together with interest at court rates, an order for general damages for trespass and loss of profits together with interest at court rate; costs of this suit together with interest at court rates and such further or other relief as this honourable court may deem fit and just to grant.

A defence filed in court on 3rd August, 1976 state that the plaintiff was/is not the absolute and indefeasible proprietor of but that his name was registered on the land as trustee for the family of Kiritu s/o Ticha.

Evidence for the plaintiff was adduced by the plaintiff himself, his mother Esther Wamboi and his wife Beatrice Wamotho while the defence evidence was by one Hamfrey Muthondu Maruu, a relative of both parties, Wanjiru Ticha yonger step mother of the plaintiff and Kiritu Ticha, his step brother.

The plaintiff stated that after his father died in Embu, his family were ordered to go back to where they had come from because they were suspected to be sympathetic to the mau mau cause.

He brought the Ticha family to Kahara in Kiambu Distric where their father originally came from.

That hence, they were received by his uncle Karumbi, who lived with the Ticha family before an announcement was made that those who had arrived in Kahara and who had no land there should record their names for consideration and possible allocation of land, that though he and Kiritu were registered as landless, neither his, nor Kiritus mother or even Wanjiru, were registered. Karumbi had taken Wanjiru to live with her and it was presumed he had married her.

According to the plaintiff, the emergency village elder had, in the meantime, allocated him one plot and Waithera and plaintiff's mother another plot where to put up their houses. I opine these are plots referred to in these proceedings from time to time as KIAMBAA/KIHARA/T.201 and T.204 respectively. Plot No. KIAMBAA/KIHARA/T.201 is registered in the name of Kiritu Ticha (DW3) while KIAMBAA/KIHARA/T.204 is registered in the name of the plaintiff.

From the evidence adduced, there is no dispute over the plots but that the dispute is over the land allocated to the plaintiff and given the title KIAMBAA/KIHARA/796.

When the plaintiff put up a house on his plot for his mother, Waithera (mother of DW3) was allowed to live with plaintiffs' mother in this house. She came there with her children including DW3.

According to evidence of the plaintiff, a quarrel erupted between his mother and Waithera and they could no longer live in the same house, so he built a separate house for his mother, leaving Waithera in the old house.

He himself had asked DW3 to allow him put up his own house on DW3's plot which he did in 1959. That he stayed there up to 1977 when DW3 asked him to vacate the plot. That he vacated DW3's plot and rented a house on somebody else's plot where he stayed for 1½ years.

In the meantime, DW3 and his brothers put up a house for Waithera by force on this plot as well as one for DW3 himself.

From the plaintiff's testimony, all those who had built and had, been staying on the plaintiff's plot vacated it and built their houses on L.R No. KIAMBAA/KIHARA/796 and this is house this case started.

The plaintiff complained that apart from the defendants putting up housing structures on the suit land they also cultivate a bigger portion of it and have only left him a small portion thereof which he cultivates.

The plaintiff gave names of all those occupying the suit land. They include his two step mothers – 1st and 2nd defendants – and their children or grand children and said they occupy that land by force because he has not allowed them to do so.

He denied having been allocated this land as trustee for the family of his deceased father; Ticha s/o Kiritu, alias Kimani and that he is not under any obligaton to sub-divide the suit land and allocate it to the defendants.

The plaintiff sought a court's declaration that the suit land is his and that the defendants do more out therefrom.

He also prayed for mesne profits, damages for trespass and costs of the suit.

The plaintiff's witness were his mother Esther Wamboi w/o Ticha Kiritu (PW2) and Beatrice Wamotho w/o Ngugi Ticha (PW3) to support the plaintiff that the suit land was given to the plaintiff in his own right and not as trustee for the family of his father.

Defence witnesses Humphrey Muthondu Muruu (DW1), Wanjiru Ticha (DW2) and Kiritu Ticha

(DW3) were called to say L.R Number KIAMBAA/KIHARA/796 was registered in the name of the plaintiff in trust for the family of Ticha s/o Kiritu. Humphrey stated thus:-

“Ngugi had believed that when his name was taken to the committee that the land was his. He did not know the condition on it. The condition was the land was given to Ngugi as trustee for his father’s family. I still say he is trustee for the family of elder Ticha”.

During cross examination, DW2 stated that nobody knew the Ticha family at Gachie and that it was Karumbi who welcomed them there who arranged for the suit land to be registered in the name of the plaintiff on behalf of that family.

That is the evidence this court has heard and recorded for consideration and decision.

Though parties referred in their evidence to L.R No. KIAMBAA/KIHARA796 and T.204 as being in dispute. I have been to discover that after around 1983, the dispute was mainly focused on the L.R Number KIAMBAA/KIHARA/796 because Waithera and Wanjiru family left the plot and put up their houses on the land.

Their whole argument is and has been that the title to this land was not registered in the plaintiffs’ name as sole and/or absolute proprietor but as “trustee” for the entire Ticha family – (see paragraphs 3 and 4 of the defence).

The plaintiff and indeed the Ticha family knew nothing about Gachie.

Some of them had been either in Rift Valley or Embu.

Ticha died and was buried in Embu in 1955 after having gone there in 1934. The plaintiff was the eldest son of Ticha and, if I understood the evidence correctly, this family was ordered out of Embu to go back to their original home because they were suspected to be sympathetic to the Mau Mau cause.

The plaintiff led the family back to Kiambu and into Kihara.

According to Esther Wamboi (PW2) the family were looking for the clan of Kiritu – known otherwise as “Mbari ya Kihara”.

On reaching there this family was fortunately welcomed by the brother of Ticha, one Kirumbi.

The Ticha family did not set out from Embu to go to any place where they could acquire their own land. They went to their clan.

Then there was an announcement that the new arrivals who had no land should register their names for consideration if more land became available. Either all those or a few entitled to such land registered their name. The evidence available reveals that the plaintiff and DW3 registered their names for consideration.

But when some land became available portions there of were hired off to create plot number KIAMBAA/KIHARA/T.201 and T.204 which were allocated to the plaintiff and DW3 and the balance which forms L.R KIAMBAA/KIHARA/796 which is now the suit in dispute herein.

What do these facts tell, about the capacity of the plaintiff in being allocated this land by the committee (clan)?

When the Ticha family came to from Embu, Kihara almost all the clan land had been given out and this is why DW2 stated in cross examination that:-

“We were given left over of land which people living at Gachie had been given because we

were living at Embu, otherwise me could have been given a much bigger land”,

or that it was Ticha’s brother Karumbi who arranged and ensured that some land was availed for the Ticha family.

Whether or not someone is given some property to held in trust for himself and another person or others is not necessarily pegged on the entry to this effect in the register – (see Mwangi Mugunthu vs Maina Muguthu Civil Case No.377 of 1968 (unreported) and Gatimu Kinguru vs Muya Gathangi [1976] KLR 253 at page 262 – 263.

In the present case its circumstances, favour a trust over L.R No. KIAMBAA/KIHARA/796 whose title was issued to the plaintiff for the Ticha family.

This is why this family came from Embu to look for the Kihara wa Mbari clan and the intention must have been for this family to be given a share of ancestral land.

Unfortunately this land had all been given out and whatever was available is what was given to the applicant with intent on the part of the clan that the family of Ticha do share it.

I dare add that this is why the elders deliberated over the dispute and subdivided this land showing each of the Ticha house where to cultivate.

In fact two of the Ticha houses were given plots where to put up houses; namely the plaintiffs and that of Kiritu (DW3) and these plots were hired off the suit land – further fortifying the view that the land was intended for the entire Ticha family.

Unfortunately, Wanjiru’s house (DW2) was not given any plot but she testified that her only son and daughters had built on the land in dispute and that they also cultivate a portion thereof, thus converting a portion of the land they have built on to a plot.

I would adopt the words of the late Madan, J, as he was in Mwangi Mugunthu’s case over the application of Section 126 of the Registered Land Act, Chapter 300 Laws of Kenya and say the plaintiff was registered as owner of the suit land as the eldest son of the family in accordance with Kikuyu customary law which has the notion of trust inherent in it.

Ordinarily and in pursuance of such custom he would be entitled to only 1/3 of th eland while the other 2/3 went to Waithera and Wanjiru houses, respectively.

I do not believe the evidence of the plaintiff’s side that this land was allocated to the plaintiff as its absolute owner and in any judgement I would make a declaration the plaintiff holds the parcel of land KIAMBAA/KIHARA/796 for himself and the defendants as tenants in common in equal shares and that the defendant’s name shall be entered in the register accordingly.

And in the result, the plaintiff’s suit be and is hereby dismissed but since the parties are close relatives, I shall make no order as to costs.

Delivered and dated this 6th day of February, 2002.

D.K.S AGANYANYA

JUDGE