



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 651 OF 2000

PAUL NDUNGU KARIUKI

& 3 OTHERSAPPELLANTS

VERSUS

TERESIAH WAITHERA WAINAINARESPONDENTS

J U D G M E N T

The deceased Joseph Wainaina Kariuki was the husband to the defendant – respondent and a brother to the plaintiff – appellants. He died in 1991 leaving behind a piece of land known as Dagoretti/Ruthimitu/T.194 which was registered in his name.

On 17th January 1997 the appellants filed a suit in the court of the Senior Principal Magistrate Nairobi to pray for some orders; namely:-

(a) a declaration that the plaintiffs are entitled to a portion of the suit land Dagoretti/Ruthimitu/T.194. (b) In the alternative to (a) above a declaration that they are entitled to the suit land

Dagoretti/Ruthimitu/T.194 by virtue of adverse possession,

(c) a declaration that Joseph Wainaina Kariuki (deceased) held the parcel of land Dagoretti/Ruthimitu/t.194 in trust for himself and the plaintiffs as tenants in common in equal shares.

(d) an order directing the plaintiff's names be entered in the Register at Nairobi Lands Registry Office as tenants in common in equal shares of the parcel Dagoretti/Ruthimitu/T.194.

(e) a perpetual injunction restraining the defendant from interfering with the plaintiff's peaceful and quiet possession/occupation of a portion of Dagoretti/Ruthimitu/T.194.

(f) Damages for trespass and disturbance/interference

with the plaintiffs quiet possession.

(g) Costs of this suit together with interest thereon.

(h) any other or further order this Honourable Court may deem fit to grant.

The suit and the prayers were based on the fact that though the deceased was registered as proprietor of the suit land, the same had been purchased in 1958 by the plaintiff's and deceased's mother with proceeds from dowry paid for their sister known as Mirriam Wanjiku Kariuki and that the same was registered in the name of the deceased as their eldest brother in trust for himself and members of the family in accordance with Kikuyu Customary Law.

They also averred in the plaint that since the suit land was purchased in 1958, the appellants have lived/occupied and have been in possession of a portion thereof on which they had constructed homes with permanent houses, hence the prayers sought in the plaint.

The case was heard by a Senior Principal Magistrate (J.R. Karanja) on 30th June, 1999 and 15th July 1999 and judgment delivered on 15th October, 1999.

The learned magistrate dismissed the case and this is why an appeal was filed herein on 5th December 2000 in a memorandum of appeal which listed 5 grounds of appeal.

These grounds were that the learned magistrate erred in both law and fact when he held that the suit premises was purchased solely by the deceased when the respondent's evidence proved that it was purchased by the appellant's and deceased's mother by dowry proceeds obtained from their sister's marriage; that he erred in failing to appreciate or recognize the doctrine of Kikuyu Customary trust under which the eldest son/brother was registered as owner in trust for others and that such trust need not be expressly or impliedly stated in title documents; that he erred in failing to recognize that the 3rd appellant had lived on the suit land uninterrupted for 35 years and had therefore acquired ownership of the suit premises by adverse possession as there was no proof that such occupation was with the permission of the deceased; that he further erred in over relying on the sale agreement when the said agreement was inadmissible in law as the same was neither witnessed nor stamped and when its authenticity was in doubt and in so relying on the same and other irrelevant documents he arrived at a wrong decision and that he erred when he failed to consider the fact that during the time when the deceased was alive, there was no dispute regarding the ownership of the suit land and that it was after his demise that the respondent started disturbing the appellant's peaceful occupation and possession of the suit premises and threatened them with eviction thereby prompting them to resort to this court action.

The appeal was fixed for hearing in this court on 30th October 2002 when counsel for both parties appeared to submit either in favour or against the same.

Counsel for the appellant abandoned the third (3rd) ground of appeal and repeated the submissions as per the other grounds stated on the memorandum of appeal.

He submitted that this dispute had been handled by elders earlier and had found for the appellants and that under Kikuyu Customary Law the eldest son is registered to hold property in trust for other members of the family.

That when this land was purchased by the appellant's mother, her husband had died and since at that time, a woman could not be registered as proprietor of land registration of the suit land was done in the name of the deceased who was the appellant's brother.

That the magistrate did not recognize or appreciate this custom. According to counsel, the magistrate over relied on the sale agreement which was not witnessed and that the third (3rd) appellant had occupied the portion of the suit premises peacefully during the deceased lifetime and it is after the deceased died that the respondent issued a notice of eviction against the third appellant.

Counsel prayed that this appeal be allowed and the lower court order set aside.

Counsel for the respondent opposed the appeal and said this was a case where the respondent and her son were being harassed by the appellant after the deceased died.

According to him no evidence was adduced to show that it was dowry proceeds from the appellant and the deceased sister Wanjiku used to purchase the suit land and that her evidence to this effect was hearsay. That the evidence that the respondent bought the land and/or the existence of the sale agreement was not disputed.

That the deceased was in gainful employment from which he bought the suit land was not disputed. That since this was registered land the question of applying Kikuyu Customary Law thereon could not arise.

That before the deceased died, the appellants were adults but did not raise the issue of trust because they knew the suit land was bought by the deceased.

That the third appellant stated in evidence that he moved out of the suit land because it had become small and counsel wondered whether it had become bigger for the same appellant to want to come back to it.

He prayed that this appeal be dismissed with costs.

The plaintiff-appellant's claim was based on the belief that the suit land was purchased with dowry proceeds paid in respect of Mirriam Wanjiru (PW3).

When she testified in the lower court, however, she stated that:-

"I was informed it was purchased with money paid for my dowry. I was told that it was purchased for Kshs.300/=. My mother did ask for money but did not tell me for what purpose."

During cross examination she answered:

"I suspected that the Kshs.300/= was paid to purchase the plot in question. I also heard that from my brothers."

Clement Mwaura Kariuki who testified in the lower court case as PW1 did not say anything as to how the land was acquired but only said the land was registered in the name of the deceased because he was the eldest son in the family and also because their father was not alive.

But he added that his other brothers had left the suit land on instructions of their late mother because the land was congested and some of them had to leave. That they eventually got Government land.

In cross-examination, this appellant hinted that during this registration their father was alive by saying their mother could not be registered as the proprietor of the land when their father was alive.

Another brother Paul Ndungu Kariuki also testified as PW2. He supported the evidence of PW3 (Wanjiru) that the suit land was bought by proceeds of dowry from the marriage of their sister in 1953. He did not give the basis of his belief as according to his evidence the sale transaction was not witnessed by anybody.

In cross examination, this witness stated that he left this land because of congestion and hunger.

When the magistrate considered all this evidence he was of the view that there was no sufficient evidence adduced by the appellants to confirm on a balance of probabilities that this land was purchased by proceeds of dowry paid in respect to the marriage of Miriam Wanjiku.

Miriam said her mother asked her for some money and she gave her Kshs.300/=. She did not know what the money

was to be used for.

A woman does not pay dowry for herself and if it is Miriam herself who gave her mother some 300/= on request, how does this money form part of or dowry proceeds?

Then Paul Ndungu says the Shs.300/= was paid in 1953. How does the money given in 1953 form part of or the whole purchase price of the suit land which was bought in 1958?

Miriam was only informed or suspected that the Kshs.300/= was used to purchase the suit land otherwise it was not within her knowledge that this is what happened.

PW1 testified that his other brothers were instructed by their mother to leave the suit land because was congested and that some of them had to leave it.

If this was so, that was an opportunity for them to assert their right of portions they were occupying and tell their mother they were claiming those portion as of right because this was family land and that the deceased name had been registered thereon in trust for himself and other members of Kariuki family.

But to leave to look for their own pieces of land meant they were conceding that the suit land was that of the deceased solely. And the 3rd appellant's refusal to leave it did not help him much because with the available evidence on record and the circumstances of the case, he could and did not prove on a balance of probabilities that this was family land or that the deceased was registered thereon as trustee for himself and the appellants.

As far as the evidence confirms, this was a first registration. The son of the deceased produced the title deed of the suit land with the deceased name thereon. The effect of this under Section 27(a) of the Registered Land Act was that the land was so registered in that person as:-

“the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto”.

No sufficient evidence was adduced as to the existence of a trust in the case subject to this appeal once the appellants failed on their assertion that the suit property was bought with proceeds from dowry paid for their sister – See Section 27 of the Registered Land Act – Cap 300 Laws of Kenya and *Gatimui Vs Gathanji [1976] KLR 253*.

Even if that assertion were true, how could the appellants counter their mother's instructions that they leave the suit land? She was simply echoing the respondents plea that this land was not family land and that they had no right over it.

It is my view and, I think the view of the learned Senior Principal Magistrate; that all the appellants must have been ordered out of the deceased land but the 3rd appellant ignored those instructions only to wait when the deceased had passed away to begin claiming part of the suit land under the pretext that the deceased held it in trust for himself and other members of the Kariuki family.

I do not think I have any basis to interfere with the judgment of the learned Senior Principal magistrate which I am satisfied was reasonable in the circumstances of the case subject to this appeal.

I dismiss this appeal with costs.

Delivered this 5th day of November, 2002.

D.K.S. AGANYANYA

JUDGE