



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIV CASE 5224 OF 1990[1]

PAULINE NJERI KARIUKI.....PLAINTIFF

VERSUS

MONICAH NJERI KARIUKI

NICHOLAS WAMUOGONGO KARIUKI.....DEFENDANTS

CONSOLIDATED WITH

MONICA NJERI KARIUKI.....PLAINTIFF

VERSUS

PAULINE NJERI KARIUKI.....DEFENDANT

JUDGMENT

Pauline Njeri Kariuki filed HCCC No. 5224/90 on 5/10/90. She is the widow of Kariuki Mwongo who died in about 1957 before the Land Consolidation and Registration. After the Land Consolidation and demarcation, she was on 10.5.58 registered as proprietor of the pieces of land, which belonged to her deceased husband now known as Kiambaa/Thimbigua/203 comprising of 9.8 acres. She has three sons and one daughter.

The first defendant Monica Njeri Kariuki claims to be also the second wife of the deceased. The second defendant Nicholas Wamuongo Kariuki is the son of the first defendant. He died when this suit was pending and plaintiff has abandoned the suit against him. She has seven daughters. She claimed that she lives with her seven daughters in Land in dispute.

On 16.1.83, the clan elders met and distributed land of Kariuki Wamuongo (deceased) that is land parcel no. Kiambaa/Thimbigua/203 as follows:

1. James Wamuongo (son of Plaintiff) - 2 acres
2. Njau Kariuki (son of plaintiff) - 2 acres
3. Njoroge Kariuki (son of plaintiff) - 2 acres

4. Wamuongo Kariuki (son of first defendant) - 2 acres

5. Totu Kariuki (Pauline Njeri Kariuki _ Plaintiff - 0.8 acres

6. Njeri Kariuki

(Monica Njeri Kariuki - 1st Defendant) - 1 acre By that distribution, the plaintiff's house got 6.80 acres while the first defendants house got 3 acres.

Plaintiff was satisfied with that distribution She then made an application to the local Land Control Board for consent to the sub division so that she could, inter alia, transfer 3 acres to the first defendant. The Local land Control board gave its consent on 30.1.85. She then called a surveyor to subdivide the land. But the first defendant refused to have the land surveyed. Plaintiff then filed HCCC No. 5224/90 for orders to force the defendants to execute the mutation forms and allow the surveyor to carry out the survey.

Two months later, on 14.12.90, the first defendant filed RMCC No. 436/90 in the RM's court Kiambu against the plaintiff in HCCC NO. 5224/90. In that suit, she claimed that she and Pauline Njeri Kariuki were co-wives of Kariuki Mwuongo who died in 1956 and that Pauline Njeri Kariuki was registered as proprietor of Land Parcel No.

Kiambaa/Thimbigua/203 in trust for herself and the plaintiff. The relief sought was the partition of the suit land into two equal portions and a transfer of half share to her. Monica Njeri Kariuki also filed an application for injunction in that suit to restrain Pauline from disposing of the suit Land. Pauline Njeri Kariuki filed a replying affidavit sworn on 7.1.91 to that application.

In that replying affidavit, she did not deny the contents of paras 2, 3 and 5 of Monica's affidavit, sworn on 14.12.90 in support of the application for injunction in which Monica deposed, inter alia, that, both were widows of the deceased; that Pauline was the eldest wife and that Pauline was registered as owner of the land as a trustee. Pauline Njeri Kariuki did not also file a Defence in the Kiambu suit.

On the application of Monica Njeri Kariuki; the Kiambu suit was by an order given on 21.6.91 transferred to the High court for disposal and has now been registered as HCCC NO. 271/2001 and consolidated with this suit. On 20.10.97, Pauline Njeri Kariuki filed an application for leave to amend the plaint. The application was allowed on 19.12.97. The effect of the amendment was to change the plaintiff's cause of action. She now asks court to declare Monica Njeri Kariuki and her son as trespassers and issue an eviction order against them. She however stated in her evidence in rewww. examination that, if Monica now wants the 3 acres she is ready to give her the 3 acres and court can so order. But Monica insisted that she is entitled to half share of the land.

Pauline Njeri by the Amended plaint, seeks three main relief's namely:

(a) A declaration that defendant Monica Njeri is a trespasser on the suit land

(b) Defendant be evicted from the sit land

(c) Defendant be permanently restrained from interfering with the suit land

(d) General damages for trespass On the other hand Monica Njeri Kariuki seeks two main prayers in HCCC No. 271/2001 namely:Pauline Njeri from wasting, dealing or alienating the suit land

(b) Partition of Title No. Kiambaa/Thimbiqua 203 into two equal portions and transfer of half portion to her and in default the executive officer be authorized to execute the necessary documents

It is true that Pauline Njeri Kariuki was registered under the Registered Land Act as proprietor of Land title No, Kiambaa/Thimbigua/203 which is 9.8 acres on 10.5.58. It is also true that under s. 27 (a) and s.

28 of the Registered Land Act, Pauline Njeri is the absolute owner and her title cannot defeat except in accordance with the provisions of the Registered Land Act. But by the proviso to section 28 of the Registered Land Act (RLA), the Registration of Pauline as proprietor does not relieve her from any duty or obligations to which she is subject as a trustee.

Counsel for Pauline Njeri submits that by s. 126(2) of the Registered Land Act, if the registered proprietor holds the land as a trustee, then the trust must be registered. There is ample authority to the effect that customary trusts and implied or constructive trusts do not require registration on the title. Indeed, section 126 of the Registered Act deals with express trusts created by instruments and not with customary or implied trust. Monica Njeri is not relying on express trust created by Deed or any other instruments. She is relying on customary trust or constructive trust. Monica Njeri gave evidence that she was married by Kariuki Wamuongo before Emergency and lived with him until 1957 when he died. Pauline Njeri merely said that Monica was not a wife of Kariuki Wamuongo but she did not provide any concrete evidence. She did not rebut the evidence of Monica Njeri. Indeed the evidence shows nearly that Monica was not a stranger but a wife of Kariuki Wamuongo.

Firstly, Pauline Njeri accepted her and gave her a share of the Land where Monica has been living with her children for many years. Secondly, Pauline Njeri called clan elders to decide how the land should be shared. She accepts that Monica attended the elders meeting as wife of Kariuki Wamuongo.

The clan elders gave Monica Njeri and her son a share of the land as wife and son of Kariuki Wamuongo respectively. Pauline Njeri accepted the decision of elders and in fact filed the present suit to enforce the decision of the elders. The elders marked a boundary between the portion given to Pauline and the portion given to Monica. The two have since been living in separate distinct portions of the land. Thirdly, Pauline Njeri did not, in the original plaint, dispute the status of Monica. She has not in any pleading filed in court asserted that Monica is not a wife of Kariuki Wamuongo. As I stated earlier she did not in her affidavit deny the contents of Monica's affidavit sworn on 14.12.90. Pauline Njeri has not in any document filed in court disputed that Monica Njeri was not a wife of Kariuki Wamuongo. It is only during her evidence in court that she claimed that Monica Njeri is not a wife of Kariuki Wamuongo. Fourthly, by filing a suit to enforce the elders decision, Pauline Njeri must be deemed to have admitted that the house of Monica Njeri was entitled to a share of the land as of right. Although she filed an amended plaint to depart from the previous pleading Order VI Rules 6(1) CP Rules does not permit a party to raise any new ground of claim inconsistent with his own previous pleading in the same suit.

As order VI Rule 6(2) CP Rules provides, an inconsistent claim can only be raised in the alternative. As the claim that Monica Njeri is a trespasser and is not entitled to any land is not raised in the Amended plaint as an alternative claim, the Amended plaint is in effectual and Pauline Njeri cannot be heard to say that Monica Njeri is a trespasser. From the foregoing, Pauline Njeri's evidence that Monica Njeri is not a widow of Kariuki Muongo is an after thought. From what I have said about the amended plaint and from her conduct, Pauline Njeri is estopped from denying that Monica Njeri is not a wife of the deceased and from denying that she is registered as proprietor of the land on her own behalf and in trust for Monica Njeri. Pauline Njeri did not acquire the land for valuable consideration. She was registered in respect of the share of the clan Land, which belonged to her deceased husband.

I am satisfied from the evidence that Monica Njeri is a widow of Kariuki Wamuongo and that Pauline Njeri is registered as proprietor on her own behalf and in trust for Monica Njeri.

This dispute arose because Pauline Njeri wanted the land to be shared according to the number of sons in each house which would result in her house getting 6.8 acres and Monica's house 3 acres. Monica has more children though daughters. This is not a succession case in which it can be argued that daughters are not entitled to inherit. This is a case where Monica Njeri is asking Pauline Njeri to give her share of the land as a wife of the deceased. As deceased have two wives, each is entitled to a half share of land. Although this is a family dispute, it is Pauline's selfish conduct, which has given rise to these proceedings. It just that she should pay the costs of the suit to Monica. For the foregoing reasons I dismiss Pauline Njeri's claim and allow Monica Njeri's claim with costs and I order that:

1. Land title no. Kiambaa/Thimbigua/203 be partitioned into two equal portions. 2. Pauline Njeri Kariuki do transfer half equal portion to Monica Njeri Kariuki within 30 days 3. Parties to share the sub-division and transfer charges equally 4. In default, the Deputy Registrar of this court is authorized to execute all necessary documents on behalf of Pauline Njeri

E. M. Githinji

Judge

17.10.2000

Mr. James Gatare holding brief for Mr. Gichachi present

Mr. Gachuhi holding brief for Mr. Musyoki present