



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 32 OF 2019

NDUNG'U NGUKU.....1ST PLAINTIFF

GIBB NJOROGE GITAU.....2ND PLAINTIFF

VS

KAMANDE NGUKU.....1ST DEFENDANT

STANLEY MWAURA MUNGAI.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiffs filed his Complaint dated 30/09/2019 against the Defendants seeking orders that; -

- a) Permanent injunction restraining the Defendants whether by themselves, their agents, servants, employees or any way persons claiming under them from selling, charging, leasing or in any way disposing all those properties known as LOC 17 KAMAHUHA/2906, LOC 17 KAMAHUHA/2907, LOC 17 KAMAHUHA/2908 AND LOC 17 KAMAHUHA/2633.
- b) Mandatory injunction directing the Land Registrar to cancel all subdivisions arising from LOC 17 KAMAHUHA/519 and to revert the property to its original position.
- c) Following (b) above, a declaration do issue that the Plaintiffs are the legal and lawful owners of a portion of land measuring 5 acres in all that property known as LOC 17 KAMAHUHA/519.
- d) Following (b) and (c) above, an order do issue directing the Land Registrar Murang'a to cause all that property formerly known as LOC 17 KAMAHUHA/519 to be divided into two portions and to issue a title in the name of the 1st Plaintiff.
- e) Costs of the suit.

2. The 1st Plaintiff and 1st Defendant are brothers born to Njoki Ng'ang'a. The 2nd Plaintiff and 2nd Defendant are alleged purchasers for value claiming from the said brothers respectively. The Plaintiffs' claim is premised on an alleged customary trust and/or adverse possession in respect to 5 acres of portion of land in the LOC 17 KAMAHUHA/519 hereinafter referred to as suit land. Besides the suit land, the late Nyambura Nguku also owned another parcel of land known as LOC 17/KAMAHUHA/825 also known as parcel 825 measuring 10 acres.

3. The 1st Plaintiff alleges that the 1st Defendant is the registered owner of the suit land which he holds in trust for the 1st Plaintiff. That the suit land initially belonged to late Nyambura Nguku who married Njoki Ng'ang'a under woman to woman kikuyu customary marriage (polyandry marriage).

4. It is undisputed that the 1st Defendant was registered as the owner of the suit land measuring 10 acres in 1961. The 1st Plaintiff claims that the 1st Defendant's registration was in trust for him as well thus his claim for a portion of 5 acres thereof. Additionally, the 1st Plaintiff accused the 1st Defendant of breach of trust as a trustee and fraudulent subdivision and transfer of the suit land and prayed for cancellation of the resultant titles.

5. The suit is vigorously opposed vide the Defendants' statement of defence dated 30/10/2019. The 1st Defendant denied any customary trust over the suit land because the late Nyambura transferred it wholly and exclusively to him. Likewise, in denying adverse possession, the 1st Defendant maintained that the Plaintiffs' occupation has been forceful and unlawful and that they were evicted vide the Court judgment in Nyeri Civil Appeal No. 4 of 1991.

The Plaintiffs' case

6. The 1st Plaintiff testified as PW1 adopted his witness statement dated 30/09/2019 as his evidence in chief. He also produced PExh. No.1 being a copy of the clan decision in Agikuyu language wherein the suit land was allegedly subdivided between him and the 1st Defendant.
7. On Cross-examination PW1 explained that Mutation form No 086163 was registered, mutation dated 15/2/2000 was also registered whilst mutation No. 133151 was rejected. He denied knowledge and/or determination of Nyeri Civil Appeal No. 4 of 1991 as he was never served. In particular, PW1 denied receiving a share of 2.5 acres in parcel No. 825 pursuant to succession proceedings No. 117 of 1996.
8. The 2nd Plaintiff testified as PW2 and adopted his statement dated 13/12/2019. He told the Court that he purchased 3 acres of the suit land from the 1st Plaintiff on diverse dates namely 05/06/1993, 27/01/1994 and 08/09/1994 at a total of Kshs. 135,000/= . That he took possession and occupied his 3 acres in 1994 and produced the three sale agreements as PExh. Nos 3, 4 & 5.
9. On Cross-examination, PW2 was clear that he bought the 3 acres out of PW1's shares of 5 acres in the suit land. He confirmed he did not have any title deed for his property. He admitted that he did not conduct an official search before the said purchase. PW2 was also referred to paragraph 3 of his statement, he denied having shown any such decision to share the suit land between the 1st Plaintiff and 1st Defendant.
10. Mary Wanjiku Ng'ang'a, a sister to both the 1st Plaintiff and 1st Defendant took the stand as PW3 and adopted her statement dated 15/12/2019.
11. On Cross-examination, she explained that the suit land and parcel No. 825 belonged to her late grandmother. That the suit land was registered in the 1st Defendant's name to hold in trust for PW1. She was emphatic that the suit land was to be subdivided between 1st Plaintiff and 1st Defendant whereas parcel No. 825 belonged to their other 2 brothers; Murigi Nguku and Muiruri Nguku to her exclusion. PW3 added that she was present at the clan elders meeting that allegedly subdivide the suit land though passively as she was cooking food.
12. The Plaintiffs' last witness was PW4 - Muthoni Mbugua the Murang'a Land Registrar. She gave evidence that the original title of the suit land was freehold namely LOC 17/KAMAHUHA parcel 519 measuring 10.36 acres. That the title deed was issued to Kamande Nguku on 28/01/1961 and was closed on 27/11/2020 to yield parcel Nos. 2184 and 2185. That parcel No. 2185 was sold to David Mungai on 6/12/2000 who later sold it to Daniel Kamau. In the same vein, parcel 2184 was subdivided into 2633 and 2634. Parcel No. LOC 17 KAMAHUHA /2633 was transferred to Wanyoike Gitau and later sold to Patrick Mwangi in 2015 while parcel No. 2634 was subdivided into 3 parcels; - LOC 17 KAMAHUHA/ 2906, 2907 and 2908.
13. PW4 informed the Court that she could not get the files for parcels 2906 – 2908. She presented the signed mutation for parcel no. LOC 17 KAMAHUHA /519. She added that the mutation form for 2184 could not be traced in the Land Registry. She also confirmed that she had no titles showing that the 2nd Defendant owned any of the parcels of land.
14. That marked the closure of the Plaintiffs' case.
15. On the other hand, the 2nd Defendant Stanley Mwaura Mungai was called as DW1. He adopted his statement dated 20/12/2019 as his evidence in chief. He testified that he bought parcel no. 2907 from the 1st Defendant in 2015. He went ahead to state that he conducted due diligence before the purchase and produced the green card for the suit land. That he obtained mutation for parcel 2634 that yielded parcels 2906-2908. He stated that he got title for his land but was repulsed when he entered and thus has never occupied it. He produced the documents listed in their List of Documents Nos. 1-17.
16. The 1st Defendant, Kamande Nguku testified as DW2 and adopted his statement dated 20/12/2020. He was adamant that the suit land is his land having acquired it from his late grandmother who died in 1987. That upon her death, her other parcel no. 825 was subdivided and he did not get any share thereof since he had acquired the suit land. That the 1st Plaintiff inherited parcel 825. He confirmed knowing and selling parcel 2907 to DW1.
17. On Cross-examination, he said he is the eldest son of Njoki and was given the suit land in 1961 at the age of 5 years. That the 1st Plaintiff entered the suit land in 1987 after their grandmother's death leading to the filing of Murang'a SRMCC No. 179 of 1989 for eviction orders against the 1st Plaintiff. That he evicted the 1st Plaintiff on 13/02/2019, 18 years after obtaining judgment. He also confirmed that the 2nd Plaintiff was his neighbor and lived in the adjacent land. He also admitted that mutation form for parcel 2634 was not executed by the Land Registrar.
18. The last defence witness was DW3 - Julius Kamande Waitthaka, an uncle to both PW1 and DW2. He stated that the suit land belonged exclusively to the 1st Defendant as allegedly confided in him by the late Nyambura. That parcel 825 was given to Njoki to hold in trust for herself and her children. He contradicted the late Nyambura year as 1985 and the 1st Defendant's age in 1961 as being 20 years old.
19. That was the end of the Defendants' case.
20. Parties filed their respective written submissions dated 04/03/2021 and 22/03/2021.
21. On behalf of the Plaintiffs, it was submitted that the 1st Defendants title is encumbered by a customary trust is now protected as an overriding interest in terms of Section 28 of the Land Registration Act. That the suit land was initially family land and the 1st Defendant was registered to hold in trust for the 1st Plaintiff and thus satisfied the criteria set out in the Supreme Court case of **Isack M'inanga Kiebia v**

Isaaya Theuri M'iintari [2018] eKLR. They denied that their claim for customary trust is *res judicata* by virtue of the judgment in Nyeri CA 4 of 1991 as the same was pleaded in the Defendants' Defence.

22. In the alternative, the Plaintiffs submitted their claim for ownership would still suffice under adverse possession having satisfied the necessary ingredients thereof. They discredited the attempted eviction as raised by the Defendants on the ground that the judgment decree was not executed within 12 years since delivery as provided for under Section 4 (4) of the Limitation of Actions Act. Lastly, the Plaintiff argued that any subdivisions arising from the suit land were unlawful and unprocedurally as the attendant mutations were not signed by the Land Registrar.

23. On the other hand, the Defendants were firm that the issue of customary trust arise does not arise as the same was determined on 18/01/2000 in Nyeri CA no. 4 of 1991 and consequently it was *res judicata*. They also added that the Plaintiffs failed to prove their case as required in law. They wondered why the Plaintiff was claiming a customary trust for his benefit alone as opposed to benefitting all siblings. Reliance was placed on **Peter Ndungu Njenga vs Sophia Watiri Ndungu [2000] eKLR and Njenga Chogera vs Maina Wanjira Kimani & 2 others [2005] eKLR.** They prayed for dismissal of the suit with costs.

24. In my view, the issues for determination are; -

- a. Whether a customary trust existed over the suit land.
- b. Whether the Plaintiff's claim for customary trust is *Res Judicata*.
- c. Whether the Plaintiff has proved his claim for title of the suit land by adverse possession.
- d. Whether the 1st Defendant's subdivisions were done procedurally.

Analysis and Determination

25. The Plaintiffs' cause of action is premised on a customary trust on the suit land. It is upon them to prove their case on a balance of probabilities as required under Section 107 of the Evidence Act. The existence of a customary trust is a question of fact that must be proved by way of evidence. The Supreme Court in the while determining a dispute touching on existence of customary trust in the case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR** established the criteria for determining or presuming a trust that a claimant has to satisfy namely; -

- a. The land in question was before registration, family, clan or group land.
- b. The claimant belongs to such family, clan, or group.
- c. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
- d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- e. The claim is directed against the registered proprietor who is a member of the family, clan or group"

26. It is not in dispute that the suit land initially belonged to the late Nyambura, the 1st Plaintiff and 1st Defendant's grandmother. The 1st Plaintiff has not tendered tangible evidence to demonstrate the nature of the suit land prior to his grandmother's registration as contemplated in the first limb above. It was not explained how the late Nyambura acquired the suit land to enable this Court imply a presumption of customary trust.

27. The Court of Appeal in **Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] eKLR** held that the onus of proof lies on a party relying on the existence of a trust to prove it through evidence. That is so because the law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.

28. Secondly, the Defendants raised the issue of **Res Judicata** in their written submissions despite admitting this Court's jurisdiction in their defence. The Court of Appeal in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** reaffirmed the legal position that parties are bound by their pleadings and cited with approval the Nigerian Supreme Court decision in **Adetoun Oladeji (nig) Ltd vs. Nigeria Breweries PLC S.C. 91/2002**, where Judge Pius Aderemi J.S.C. expressed himself, as follows;

"...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

29. Be that as it may and in the interest of justice, I will inquire whether this suit is *Res judicata*. The test for determining the application of the doctrine of *res-judicata* is spelt out under Section 7 of the Civil Procedure Act. The Supreme Court in **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, held that all the elements outlined thereunder must be satisfied

conjunctively for the doctrine to be invoked i.e;

- “(a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

30. I have glanced at the Dexh.1 -Nyeri HCCA No. 4 of 1991 proceedings and judgment dated 18/01/2000 and noted that the Appeal was challenging the trial Court decision dismissing the 1st Defendants case for eviction against the 1st Plaintiff. The issue of trust was squarely addressed and the Court on the evaluation of the evidence adduced held that the Plaintiff had not proved that the 1st Defendant was registered as proprietor of the land in trust. Though resjudicata was not pleaded in the defence of the Defendants, the issue was sufficiently raised in the abduction of evidence to notify the Plaintiffs to respond to it. Resjudicata in any event is a point of law which can be raised at any time of the proceedings although it is neater to raise it in the early instances of the suit.

31. Thirdly, the Plaintiffs in the alternative claim title to the suit property by virtue of adverse possession. This is a common law doctrine where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years. See Court of Appeal decision in **Mtana Lewa –v Kahindi Ngala Mwangandi (2005) eKLR**. It is also a well settled principle that a party claiming Adverse Possession ought to prove that his possession was “*nec vi, nec clam, nec precario*,” that is, peaceful, open and continuous. The possession should not have been through force, no in secrecy and without the authority or permission of the owner.

32. Section 7 of the Land Act, 2012 recognizes prescription as a method of acquiring land. Section 28(h) Land Registration Act recognizes adverse possession as an overriding interest protected thereunder.

33. The 1st Defendant acknowledged the Plaintiff’s occupation on the suit land. As rightly submitted by the Plaintiffs, their occupation was without the 1st Defendant’s permission necessitating the filing of eviction proceedings.

34. It is commonly acknowledged that the 1st Plaintiff entered the suit land in 1985 upon the alleged consent of the grandmother. It must be noted that the registered owner of the suit land has been the 1st Defendant since 1961 and therefore the consent of the grandmother in my view is insignificant in negating a case of adverse possession. The 1st Defendant in his evidence states that the 1st Plaintiff entered the suit land in 1987 through force and without his consent. Both parties commonly acknowledge that the 1st Defendant filed suit in 1991 seeking eviction of the 1st Plaintiff thus asserting his right to ownership. The 1st Defendant lost the case in the lower Court but was upheld on Appeal. See CA No 4 of 1991 which was decided on the 18/1/2000. These orders in pursuance of the section 4(4) of the Limitations of Actions Act expired after 12 years that is to say 2012 before they were executed. The attempted execution vide orders issued on the 13/2/2019 run contra the provisions of the above section. It is my considered opinion that time does not run during the validity of the orders of the Court that is to say within 12 years of the life of the orders.

35. In my view I find that time started running afresh from 2012 in favour of the Plaintiffs. This case therefore having been filed in 2019 shows that time is yet to run the full course of the mandatory 12 years permitted by law. It is therefore the finding of the Court that the suit is premature and that adverse possession cannot be founded on a period of 7 years. It falls short of the legal threshold of 12 years.

36. In the end the Plaintiffs have not proved a claim in adverse possession.

37. Having reached the conclusions as made in the preceding paras, I find no necessity to consider the issue of whether the various subdivisions were fraudulently processed. In any event the issue of fraud was not proved to the required standard. Further the Land Registrar led evidence that there was no fraud in the processing of the mutations. She also informed the Court that some of the mutations were missing in the registry.

38. In the end the suit of the Plaintiffs is dismissed.

39. The costs of the suit shall be in favour of the Defendants.

40. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 26TH DAY OF MAY 2021.

J.G. KEMEI

JUDGE

Delivered in the presence of:

Muiru HB for Mugo for the 1st and 2nd Plaintiffs

Ndegwa HB for Kinuthia for the 1st and 2nd Defendants

Court Assistants: Kuyiki/Alex