



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 495 OF 2017**

**JAMES KAMANDE WAINAINA.....PLAINTIFF**

**VERSUS**

**PETER WAINAINA MBURU.....DEFENDANT**

**JUDGMENT**

1. By way of a plaint the Plaintiff filed suit against the Defendant on the 9/11/17 seeking the following orders;
  - a. A declaration that the Defendant holds 2 acres out of land parcel LOC17/KAMAHUHA/203 in trust for the Plaintiff and the said trust must be dissolved and the Defendant to transfer 2 acres out of LOC17/KAMAHUHA/203 to the Plaintiff.
  - b. A declaration that the Plaintiff has acquired land measuring g 2 acres out of the land parcel LOC17/KAMAHUHA/203 by way of Adverse Possession and all the rights thereto and the suit land be transferred to the Plaintiff.
  - c. Costs of the suit.
2. It is the Plaintiff's case that the suit land is family land and the Defendant holds 2 acres in trust for him. Further he states that he has occupied the suit land since 1969 and has become entitled by way of Adverse Possession.
3. The Defendant denied the Plaintiffs claim vide a statement of defense filed on the 28/6/18. The Defendant denied being the owner of the land as well as the legal representative of the estate of his father Isaac Mburu Wainaina, in whose name the title is registered. He contended that to the extent that he is being wrongly sued, this suit is fatally incompetent and should be dismissed. That he is not a trustee of the Plaintiff or at all in respect to the suit land. Further he stated that the Plaintiff should be have revived the suit CMCC NO 267 of 2004 which abated after the demise of his father who was the Defendant in that case. That to the extent that he filed this suit, he opined that this suit is resjudicata. He denied that the Plaintiff occupies the land and the claim of Adverse Possession does not lie. He faulted the Plaintiff by making a claim on Adverse Possession in a plaint instead of an Originating Summons and that as such the suit is defective in law and is for dismissal.
4. At the hearing of the suit the Plaintiff testified and stated that the original owner of the suit land was his paternal uncle Njuguna Kimindiri. As fate would have it, his uncle was unmarried and childless. That he invited the Plaintiff and his two brothers Isaac Mburu Wainaina (Defendant's father) and Benson Njuguna Wainaina to settle on the suit land, each on 2 acres. That their parents were landless. That due to his tender age then his portion of 2 acres was registered in the name of his brother Isaac Mburu Wainaina. He posited that Isaac Mburu Wainaina later transferred 2 acres entitlement to their brother Benson Wainaina but refused and or neglected to give him his portion. That the Defendant is the son of Isaac Wainaina, his elder brother.
5. Further that he filed a suit against his said brother Isaac Wainaina in CMCC 267 of 2004 but upon the demise of Wainaina in 2009, his family refused to substitute him and the suit lapsed. That the suit also faced jurisdictional hurdles when the mandate of the magistrates in hearing land cases was put in limbo.
6. He informed the Court that there are proceedings pending in the High Court where he has sought to revoke the grant on the basis of an existence of trust. He wants the trust to be determined in this case.
7. He stated that he has lived on the land since 1969 uninterrupted with his family and children who are now grown up. That he constructed a house thereon in 1972 and has planted trees and coffee. He urged the Court to find that he has become entitled to the 2 acres of land through Adverse Possession on account of long and uninterrupted occupation.
8. Alexander Maina Kamande (PW1) stated that he is the son of the Plaintiff currently working for gain in Mombasa. That he was born on the land and lives on the suit land while several of their family members are buried thereon. He informed that Court that though he does not know the history of the land he is aware that there is no other family land save for the suit land.

9. The Defendant testified and stated that the land is registered in the name of his deceased father Isaac Wainaina and that he is the legal administrator of the estate having been substituted with his deceased mother in SUCC cause No 202 of 2004, Muranga High Court. He informed the Court that his father informed him that he purchased the suit land from Kimindira and therefore denied that the suit land is family land. He confirmed that the Plaintiff is his paternal uncle.

10. The parties filed Written Submission which I have read and considered.

11. The parties to the suit are related. The Plaintiff is the uncle of the Defendant. It is not in dispute that the suit land is registered in the name of Isaac Mburu Wainaina as shown on the official search dated the 25/4/16. He became registered on 26/4/1974. The caution registered on the 7/6/2004 was filed by the Plaintiff claiming licensees interest.

12. The Plaintiff has sought two prayers firstly on trust and secondly on Adverse Possession. The mere fact of a licensees interest denotes permission, license to occupy the suit land. This destroys the claim in Adverse Possession. In the case of **Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001**, the Court delivered the following dictum:

“...it is trite law a claim of Adverse Possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in **Jandu v Kirpal [1975] EA 225** possession does not become adverse before the end of the period for which permission to occupy has been granted.”

13. Going by the reason underpinning the caution registered against the title on 7/6/2004 read together with the decision in the above case, the Court holds that Adverse Possession is not tenable in the circumstances. A party is bound by his pleadings and his evidence placed before the Court. The Court is also bound in law by the very pleadings and evidence in determining the rights or otherwise of the parties in a suit.

14. The Plaintiff led evidence that the suit land belonged to their Uncle Njuguna Kimindiri. However, he has not shown any document to evidence ownership. The Defendant has alluded that indeed the said land belonged to the said Njuguna Kimindiri. On that account the original owner of the suit land is not in dispute. The Plaintiff testified that the land was family land on which his three brothers settled thereon at the invitation of the original owner Njuguna Kimindiri. He stated that he has lived on the land since 1969 continuously and has planted trees and coffee and built a house. He produced a valuation report dated the 29/1/14 which report went unchallenged by the Defendant. The evidence of the Plaintiff's son corroborates the description of the developments stated in the valuation report.

15. The Defendant led evidence that his father informed him that he bought the land from Kimindiri. However, he did not show any evidence of such purchase of the land. He stated that he found the Plaintiff living on the suit land as he grew up. That the land is registered in the name of his late father where he is the legal representative having been substituted upon the demise of his mother.

16. Section 28 of the Land Registration Act states that unless the contrary is expressed in the register, all registered land shall be subject to such overriding interest as may for the time being subsist and affect the land without the necessity of the overriding interests being noted thereon. Customary trust is such overriding interest in registered land. In the case of **Isack M'Inanga Kieba Vs Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015**, the apex Court stated that occupation and are no necessary for a trust to be established.

17. Customary trust therefore are rights that attach to the land and move or subsist on the land. In the case of **Peter Gitonga Vs Francis Maingi M'Ikiara Meru HC.CC NO. 146 OF 2000**- it was stated that:-

“A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”. (emphasis is mine).

18. The Kieba case supra held as follows;

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in **Kiarie v. Kinuthia**, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; 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; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group”. (emphasis mine).

19. In this case, going by the evidence adduced, the Court finds that the land was family land having been owned by the party's uncle namely Njuguna Kimindiri. He settled the three brothers on the suit land and as it would happen the father of the Defendant became registered as owner of the land in 1974. This being family or clan land and in the absence of any evidence that he indeed bought the land, the said registered owner was not exempted from trust that subsisted on the land. The Defendant has admitted that he is the legal representative of the estate of his late father. He is therefore properly well suited in the suit.

20. The Court holds that the Plaintiff has proved trust to the extent of 2 acres on the suit land.

21. In the end the Plaintiffs suit succeeds and judgement is entered in terms of 1a.

22. Parties being related, I order that each should meet their respective costs of their suit.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 2<sup>ND</sup> DAY OF MAY 2019.**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Thige HB for Kimwere for the Plaintiff

Gichachi HB for Njoroge for the Defendant

Grace and Njeri, Court Assistants