



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 126 OF 2015**

**(Formerly NYERI HCC 56 OF 2012)**

**EUNICE NGONYO WAMBUGU.....PLAINTIFF**

**VERSUS**

**JOSEPH KIHARA THEURI.....DEFENDANT**

**JUDGMENT**

1. The plaintiff brought the suit herein seeking judgment against the defendant for:-

- (a) A declaration that the estate of Kiago Kimere holds 1.98 acres of land in trust for Wairimu Gathute (deceased).**
- (b) Determination of the alleged trust, if found to exist and registration of the 1.98 acres in her name.**
- (c) Costs of the suit and interest at court rate.**

2. The plaintiff, who is the legal representative of the estate of Wairimu Gathute (hereinafter WG) contends that WG had before land demarcation, consolidation and registration, bought from various people land in aggregate amounting to 1.98 acres.

3. It is the plaintiff's case that the land bought by WG was registered alongside the land of Kiago Kimere (hereinafter KK), to wit, Muhito/Njiruini/137 measuring 9.1 acres or thereabouts (hereinafter referred to as the suit property) during land demarcation, consolidation and registration; that the registration was subject to trust in favour of WG; that the pleaded trust has been observed since the time of registration of the suit property in the name of KK (WG and/or her heirs have been in exclusive use and occupation of the 1.98 acres); and that the issue of ownership of the 1.98 is an issue of common notoriety (has been subject of various awards and determinations in favour of WG).

4. Vide the statement of defence filed on 24<sup>th</sup> April, 2012, the defendant, who is the legal representative of KK, denies the plaintiff's contention that the suit property is subject to any trust in favour of WG.

5. According to the defendant, there was no reason at all for the land belonging to WG to be registered in KK's name because WG and her husband Gathute Kiago were of majority age at the time of registration of the suit property in the name of KK (K.K was WG's father-in-law).

6. The defendant acknowledges that there are boundaries in the suit property but contends that they were put for cultivation purposes only.

7. According to the defendant, if WG had any claim to the suit property, she should have brought it when K.K was alive (K.K died in 1968).

8. With regard to the awards and determinations made in favour of WG by the defunct Land Disputes Tribunal, it is the defendant's case that the awards and determinations are of no evidential value as they were set aside by court.

9. Terming the current suit res judicata the proceedings in Nyeri High Court Succession Cause No.532 of 2006 (hereinafter referred to as the Succession Cause), the defendant urges the court to dismiss the suit herein with costs to him.

10. Pursuant to the directions given on 12<sup>th</sup> June, 2017, the evidence adduced in the Succession Cause was admitted as the evidence in this suit.

## **EVIDENCE**

11. The evidence adduced in the Succession Cause was as follows:-

The plaintiff who testified as P.W.1 informed the Succession Court that she was married by WG to bear children for her. WG informed her that the suit property contained 1.98 acres of land belonging to her. She further informed the court that the portion WG bought and which is comprised in the suit property was subject of a dispute before the defunct Land Disputes Tribunal. The Tribunal found in favour of WG. She produced the proceedings of the Land Disputes Tribunal as **Pexbt 1**.

12. The plaintiff further informed the court that the portion belonging to WG is demarcated by a boundary on the ground and that she has effected developments thereon (put up a house thereon).

13. The court further heard that when the plaintiff got married by WG, the different families of KK lived in their own portions of the suit property). However, she could not tell when WG bought the land or when the suit property was sub-divided.

14. James Kabue, a retired assistant chief for the area where the suit property is situated, informed the court that in 1984 together with two other assistant chiefs, they were instructed by the area chief to arbitrate a dispute between WG and Gathoni Gathute over Gathute Kiago's land. They visited the suit property and found that it had been divided into three portions, a portion for the late Theuri Kiago, a portion for the late Gathute Kiago and a portion for the late WG.

15. Explaining that the dispute was in respect of the portion owned by the late WG, P.W.2, informed the court that they received evidence and in the end established that Nguchu Murage had sold 1.5 acres to the late WG. When they visited the land in dispute, they found that it was occupied by P.W.1, the plaintiff herein.

16. P.W.2 further informed the Succession Court that the dispute was between the wives of Gathute Kiago.

17. According to P.W.2, there was evidence that the land of WG was separate from the other portions (there were boundary features). There was also a note book showing that WG bought the land that was the subject of the dispute they were called upon to arbitrate. They also established that WG had planted coffee on her portion.

18. In re-examination, P.W.2 maintained that they found the land divided into 3 portions, one portion for WG and the other portion equally between the two wives of Kiago.

19. P.W.3, Francis Gathacia Nyaga and P.W.4, Benson Maina Gachuhi's testimonies are to the effect that the plaintiff was married by WG.

20. The defendant, who testified as D.W.1, informed the court that K.K (his grandfather) had two wives and that each wife had one son. The sons were Theuri Kiago and Gathute Kiago.

21. According to D.W.1, WG who was one of the wives of Gathute Kiago, died living no children.

22. D.W.1 informed the court that he does not recognise the plaintiff. He however, admitted that the suit property has been divided into various portions and that no one enters the portion reserved for WG.

23. In re-examination, D.W.1 maintained that he does not recognise the plaintiff and reiterated his contention that WG did not have any land comprised in the suit property.

24. Like D.W.1, D.W.2, Charles Maina Gakuru, informed the court that he did not know P.W.1. He was also not aware that WG had her own separate land comprised in the suit property. Because WG did not have children of her own, he urged the court to give WG's share of K.K's estate to WG' co-wife.

25. The foregoing was the evidence presented before the Succession Court. Upon considering that evidence the Succession Court, observed:-

**“...there is no dispute that the deceased had two sons namely: Gathute and Theuri. Gathute was married to Gathoni Gathute and Wairimu Gathute. The Protessor avers that she was married by Wairimu Gathute to bear for her children since she was barren. It is also not in dispute that the assets of the estate should be shared between the two brothers namely Gathute and Theuri. It should be noted that none of the members of Gathute lineage have disputed the Protessor's claim (the Protessor is the plaintiff herein). Gathoni Gathute has not controverted the assertion by the Protessor that she was married by Wairimu Gathute. It is apparent from the evidence tendered that the Protessor told the truth. I am convinced she was married to Wairimu Gathute hence she is entitled to pursue her “husband’s” entitlement from the estate. It has also emerged from the evidence that the share due to the late Wairimu appears to be more than that of her co-wife. This supports the assertion by the Protessor that the late Wairimu Gathute had purchased 1.98 acres which land was consolidated with that of the deceased as part of L.R. No. Muhito/Njiruini/137. The Protessor's claim may not be realized through these proceedings because of the following technicalities. First, the late Wairimu Gathute had filed a Succession Cause over her father-in-law's estate, in 1985 but she died before establishing her claim. I doubt whether the late Wairimu could have succeeded in a claim against her father-in-law in this succession cause. It is apparent that she did not file a claim against her father-in-law during his life time nor did she file a claim against his estate after his death. Secondly, it would appear the protessor's claim is based on trust. She is required by law to take up Letters of Administration in respect of the Estate of Wairimu Gathute, deceased, which she has not done.**

**What is clear in my mind is that the Protestor should be treated as a defendant of the deceased. It is clear from the evidence that she lived with the late Wairimu Gathute hence she ought to be provided for in that capacity.”**

26. It is the foregoing observation/determination by the Succession Court which precipitated this suit.

#### **Submissions**

27. On behalf of the plaintiff, it is reiterated that the suit property is subject to a trust in favour of WG for 1.98 acres. According to the plaintiff, the 1.98 acres should be excluded from the estate of KK when sharing the suit property between the two houses of KK. The evidence in support of the pleaded trust is said to be the proceedings of the defunct Land Disputes Tribunal and the conduct of the parties to this dispute and their predecessors in entitlement to the suit property concerning the portion claimed by the plaintiff.

28. On behalf of the defendant, it is submitted that no convincing evidence was given as to why land belonging to plaintiff was registered in the name of KK yet her husband was of majority age at the material time. The defendant faults WG for having failed to make a claim when KK was alive.

29. Concerning the proceedings of the Land Disputes Tribunal relied on by the plaintiff in support of her case, the defendant submits that those proceedings are unreliable because the award in respect thereof was set aside by court.

30. The plaintiff is also faulted for having failed to call the people from whom WG allegedly bought the land she claims, to vouch for the allegation that WG had her own land, separate from the land held by KK.

31. Concerning the existence of boundaries in the suit property, it is reiterated that the boundaries were merely for occupation and cultivation of the suit property. Despite existence of those boundaries, the plaintiff is said to have failed to prove that the portion said to belong to WG, if at all it exists, measures 1.98 acres. In the absence of any evidence showing that the parcel of land allegedly bought by WG measures 1.98 acres, it is submitted that there is no basis for determining that the suit property is subject to a trust in favour of the plaintiff to the extent of 1.98 acres.

32. In view of the foregoing, it is submitted that the plaintiff has not discharged the burden imposed on her of proving that the suit property is subject of a trust in favour of WG.

33. From the pleadings filed in this suit and the submissions made in respect thereof, I find the issues for determination to be:-

- (i) Whether this suit is *res judicata* the proceedings in the Succession Cause?
- (ii) Whether the proceedings of the defunct Land Dispute Tribunal produced in evidence by the Plaintiff are of any evidential value?
- (iii) Whether the Plaintiff has proved that the suit property is subject of any trust in favour of WG?
- (iv) What orders should the court make.

34. On whether this suit is *res judicata* the proceedings in the Succession Cause, having carefully read and analyzed the determination in the Succession Cause I note that the issue for determination in this suit, to wit, whether or not the suit property is subject to any trust in favour of the Plaintiff or her benefactor WG, was never determined by the Succession Court or any other court with jurisdiction to hear and determine it. For that reason I return a negative verdict to this issue.

35. On whether the proceedings of the Land Dispute Tribunal produced by the plaintiff are of any evidential value to the plaintiff's case, despite the award in respect of those proceedings having been set aside, I am of the considered view that the proceedings are admissible in evidence at least for purposes of proving that such proceedings existed and the outcome thereof.

36. As to whether the plaintiff has proved that the suit property is subject to any trust in favour of the WG, a review of the totality of the evidence adduced before the succession cause and which evidence was adopted as evidence in this suit shows that there are boundaries to the suit properties, that the beneficiaries of the suit property are in use and possession of their respective portions of the suit property and that no one enters the portion said to be WG's.

37. A further review of the evidence adduced before the defunct Land Disputes Tribunal leaves me without any doubt that WG had her own parcel of land comprised in the suit property. Even though from the evidence adduced it is not possible to say with certainty the size of the parcel which belongs to WG, I disagree with the defendant's contention that lack of certainty concerning the portion claimed by the plaintiff renders the plaintiff's claim unmaintainable as the evidence adduced shows that the portion is distinct and identifiable on the ground. If it turns out that the portion is not exactly 1.98 acres as per the plaintiff's claim, the plaintiff will still be entitled to the portion earmarked for WG on the ground as per the existing boundaries.

38. Consequently, the plaintiff's claim succeeds to the extent contemplated in this judgement.

39. This being a family dispute each party to bear their own costs for the suit.

**Dated, Signed and Delivered in open court at Nyeri this 4th day of July, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. Mshila h/b for Mr. Nderi for the plaintiff

Mr. Kebuka Wachira for the defendant

Court assistant - Esther