



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 125 OF 2006

ANDRIANO MUNYUA.....PLAINTIFF

VERSUS

BONFACE MUTEMBEI GITUMA (Legal representative of MARIAM

MUNYANGE GITUMA.....DEFENDANT

JUDGMENT

1. Vide a plaint dated 21st December 2006, plaintiff claims 2.751 acres out of **L. R. NYAKI/THUURA/493 (the suit land)** on the basis of customary trust. He also avers that his rights to occupation of the suit land has arisen due to his considerable long time in occupation of the suit land which he developed.
2. The Defendant was found to be mentally incapacitated and was therefore represented by a Guardian Ad litem, **Mariam Munyange Gituma** who sadly passed on on 5.9.2019, few days before the scheduled date of judgment delivery. She was substituted by **Bonface Mutembei Gituma**. The defendant filed her defence statement on 17th June 2008 denying all the allegations in the plaint save for an admission that the plaintiff and the defendants are cousins.
3. During the hearing the plaintiff called five (5) witnesses in support of his case whereas the defendant called two (2) witnesses.
4. The evidence of **Pw1 Andriano Munyua M' Kiunga (the plaintiff)**, was partially taken away back on 12.6.2013 and the case continued again as from 4.4.2017. He testified that he is the son of **M' Kiunga Nkubito** whereas the Defendant is the son of **M' Kiunga M' Aruja** and that their fathers who were brothers died before the land was adjudicated. Plaintiff avers that he conducted the land adjudication in the year **1973** and registered the land in the name of the Defendant for the benefit of the family and the Clan.
5. Plaintiff further stated that the reason as to why he caused the land to be registered in Defendant's name was because the latter was the younger child and that he had made a promise to his father that he would not leave defendant out in the land division process.
6. Plaintiff further told the court that he has not built on the suit land as he currently resides on land Parcel 619 (measuring 0.93 Acres) which land he bought. He equally has other parcels of land which he bought. According to the plaintiff, His father, M'Kiunga died in 1940, so he was left with the brother of M'Kiunga, who happens to be M'Arunja (defendant's father). However, by the time of Land Adjudication, M'Arunja was also deceased. Plaintiff then embarked on the process of ensuring the family land was combined together. He then caused the same to be registered in the name of defendant.
7. Plaintiff contends that they divided the land where each of the litigant got their own portion out of the suit land and for a long time there was no problem.
8. **Pw2 David Anampiu** adopted his statement of 20.4.2015 as his evidence. He is familiar to both the plaintiff and the defendant for many years and he is married to a relative of the parties. He is also a neighbour as he resides about ½ a Kilometre away from the suit premises. He avers that plaintiff utilizes a half portion of the suit land and that the plaintiff's and defendant's portion of the land have clear and distinct marked boundaries. He contends that Defendant resides in the suit premises, but the land is owned by both parties.
9. During cross-examination, PW2 stated that he was not present during the land adjudication period and he is not familiar with the issue of acreage belonging to each person. He however restated that the land belonged to the clan.
10. **Pw3 Jeremiah Nkuundi Kirandu** is a neighbour to the plaintiff and Defendant, and so is **Pw4 John Thurairia**, while **Pw5 Mutaria Munyua**, is a son to the Plaintiff. The evidence of these witnesses is more or less similar to that of PW2. PW5 added that the boundary between the two portions of land was elected in **1974**, and that no one invades the other party's parcel of land.

11. **Dw1 Mariam Munyange Gitumba** is the guardian of the defendant. She adopted her statement of 7.3.2016 as her evidence. She testified that Plaintiff is in occupation of about 2 acres of the suit premises and utilises the same, while her family utilizes two acres also. She further testified that plaintiff has planted macadamia and coffee trees on the said premises. She however stated that plaintiff is using the land through force and that the suit land is solely owned by the Defendant. She further told the court that she was married to the defendant in 1977 and at that time, the plaintiff was already in the suit premises. She confirmed that the suit premises was ancestral land since it emanated from Defendants father and that the land was gathered for the benefit of the Defendant. She however stated that she is not aware of the clan meeting of 1974.

12. **Dw2 Lazarus M' Amai** is a resident of the village where the suit premises is situated. He too adopted his statement of 7.3.2016 as his evidence. He avers that the land in the village was clan land. He is aware that the plaintiff and Defendant reside in the suit premises and there is a traditional fence acting as their boundary. He further stated that plaintiff has planted coffee and macadamia trees in the suit premises. He told the court that even before the land was gathered the plaintiff was using the land.

Analysis and Determination

13. The plaintiff's claim in the suit premises is majorly anchored on Paragraph 7 of the plaint. There in, he avers that he had bought some of the pieces of land totalling to 1.83 Acres. This parcel was combined with the family's (Mburago) trust land measuring 1.843 acres and the defendant's own parcel measuring 0.28 of an acre and the same was registered in the name of the Defendant as L.R. No. Nyaki/Thuura/493 measuring 1.6 hectares (3.953 acres).

14. I have looked at the copy of the green card and the same shows that the suit premises was registered in the name of the defendant in the year 1973, which fact is not disputed. The relationship of the parties too appears not to be in dispute. Although defendant in her statement of 7.3.2016 has claimed that "*plaintiff is not our relative..*", she did admit during cross examination that plaintiff's father and defendant's father were brothers.

15. Having considered the pleadings, the record, the evidence and the submissions of the parties, I find that the issue for determination is whether the suit premises falls under customary trust land, and whether the plaintiff has proved his claim of entitlement to a portion of the said land.

16. The issue as to how a trust is created is a question of fact to be proved by evidence see **Mumo vs. Makau (2002) IEA 170 Court of Appeal, Salesio M'Itonga vs. M'Ithara & 3 Others (2015) eKLR**.

17. In the present suit, plaintiff has been in occupation of the suit premises for many years. According to the witness of defendant (DW2), plaintiff was using the suit land long before the land was registered. Even when defendant got married into the family in 1977, she still found the plaintiff using the suit land. He has made developments to the property where he has planted trees, macadamia and coffee. Even Miraa trees are on that land according to DW2. Defendant's allegation that plaintiff has been living in the suit premises through force is therefore unfounded. Defendant even admitted that neither party invades the other litigant's land which means that there is clear demarcation of the land used by each party.

18. The evidence of the plaintiff with regard to occupation and continuous development has been consistent. The same remains unshaken. However, the claim that he bought some of the pieces of land as captured in paragraph 7 of the plaint have not been proved on a balance of probabilities. What is crystal clear is that the suit land has its roots in ancestry, but during adjudication, the land was combined to be held by the Defendant in trust for the family. That is why even before registration, the land was divided into two whereby plaintiff was in possession of one portion while defendant utilized the other portion.

19. In the Supreme Court case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR**, it was held that;

"Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence (emphasize added). 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 is 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. (Emphasize added). Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land

2. The claimant belongs to such family, clan, or group

3. 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.

4. *The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*

5. *The claim is directed against the registered proprietor who is a member of the family, clan or group”.*

20. In **Felista Muthoni Nyaga V. Peter Kayo Mugo [2016] eKLR**, it was held that;

“while it is the law that the registration of a party as the proprietor of land does not defeat a claim of trust nor relieve such proprietor of his obligation as a trustees, there must be evidence upon which a court can conclude that infact the registered proprietor of the land subject of the suit before it is infact holding the same as a trustee for the benefit of others.”

21. In the present suit, there is uncontested evidence of occupation, whereby the defendant has admitted that plaintiff occupies about two acres of the suit premises. This evidence of occupation predates the registration of the suit land in 1773. There is also evidence of a traditional boundary that separates the two parcels and there appears to be a peaceful co-existence of the parties, where no one invades the other’s portion of the suit land. All this evidence is a manifestation of the customary trust. Thus plaintiff fits the definition of a claimant of ancestral land as set out in the above case of **Isack M’Inanga Kiebia v Isaaya Theuri M’Lintari & another (Supra)**. It is peculiar that during the last fifty-eight or so years of the Plaintiff’s occupation of the suit premises, the Defendant has never sought to interfere with plaintiff’s occupation.

22. On the issue of acreage, the green card shows that the suit land measures 1.6 ha (approximately 3.95 acres). I will direct that the land be shared equally between the parties.

23. The upshot of my findings are that plaintiff’s case is merited to the extent of a half portion of the suit land. I, therefore proceed to make the following orders;

(i) It is hereby declared that plaintiff is entitled to half share of parcel no. Nyaki/Thuura/493.

(ii) An order is hereby issued that the defendant do transfer half of parcel no. L.R. Nyaki/Thuura/493 to the plaintiff herein.

(iii) The Deputy Registrar of this Honourable Court is hereby authorized to sign all the requisite documents to effect the transfer thereof in the event that defendant fails to sign such transfer documents.

(iv) Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 5TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

Nyamu Nyaga holding brief for Kiogora Arithi for plaintiff

Kimaita holding brief for Kaumbi for defendant

HON. LUCY. N. MBUGUA

ELC JUDGE