



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1120 OF 2014

(FORMERLY HCC SUIT NO. 1549 OF 1985)

WAMBURU KARIUKI..... PLAINTIFF

=VERSUS=

WAMBUI KOIGI.....1ST DEFENDANT

GITHINJI WA CHEGE.....2ND DEFENDANT

JUDGMENT

The plaintiff filed this suit on 29th May, 1985 in the High Court. The suit was subsequently transferred to this court in 2014 and given the current case number. In his plaint dated 23rd May, 1985, the plaintiff sued Koigi Gichuru and Githinji Wa Chege as the 1st defendant and 2nd defendant respectively. Koigi Gichuru (hereinafter referred to only as “the deceased”) died on 30th January, 1992 while this suit was pending and was substituted by his wife Wambui Koigi, the current 1st defendant on 4th December, 1992. The plaintiff averred that the deceased and the plaintiff were brothers. The plaintiff averred that their father was one, Gichuru Hungu. The plaintiff averred that during land consolidation, demarcation and registration, the deceased was registered as the proprietor of all the parcels of land that belonged to the plaintiff and the deceased’s said father Gichuru Hungu to hold in trust for himself and the plaintiff. The plaintiff averred that among the parcels of land that were registered in the name of the deceased to hold in trust for the plaintiff was Title No. Ngenda/Gatukuyu/T.258 (hereinafter referred to as “the suit property”). The plaintiff averred that he enjoyed quiet and uninterrupted possession of the suit property from 1958 until the year 1985 when the 2nd defendant came to the suit property and planted crops thereon on top of the crops that had already been planted by the plaintiff.

The plaintiff averred that on 11th May, 1984 the deceased in breach of the trust in respect of which he held the suit property sold the suit property to the 2nd defendant without the plaintiff’s knowledge. The plaintiff averred that the 2nd defendant was aware that the deceased held the suit property in trust for the plaintiff. The plaintiff averred that the 2nd defendant was bound by the said trust.

The plaintiff averred in the alternative that as at the time the deceased transferred the suit property to the 2nd defendant, the deceased’s title in the suit property had already been extinguished by the plaintiff’s adverse possession. The plaintiff averred that the deceased had no title in the suit property that he could pass to the 2nd defendant.

The plaintiff sought judgment against the defendants jointly and severally for:

1. An order that the 2nd defendant transfers the suit property to the plaintiff.
2. An order that the 2nd defendant, his servants, family members and/or employees cease from interfering with the plaintiff’s possession of the suit property.
3. Costs and interest at court rates.

The deceased filed a statement of defence on 15th July, 1985. The deceased denied that he was registered as the proprietor of the suit property to hold the same in trust for the plaintiff. The deceased denied further that the plaintiff had been in possession of the suit property as claimed in the plaint. The deceased denied further that the plaintiff had acquired the suit property by adverse possession. The deceased averred that the plaint disclosed no cause of action against the deceased and that the suit offended the provisions of Order XXXVI of the Civil Procedure Rules. The deceased prayed that the plaintiff’s suit be dismissed.

The 2nd defendant filed his statement of defence on the same date as the deceased. The 2nd defendant admitted that he was registered as the

owner of the suit property on 11th May, 1984. The 2nd defendant denied that the plaintiff enjoyed quiet and uninterrupted possession of the suit property from 1958 until 1985 when the same was interrupted by the 2nd defendant. The 2nd defendant denied that the suit property was transferred to him secretly by the deceased in breach of trust. The 2nd defendant averred that he took possession of the suit property immediately the same was sold to him and that he spent about Kshs. 100,000/= in developing the same. The 2nd defendant averred that even if the deceased held the suit property in trust for the plaintiff, the 2nd defendant was not bound by the said trust since he acquired the suit property for valuable consideration without notice of the said trust. The 2nd defendant denied that the plaintiff had acquired the suit property by adverse possession. The 2nd defendant averred that the plaintiff's suit was unprocedural and offended the provisions of Order XXXVI of the Civil Procedure Rules. The 2nd defendant urged the court to dismiss the suit.

The plaintiff case:

The plaintiff gave evidence and called one witness, Clement Mburu Mutembei (PW2). The plaintiff also filed closing submissions. The plaintiff's case is as follows: The deceased was his elder brother. Their father Gichuru Hungu died before land demarcation and registration. During land consolidation, demarcation and registration, the deceased was an adult and had a National Identity Card. As was the custom then, the parcels of land that belonged to their father which their mother's house was entitled to was registered in the name of the deceased as the eldest son to hold in trust for himself and the plaintiff. The parcels of land that were registered in the name of the deceased to hold in trust were;

1. Chania/Makwa/T.37
2. Ngenda/Gatukuyu/T.258
3. Ngenda/Mangu/510

The deceased and the plaintiff were to share the three (3) parcels of land. The deceased took Chania/Makwa/T.37 ("Plot No. T.37") for himself while the plaintiff was allocated Ngenda/Gatukuyu/T.258 ("the suit property"). Ngenda/Mangu/510 ("Plot No. 510") was divided equally between the deceased and the plaintiff. Plot No. 510 was subdivided into Ngenda/Mangu/11313 measuring 0.79 ha. which was registered in the name of the plaintiff and Ngenda/Mangu/11314 measuring 0.77 ha. which was registered in the name of the deceased.

On 10th May, 1984, the deceased transferred Plot No. T.37 to his son Michael Njenga Koigi and on 11th May, 1984, the deceased transferred the suit property to the 2nd defendant. The 2nd defendant was a nephew of the deceased's wife, the current 1st defendant. The two transfers were carried out without the plaintiff's knowledge. The 2nd defendant immediately used the suit property to secure a loan from Standard Bank Ltd. on 20th December, 1984.

In 1985, the 2nd defendant entered the suit property and destroyed the plaintiff's crops. The plaintiff has contended that he is the rightful owner of the suit property and that the property was transferred to the 2nd defendant by the deceased in breach of trust. The plaintiff has urged the court to uphold the trust, proceed to cancel the 2nd defendant's title and order for the suit property to be registered in the name of the plaintiff.

The defendants' case:

The 1st defendant did not give evidence. She however called one, Gabriel Kamau Mburu (DW2) who gave evidence in support of her defence. The 1st defendant did not file closing submissions. From the evidence of DW2, the 1st defendant admitted that the deceased and the plaintiff were brothers and that they were to share land that belonged to their father. The 1st defendant admitted further that the deceased and the plaintiff were each entitled to and were allocated a farm land (land) and a town plot (plot). The 1st defendant contended however that the suit property was the deceased's plot.

The 2nd defendant gave evidence but did not make closing submissions. The 2nd defendant's case is that he purchased the suit property from the deceased at a consideration of Kshs. 20,000/= in 1984. The suit property was transferred to him and he was issued with a title deed. He thereafter took possession of the property and had remained in possession. The 2nd defendant has admitted that he took a loan from Standard Bank with the suit property as security. The 2nd defendant has averred that he has repaid the loan. The 2nd defendant has contended that when he purchased the suit property, there was no encumbrance against the title which was in the name of the deceased. The 2nd defendant has averred that he has developed the suit property by putting up a house thereon. The 2nd defendant has contended that he is a purchaser of the suit property for value and as such the plaintiff's claim does not lie as against him.

Issues for determination:

The parties framed and filed in court a statement of agreed issues. The issues framed by the parties are the following;

1. Whether the deceased was registered as the proprietor of the suit property to hold the same in trust for himself and the plaintiff.
2. Whether the plaintiff had been in possession of the suit property.
3. Whether the deceased breached the trust under which he held the suit property.

4. Whether the plaintiff has acquired the suit property by adverse possession.
5. Whether the plaint discloses a cause of action against the defendants and whether the suit is unprocedural.
6. Whether the transfer of the suit property to the 2nd defendant was done secretly.
7. Whether the 2nd defendant took possession of the suit property and developed the same.
8. Whether the 2nd defendant was bound by the trust if any in respect of which the deceased held the suit property.
9. Whether the deceased's wife was properly joined in the suit.
10. Who is liable for the costs of the suit?

Whether the deceased was registered as the proprietor of the suit property to hold the same in trust for himself and the plaintiff.

It is common ground that the deceased was the first registered owner of the suit property. The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Although the deceased was registered as the proprietor of the suit property on first registration, his rights were subject to whatever duty or obligation that he owed as a trustee in relation to the said property. See, the proviso to section 28 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) and section 25 (2) of the Land Registration Act, 2012.

It is common ground that the plaintiff and the deceased were brothers and that their father was Gichuru Hungu. It is common ground that the plaintiff's and the deceased's father died before land consolidation and demarcation. It is also not disputed that during land consolidation, demarcation and registration, the plaintiff was a minor and that it was the deceased who had attained the age of majority. It is not contested that the land that belonged to the plaintiff's and the deceased's father that was supposed to be given to the plaintiff's and the deceased's mother's house was registered in the name of the deceased. The parcels of land that were registered in the name of the deceased were three (3) in number namely; Chania/Makwa/T.37, Ngenda/Gatukuyu/T.258 and Ngenda/Mangu/510. The same were registered in the name of the deceased on 6th November, 1957, 31st December, 1958 and 30th October, 1957 respectively. The plaintiff led evidence that the deceased held the said parcels of land in trust and that they were supposed to share the three parcels of land with the deceased equally. I am satisfied from the evidence before the court that the deceased held the three parcels of land in trust for himself and for the plaintiff. The three parcels of land did not belong to the deceased. They belonged to the deceased's and the plaintiff's father who was deceased as at the time of land registration. The plaintiff has proved in my view that the three parcels of land were registered in the name of the deceased to hold in trust for the family. In Njuguna & 5 others v Njuguna [1983]eKLR, the Court of Appeal stated that;

“Under customary law the eldest son inherits land to hold it in trust for himself and the other heirs. This is a firmly embedded and regular feature of land holding among the Kikuyu in Kenya. Normally no “uramati” is given. It is a derivative duty which by custom falls upon the eldest son, and he discharges it also as a moral obligation.”

There is no evidence before the court showing that the three parcels of land were registered in the name of the deceased to hold as the absolute proprietor thereof. The plaintiff led evidence that the deceased took for himself a town plot, Chania/Makwa/T.37 which he transferred to his son Michael Njenga Koigi. The other parcel of land Ngenda/Mangu/510 was shared equally between the deceased and the plaintiff. The plaintiff led evidence that since the deceased had already taken one town plot, Chania/Makwa/T.37, the remaining town plot, Ngenda/Gatukuyu/T.258 belonged to the plaintiff. From the evidence on record, I am persuaded that this was the case. The 1st defendant has not convinced me that the deceased was entitled to two (2) town plots. It is my finding therefore that the deceased held the parcel of land known as Ngenda/Gatukuyu/T.258 (“the suit property”) in trust for the plaintiff.

Whether the plaintiff had been in possession of the suit property.

The plaintiff pleaded that he was in quiet possession of the suit property from 1958 until 1985 when the 2nd defendant entered the property and planted crops thereon. In his evidence, the plaintiff told the court that he was still in occupation of the suit property. He stated that the 2nd defendant had put up a house on the suit property that he had rented out and that he also had a house on the property. The defendants did not rebut the plaintiff's evidence that he had a house on the suit property. It is therefore my finding that the plaintiff had been in possession of the suit property before and after the same was transferred to the 2nd defendant. After the property was transferred to the 2nd defendant both the plaintiff and the 2nd defendant remained in occupation of the same.

Whether the deceased breached the trust under which he held the suit property.

I have held earlier that the deceased held the suit property in trust for the plaintiff. This means that the deceased could not dispose of the suit property without the consent of the plaintiff. By selling and transferring the suit property to the 2nd defendant without the permission of the plaintiff on whose behalf he held the property in trust, the deceased breached the said trust.

Whether the plaintiff has acquired the suit property by adverse possession.

I find the plaintiff's adverse possession claim inconsistent with his claim over the property through trust. The plaintiff's case is that he was at all material times the owner of the suit property and that the deceased held the same in trust for him. The plaintiff cannot claim his own parcel of land by adverse possession. I find the plaintiff's claim over the suit property by adverse possession not proved.

Whether the plaint discloses a cause of action against the defendants and whether the suit is unprocedural.

The plaintiff's claim against the defendants is based on breach of trust and in the alternative, adverse possession. I have already made a finding that a case for breach of trust has been established while that of adverse possession has not been proved. Due to the foregoing, the plaintiff's plaint discloses a cause of action. On procedure, I find nothing unprocedural in bringing a claim for adverse possession as an alternative prayer in a plaint.

Whether the transfer of the suit property to the 2nd defendant was done secretly.

The plaintiff had contended that he was not aware of the sale of the suit property. The 2nd defendant told the court that he did not know the plaintiff and that he learnt later after purchasing the suit property that the plaintiff was related to the deceased. The plaintiff's claim that the suit property was sold secretly by the deceased to the 2nd defendant is therefore not farfetched.

Whether the 2nd defendant took possession of the suit property and developed the same and whether the 2nd defendant was bound by the trust if any in respect of which the deceased held the suit property.

It is common ground that after the suit property was registered in the name of the 2nd defendant, he took possession and constructed a house thereon. No evidence was however placed before the court as to the costs of construction of the said house. The court was not told how the cost of Kshs.100,000/= that was pleaded by the 2nd defendant in his defence was arrived at.

I have held that the deceased held the suit property in trust for the plaintiff. The property was therefore transferred to the 2nd defendant subject to that trust. In John Gitiba Buruna & Another v Jackson Rioba Buruna, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003, the court stated as follows:

“Although the rights of a registered proprietor of land are indefeasible under section 28 of the Registered Land act, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The 2nd defendant was bound by the trust to which the deceased's title to the suit property was subject. It was not necessary that the trust be noted in the register of the suit property. It was an overriding interest on the title of the suit property. In Gatimu Kinguru v Muya Gathangi [1976] KLR 253 Madan J. referred to his earlier decision in Mwangi Muguthu v Maina Muguthu, High Court Civil Case No. 377 of 1968 where he had stated as follows:

“As regards Section 126, there is no need to register the defendant as “trustee.” He was registered as owner as the eldest son of the family in accordance with Kikuyu Custom which has the notion of trust inherent in it. Ordinarily in pursuance of Kikuyu custom he would have transferred a half share in “Marango” (land) to the plaintiff. In any event this section does not make registration “as trustee” obligatory. It states may be described by that capacity.”

In Muthuita v Wanoe[1982] KLR 166 at pages 169 and 170, Potter J.A stated that:

“In Gatimu Kinguru v. Muya Gathangi [1976] KLR 253 Madan J(as he then was) held that the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of section 126(1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of the acquisition are not mandatory but merely permissive. That decision has been followed and in my respectful opinion it is correct. In the High Court the learned judge correctly directed himself as to the functions of a first appellate court and as to the relevant provisions of the Registered Land Act, and having carefully reviewed the evidence, found that the appellant was registered as proprietor of the suit premises as trustee for himself and the three plaintiffs. In my view there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did. With respect I agree with the learned judge.” (emphasis added)

Whether the deceased's wife was properly joined in the suit.

The deceased died on 30th January, 1992. On 19th October, 1992, the plaintiff applied to court through Chamber Summons dated 18th September, 1992 for the deceased to be substituted with the current 1st defendant, Wambui Koigi. In the application, the plaintiff averred that the deceased had died and that Wambui Koigi who was his widow was his legal representative. When the application came up for hearing on 20th November, 1992, the court ordered that the application be served upon Wambui Koigi and the advocate who was on record for the defendants for hearing on 4th December, 1992. When the matter came up on 4th December, 1992, the court was informed that the deceased's widow, Wambui Koigi and the advocate who was on record for the defendants had been served. The court after considering the application that was not opposed allowed the substitution of the deceased with his widow, Wambui Koigi, the current 1st defendant. That order has neither been varied nor set aside. The deceased's widow was therefore made a party to this suit through a lawful order of the court. Her joinder to the suit was therefore proper.

Who is liable for the costs of the suit?

Costs of and incidental to a suit are at the discretion of the court. The plaintiff has succeeded in his claim. No reason has been given that would warrant denying him the costs of the suit. I am however of the view that due to the relationship between the parties, each party should

bear its own costs.

Conclusion:

In conclusion, it is my finding that the plaintiff has proved his case against the defendants to the required standard. I therefore enter judgment for the plaintiff against the defendants jointly and severally for:

1. I declare that the deceased, Koigi Gichuru held all that parcel of land known as Ngenda/Gatukuyu/T.258 ("suit property") in trust for the plaintiff.
2. I declare that the suit property was transferred by the deceased to the 2nd defendant in breach of the said trust.
3. I declare that the 2nd defendant holds the suit property subject to the trust in favour of the plaintiff.
4. The 2nd defendant shall transfer the suit property to the plaintiff within ninety (90) days from the date hereof.
5. In the event that the 2nd defendant fails to transfer the suit property as ordered above, the Deputy Registrar of this court shall be at liberty to execute any document or instrument as may be necessary to facilitate the transfer of the suit property to the plaintiff.
6. A permanent injunction is issued restraining the defendants by themselves or through their agents, servants or employees from interfering with the plaintiff's possession of the suit property.
7. Each party shall bear its costs of the suit.

DELIVERED AND DATED AT NAIROBI THIS 24TH DAY OF JUNE 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mrs. Gulenywa for the Plaintiff

N/A for the Defendants

Ms. C. Nyokabi - Court Assistant