



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 120 OF 2017 (OS)**

**IN THE MATTER OF LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF LAND TITLE NUMBER INOI/KERUGOYA/75.**

**JOSEPHINE WANJIRU MITHAMO.....PLAINTIFF**

**VERSUS**

**JOHN KANGANGI MITHAMO.....1<sup>ST</sup> DEFENDANT**

**GLADYS MUTHONI KANGANGI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff moved this Honourable Court by way of Originating Summons dated 6<sup>th</sup> July, 2017 wherein she's seeking the following orders: -

- a. **A DECLARATION THAT UNDER SECTION 38 OF THE Limitation of Action Act cap 22 Laws of Kenya the Plaintiff/Applicant has acquired title of ONE ACRE portion out of Land Parcel NO. INOI/THAITA/75 by adverse possession.**
- b. **An order that the Plaintiff/Applicant be registered as the absolute proprietor of ONE ACRE portion to be curved from the suit land.**
- c. **That in the alternative and without prejudice to the foregoing the defendant is estopped from in any denying the Plaintiff title and possession of ONE ACRE portion out of Land Parcel No. INOI/KERUGOYA/75 to the Plaintiff.**

2. The Originating Summons were supported by the supporting affidavit of the Plaintiff sworn on 6<sup>th</sup> July, 2017. The Plaintiff also filed a Reply to the Replying Affidavit dated 30<sup>th</sup> August, 2017 sworn on 21<sup>st</sup> March, 2018.

3. The defendants opposed the said summons by filing a Replying Affidavit sworn by the 1<sup>st</sup> Defendant on 30<sup>th</sup> August, 2017.

**PLAINTIFF'S CASE**

4. The Plaintiff's case is that the 1<sup>st</sup> Defendant is her Step Brother. The 2<sup>nd</sup> Defendant is her sister-in-law as she is the wife of the 1<sup>st</sup> defendant.

5. She testified that she belongs to the clan of Umbui of the branch of Ngima. She shared the same father with the Defendant who was called Mithamo Gichugu who died before land adjudication. When the estate of their said clan was to be demarcated their mothers namely Wangaru Mithamo and Jane Wanjiku Mithamo gave out the name of the 1<sup>st</sup> defendant to be registered with Land parcel No. INOI/THAITA/75 to hold the same in his trust and in trust of the other members of the family

6. She testified that the 1<sup>st</sup> defendant was registered since in Kikuyu Custom Women were not registered as proprietors of land otherwise the suit land would have been registered in the names of Wangaru Mithamo and Jane Wanjiku Mithamo.

7. She further testified that she has lived on the suit land since her birth together with her mother Jane Wanjiku Mithamo who died in the year 2006. During the lifetime of her mother, they were utilizing a portion of approximately 1 acre out of the suit land without interruption from either of the defendants.

8. She testified that upon the demise of her mother the defendants denied her entry into the suit land and even demolished the living house of her deceased mother to deny her access of the suit land.

9. The 1<sup>st</sup> Defendant later enjoined the 2<sup>nd</sup> Defendant in the title as a gift when he found that she was persistent and without consent of the other members of the Mithamo's family including herself

10. She sought help from their clan elders however the 1<sup>st</sup> defendant remained adamant to the resolutions of the said elders. In the year 2017, the 1<sup>st</sup> Defendant was summoned by the said elders who resolved that the 1<sup>st</sup> defendant gives the plaintiff one acre out of the suit land.

11. She also testified that she had been advised by a reliable source that she had acquired a title of 1 acre out of the suit land by way of adverse possession. She and her mother had developed the suit land by planting coffee stems and thus it would be in the interest of justice for the court to order that she be registered as the absolute proprietor of One acre portion out of the suit land.

12. The plaintiff called two witnesses.

13. PW2 testified that the suit land was a clan land and that it was registered in the name of the 1<sup>st</sup> defendant as the son of his father. He further testified that the plaintiff was living in the suit land with her mother

14. PW3 testified that he belonged to the same clan as the parties herein. The plaintiff and her deceased mother used to live on the suit land until her demise in the year 2006. The 1<sup>st</sup> defendant was registered as proprietor of the suit land to hold the same in trust for the rest of his father's family members.

#### **DEFENDANT'S CASE**

15. The Defendant testified that he was the son of Ngunga Gachungu and not Mithamo Gachungu. His father was a brother of the Plaintiff's father and thus the plaintiff was his cousin and not his sister.

16. He explained that he only took his uncles name Mithamo as his surname because his father died before attaining the age of majority.

17. He testified that during the time of land adjudication he was an adult and was gainfully employed as a teacher and therefore he used to make his own personal contributions to their Umbui clan and thus was allocated the suit land absolutely and not as a trustee of anyone.

18. He further testified that the plaintiff's step brother Kitho Mithamo was also allocated his land L.R INOI/THAITA/181 and if indeed anyone was registered as a trustee for the plaintiff it would be the said KIMOTHO MITHAMO.

19. He also testified that at the time of land demarcation the plaintiff's mother Jane Wanjiku Mithamo was elderly and requested to live in the suit land and thus granted her license to live thereon until she passed on. Thus, the plaintiff has no proprietary right and has never had any proprietary interest in the suit land as all she could do in her mother's lifetime is to visit her and bring her children to visit the grandmother.

20. He further testified that the plaintiff got married and also acquired L.R MUTIRA/KANYEI/537 on 22<sup>nd</sup> November, 1977 and settled thereon where she lives to date. Thus, the plaintiff has never been in adverse possession of any portion of the suit land.

21. He further stated that he never attended the purported meetings of elders on 11<sup>th</sup> March, 2017 or 13<sup>th</sup> May, 2017. He therefore prayed that the plaintiff's suit be dismissed with costs.

#### **PARTIES SUBMISSIONS**

22. On 7<sup>th</sup> June, 2021, parties through their advocates on record agreed to file submissions. The Plaintiff filed hers on 8<sup>th</sup> July, 2021 whereas the Defendants did not file theirs within the time lines.

#### **PLAINTIFF'S SUBMISSIONS**

23. In a nutshell, the plaintiff reiterated the averments contained in the parties pleadings. She submitted that the 1<sup>st</sup> Defendant denied his own blood sister in an effort to retain the whole suit land. She urged this Honourable Court not to be blinded by his tactics. She relied on the case of *Mtaana Lewa Vs Kahadndi Ngala Mwangandi (2005 e K.L.R)* and prayed that this Honourable Court upholds her claim and hold that she is entitled to 1 acre out of the suit land.

#### **ANALYSIS**

24. I have considered the pleadings and the rival submissions of the parties herein. The issues for determination can be framed as follows:-

- a. **Whether the 1<sup>st</sup> Defendant was registered as proprietor of the suit land to hold the same in trust for his family members**

**b. In the alternative, whether the plaintiff has proved that she is entitled to the suit land by way of adverse possession.**

**c. Who will bear the costs of the suit?**

**WHETHER THE 1<sup>ST</sup> DEFENDANT WAS REGISTERED AS PROPRIETOR OF THE SUIT LAND TO HOLD THE SAME IN TRUST FOR HIS FAMILY MEMBERS**

26. The parties have engaged each other in a vigorous contest on whether the suit land was a customary land and whether the same was held by the 1<sup>st</sup> defendant in trust of his family members. However, I find that these issues are irrelevant in relation to the claim of adverse possession made by plaintiff.

26. The plaintiff claimed that the suit land was customary land held by the 1<sup>st</sup> Defendant in trust for the family members of the late Mithamo Gachugu.

27. The test to prove whether customary trust exists was laid out in the case of *Isack M'inanga Kiebia Vs Isaaya Theuri M'lintari & another [2018] e KLR* whereby the Supreme Court set out the following grounds:-

“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.”

28. It is not in dispute that the Plaintiff and the 1<sup>st</sup> Defendant belong to the Umbui clan. It is not also in dispute that the 1<sup>st</sup> Defendant was given the suit land by virtue of belonging to the said clan.

29. The main issue in contention in this case is whether the 1<sup>st</sup> Defendant was given the suit land by the clan absolutely or to hold the same in trust for himself and the rest of the family including the Plaintiff herein.

30. In his testimony, the Plaintiff stated that her father the late Mithamo Gachungu was polygamous and had married three wives, among them, the plaintiff's deceased mother and the 1<sup>st</sup> Defendant's mother.

31. The Defendant however stated that his father was Ngunga Gachungu and not Mithamo Gachungu and that his father Ngunga Gachungu and the Plaintiff's father Mithamo Gachungu were brothers.

32. The Defendant further stated that the Plaintiff was his cousin and not sister and that he only took his uncle's name Mithamo as his surname because his father died before attaining the age of majority.

33. I find the explanation by the Defendant unsupported by any fact or law as he did not call any witness or produce any documents to prove his assertion. It is trite law that he who alleges must prove. To the contrary, I find that the surname indicated in the certificate of Identity marked as “JKM-2” in the 1<sup>st</sup> Defendant's replying affidavit as the true Identity of his father's name.

34. I also agree with the explanation by the Plaintiff that the 1<sup>st</sup> Defendant was registered as proprietor of the suit property to hold in trust since women under Kikuyu Customary law were not registered as proprietors of land otherwise the suit land would have been registered in the names of the two widows Wangaru Mithamo and Jane Wanjiku Mithamo.

35. I find the testimony of the Plaintiff truthful as the same was corroborated by the Clan Chairman who testified as PW3.

**CONCLUSION**

37. The upshot of my analysis is that the suit land which is a clan land was registered in the name of the 1<sup>st</sup> Defendant to hold in trust for himself and the rest of the family members including the Plaintiff herein. That explains why the Plaintiff and her mother (deceased) lived on the land and was even buried therein.

37. Since I have established that the 1<sup>st</sup> Defendant is holding the suit land in trust for the family, I find the second issue untenable. In the final analysis, I enter judgment for the Plaintiff against the Defendants as follows:-

**1. A declaration that the Defendants hold the suit property land parcel No. INOI/KERUGOYA/75 in trust for the family**

including the Plaintiff.

2. An order for determination of trust by directing that one acre (1) out of land parcel No. INOI/KERUGOYA/75 be transferred and registered in the name of the Plaintiff herein.

3. The Land Registrar Kirinyaga County to rectify the register to reflect the changes under paragraph (2) above.

4. The Plaintiff and the Defendants being family relatives, I order each party to bear her own costs.

JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 15<sup>TH</sup> DAY OF OCTOBER, 2021

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Asimwe holding brief for Magee
2. Kabuta, Court clerk.

MR. ASIIMWE

I have instructions to apply for stay of execution for 30 days.

COURT - There shall be a stay of execution for 30 days.

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**E.C. CHERONO**

**ELC JUDGE**