



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C CASE NO. 80 OF 2015

REBECCA WANJIRUWARUI (Suing as a Personal

Representative in the Estate of

JAMES MAINA WACHIRA (Deceased)..... PLAINTIFF

VERSUS

WACHIRA GICHEGU RESPONDENT

JUDGMENT

1. The Plaintiff moved this Honourable Court by way of a Plaint dated and filed on 30th June, 2015. She seeks the following prayers:

(a) A declaration that the Defendant holds in trust land parcel No. Mwea/Mutithi/Scheme/604 subject to the overriding interest of the Plaintiff herein being the personal representative of James Maina Wachira (deceased).

(b) An order that the defendant facilitates the execution of the relevant transfer and other documents in favour of the Plaintiff and in default, the Deputy Registrar of this Court to execute all the necessary documents for and on behalf of the Defendant.

(c) An order for permanent injunction restraining the Defendant from evicting the Plaintiff.

(d) Costs of the suit and interest thereon.

(e) Any other relief that this Honourable Court may deem fit to grant.

2. The Defendant denied the plaintiff's claim and filed a Statement of of Defense dated 24th April, 2017 and filed on 25th April, 2017.

PLAINTIFF'S CASE

3. The plaintiff gave sworn testimony, adopted her written statement and produced her documents contained in her list of documents which were marked as Plaintiff Exhibits 1 - 9 respectively.

4. In a nutshell, the plaintiff's case is that she lives on Land Parcel No. Mwea/Mutithi/Scheme/604 (hereinafter referred to as "suit land") which is registered in the name of her father-in-law who is the Defendant herein.

5. She testified that she started to live in the suit land with her deceased husband in the year 1999. During that period, they were living thereon with the Defendant, her mother-in-law and brothers in law called Ndambiri and Mwangi.

6. In the said year, the defendant sold 1^{1/2} acres of the land and moved out of the suit land with his wife and brothers in law, Ndambiri and Mwangi. The plaintiff, her deceased husband and children were left on the suit land.

7. She testified that the defendant went to live in a 5acre Piece of Land parcel No. Mwea/Mutithi/Scheme/190.

8. She testified that they belong to the Agaciku Clan, Mbariya Ngurwe. In the year 2003, she got married to her deceased husband through the Kikuyu Customary Law and were blessed with two children namely Kelvin Munene Maina and Lewis Wachira Maina. At the time she was getting married, the defendant had already been registered as the registered proprietor of the suit land.

9. Upon the death of her husband in the year 2005, he was buried in the suit land. However thereafter, the defendant went and chased her from the suit land. She reported to the clan elders to intervene as the suit land belongs to the clan and later lodged a caution on the suit land.
10. She testified that she also went to the D.O who warned the Defendant from evicting her from the suit land. However, the defendant continued to threaten her with eviction which led her to institute this suit. The defendant took her cows from her house saying that they belonged to his son.
11. She called one witness called Michael Gitari Njiru who adopted his written statement and testified that he is the area in charge of the nyumbakumi at Kiandegwa Sub-location and belongs to the Mugaciku Clan.
12. The plaintiff's witness testified that he knew the plaintiff's deceased husband and had known them for long since they were young men. In the year 1971 his parents were given land in Mutithi and that is how he came to know the defendant.
13. He further testified that the defendant used to live on the suit land together with the plaintiff and her deceased husband. Later the defendant moved to Wamumo. However, when the plaintiff's husband died there was a problem as the defendant was chasing the plaintiff away from the suit land claiming that she was not his daughter in law.
14. He testified that the suit land was clan land as the clan elders has said so. He stated that he knew where the suit property is and that the plaintiff and her two children live thereon.

DEFENDANT'S CASE

15. The defendant adopted his written statement dated 24/4/2017 and produced the documents outlined in his list of documents as Exhibit Nos. 1 and 2 respectively
16. In a nutshell the Defendant's case is that the suit land is his and acquired it from the Kirinyaga County Council and thus it was not family land given to him to hold in trust for anybody.
17. He testified that he used to live on suit land since it was allotted to him. However, he acquired another land and went to live thereon. Upon leaving, he left the suit land for his son and asked him to stay there.
18. He testified that his deceased son had another wife before he got married to the plaintiff. Out of the two children the plaintiff has, only one was sired by his deceased son.
19. He stated that each of his children expected to benefit from his property however, none of them had sued him to be given land or property.
20. He further stated that her deceased husband had not given the plaintiff any land as he had no land to give. The chief had asked him to give the plaintiff land but he refused. This is because her deceased son also had another wife with whom he had other children with.
21. He stated that the plaintiff only wanted the land so that she could sell it.
22. He called one witness called Joseph Mwangi Maingi who testified and adopted his written statement dated 24th April, 2017.
23. He testified that the suit land was not ancestral land as the same was not given to the defendant by the clan but was given to him by the County Council of Kirinyaga.
24. The witness stated that he had not heard that the defendant had given land to his children and that the plaintiff's deceased husband had other children who were sons who were also entitled to the land.
25. He further stated that he had heard that brokers had placed beacons on the suit land saying that the plaintiff had sub divided it for purposes of selling it. He also stated that the defendant had not chased the plaintiff from the suit land.

SUBMISSIONS

26. The parties through their advocates on record agreed to file submissions. The Defendant filed his submissions on 18th May, 2021 while the Plaintiff filed hers on 16th June, 2021.
27. The Plaintiff submitted that the defendant is registered with the suit land and held it on behalf of his family which included his deceased son James Maina Wachira. The Defendant was thus holding the suit land in trust on behalf of the plaintiff and on behalf of the 2 children of the marriage. Therefore, she was entitled to the entire share of the suit land.
28. She also submitted that she entered occupation of the suit land in the year 1999 upon of getting married to the defendant's deceased son in accordance with the Kikuyu customs. By virtue of this she, a trust was created capable of protection under *Section 28 (b) of the Land Registration Act* and which do not have to be noted on the register
29. She submitted that she had proved existence of customary trust and urged that she was entitled to be awarded the suit land to hold it in

trust of her 2 children.

30. She relied on the authorities of *Mukangu Vs Mbui (2004) 2 KLR 256*, *Jason Gitimu Wanara Vs Martin Munene Wangara & others (2013) e K.L.R* and *Isaac M'inangu Kiebia Vs IsaayaTheuri M'lintari & another (2018) e K.L.R*.

31. She prayed that this honorable makes a finding that Defendant holds the suit land in trust of her and for this Honourable Court to order that the defendant facilitates execution of the relevant transfer and in default, the Deputy Registrar do execute all necessary documents necessary for the transfer. She also prayed for an order of injunction restraining the defendant from evicting her from the suit land, costs of the suit and interest thereon and any other relief that this Honourable Court may deem fit to grant.

32. The defendant on the other side submitted that burden to prove existed with the plaintiff. The defendant had enumerated how he came to acquire the suit land, that is, after paying the relevant charges levied by the Kirinyaga County Council and that the plaintiff had not tendered any shred of documentary evidence to show how the title was acquired.

33. He further submitted that the plaintiff had failed to prove her case on a balance of probability as he had indeed shown that he was the true owner of the suit land upon purchasing the same. That though he authorized his son to live thereon that did not mean he held it in trust for the Plaintiff or his deceased son.

34. He submitted that the plaintiff's case was an attempt to inherit him while he was still alive and disinherit his other 7 children and the deceased's two other children.

35. He further submitted that the plaintiff had not particularized her allegation of trust in her plaint as required in law and had not buttressed her position with any evidence. He thus prayed that this Honourable Court dismisses the plaintiff's case with costs.

36. The defendant relied on the authorities of *Alice Wairimu Macharia Vs Kirigo Phillip Macharia (2019 e K.L.R, Silvia Wanjiku Kimani & Another Vs Kimani Muiruri Machugu & 2 others (2020) e K.L.R* and *Shaneebal Limited Vs County Government of Machakos (2018) e K.L.R*.

ANALYSIS

37. I have considered the pleadings of the parties herein, the documents produced as evidence thereof, their submissions and authorities in support. The issues for determination in this matter are as follows: -

- (a) **Whether the defendant holds the suit land in trust for the plaintiff's deceased son James Maina Wachira; and**
- (b) **Who should bear the costs of the suit?**

WHETHER THE DEFENDANT HOLDS THE SUIT LAND IN TRUST FOR THE PLAINTIFF'S DECEASED SON JAMES MAINA WACHIRA

38. The plaintiff has based her claim on the existence of a customary trust which she submitted ought to come to an end. She claimed that the suit land was clan land the same having been given to the defendant by the clan.

39. The prerequisites of proving existence of a trust have been set out in the case of *Isack M'inanga Kiebia Vs IsaayaTheuri M'lintari & another [2018] e KLR* where the Supreme Court at paragraph stated as follows:-

“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.”*

40. From the above authority the plaintiff was required to prove that the suit land was before registration family, clan or group land. From the green cards produced as evidence it emerged that the suit land was a resultant parcel of the sub division of Land Parcel Registration Number Mwea/Mutithi/Scheme/573.

41. The said Land Parcel Registration Number Mwea/Mutithi/Scheme/573 was a resultant parcel of Land Parcel Registration Number Mwea/Mutithi/Scheme/147 which was originally registered in the name of the Kirinyaga County Council.

42. From the said green card, the circumstances that led to the transfer of Land Parcel Registration Number Mwea/Mutithi/Scheme/147 from the Kirinyaga County Council to the name of the defendant were not indicated.

43. The defendant claimed that he purchased the same from the Kirinyaga County Council. This was affirmed by his witness. However, no document was furnished to prove this.

44. The Plaintiff on the other hand claimed that the same was given to the defendant by virtue of the fact that the defendant belonged to the Agaciku clan. This was affirmed by her witness who testified that he was the area in-charge of the nyumbakumi.

45. The said witness stated that it was the clan elders who informed him that the suit land was clan land. The plaintiff produced a letter dated 28th August, 2013 by the said elders which advised the land office to transfer the suit land to the plaintiff as she had been living thereon with her deceased husband. However, I find it suspicious that none of those elders were called as witnesses in this case. The evidence PW2 is therefore hearsay and inadmissible.

46. I find that the plaintiff did not prove that before registration of Land Parcel Registration Number Mwea/Mutithi/Scheme/147 in the name of the Kirinyaga County Council it belonged to the Agaciku Clan as alleged. She accordingly did not also prove that the same was transferred to the defendant to hold in trust for his family more especially his deceased son.

47. The plaintiff did not also prove that her deceased husband could have been entitled to be registered as an owner or other beneficiary of the suit land but for some intervening circumstances.

48. From the material before this Honourable Court, it is evident that the plaintiff's case is primarily based on her long possession and occupation of the suit land. However, without evidence from the plaintiff that the suit land is clan land and held by the defendant in trust of her deceased husband, then it follows that the defendant is the absolute and indefeasible owner as per **Section 26 of the Land Registration Act, 2012** which provides that:

“ The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

CONCLUSION

49. From the foregoing, I find and hold that the plaintiff has failed to prove her case on a balance of probabilities. The same be and is hereby dismissed. Since the parties are family members, I order each party to bear her own costs. It is so ordered.

JUDGMENT READ, DELIVERED PHYSICALLY IN OPEN COURT AT KERUGOYA THIS 8TH DAY OF OCTOBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Ms Hamba holding brief for Hiram Simba for Defendant
2. Ms Wanjeri holding brief for Fatuma Wanjiku for Plaintiff
3. Kabuta – Court clerk.