



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 157 OF 2016 (O.S)

OLIVER GACHUHU.....PLAINTIFF

VERSUS

PETER WAMWAKI GICHIMU.....1ST DEFENDANT

PETER GACHUHU NJOROGE.....2ND DEFENDANT

JUDGMENT

1. The plaintiff brought this suit by way of a plaint dated **21/10/2016**. He subsequently filed an amended plaint dated **29/6/2018** and a further amended plaint dated **13/3/2019**. His claim is that his uncle, the owner of **Kitale Municipality Block 2/Tuwan 4147** called him away from his original home and gave him a place to stay where he built a permanent house and where he resides with his wife and children to date; that he has lived on the land without interruption for **14** years and is entitled to be registered as a proprietor thereof by way of adverse possession; that one *Peter Gachuhu Njoroge* was left to hold the land in customary trust for the whole family but he secretly and fraudulently and irregularly and without having taken out succession proceedings to his uncle's estate transferred the land to the defendant.

The 1st defendant's defence.

2. The 1st defendant filed a defence on **1/12/2016** and subsequently filed an amended defence and counterclaim on **12/7/2018**. He denies that the plaintiff was authorized to construct a permanent house on the suit land and states that *Peter Gachuhu Njoroge* the 2nd defendant was not a trustee but an absolute owner; that there was no fraud and that transfer to him was openly and regularly effected; that the claim of adverse possession is misplaced and that the court should issue an order of eviction against the plaintiff.

The 2nd defendant's defence.

3. The 2nd defendant did not file any defence in this matter.

EVIDENCE.

The plaintiff's evidence.

4. The plaintiff gave sworn evidence. According to him his uncle called him from his home at Banana Hill in Kiambu where he had been living and gave him a place to reside on the land; they lived together from **2002** to **2003** when his uncle died; the plaintiff was left on the suit land with his aunt and he still lives on the suit land to date and has built a three roomed flat roofed house; his **3** children were born on that land; he has no blood relationship with the 1st defendant and is not his tenant; the 1st defendant only demanded rent from him after the land was sold to him in **2016**; he took one of the plaintiff's rooms and gave it to his son; the plaintiff then went to Banana Hill and came back with his grandfather and they went to the chief's office; the 2nd defendant was summoned but in vain; instead he directed the plaintiff to go to an advocate called Ms Arunga; he went to Ms Arunga's office and they discussed the matter and failed to agree; then he lodged a caution over the land titles; according to him he could not move out of the lands while he had erected permanent developments thereon and no refund had been discussed; he testified that the deceased had summoned the family, including the plaintiff, when he was almost dying and told them that his property should not be sold; he produced a photograph of the house he had allegedly constructed on the land and the original death certificate of the deceased. Upon cross examination he denied that he had ever agreed to pay rent for his stay on the property.

5. **PW2, Waweru Njihia** gave sworn evidence. He stated that the plaintiff's uncle who was his friend called him one day to greet his father; that while there the plaintiff's uncle told the plaintiff that he was an adult and that he could proceed to build a house at a certain spot in the compound; that the plaintiff's uncle passed on soon thereafter.

6. The plaintiff then closed his case.

The defendant's evidence.

7. **DW1, the defendant**, gave sworn evidence. He stated that he bought two plots from the 2nd defendant, one in **2014** and another one in **2016**. He produced the sale agreements for the plots; he was shown a transfer from Tuwan Farm in favour of the 2nd defendant before he purchased the plots and they were signed by the directors of that company; he then bought the land and obtained titles; the plaintiff was one of the several tenants on the premises. He informed the plaintiff and the others to begin paying rent to him; the plaintiff used to pay **Ksh 400/=** per month to him; one tenant paid for two months and then declined to pay him any further rent on the basis that the plots belonged to the plaintiff to whom he announced he would be paying the rent henceforth; that the chief summoned the plaintiff and the plaintiff agreed to pay **Ksh 6000/=** and then vacate the plot in **July 2016**. The plaintiff then informed the chief that the plots belonged to him and the chief declined jurisdiction to handle the matter; when the 1st defendant wrote demand letters to the plaintiff he filed this suit; according to the 1st defendant the plaintiff's uncle never gave him land. The 1st defendant's case was then closed.

8. **DW2, the 2nd defendant** gave sworn evidence. He stated that he was the only child of his parents; that the parents were the owners of the suit land; that in **2006** they transferred the land to **DW2**, that he later sold the plots to obtain school fees; that the plaintiff and others paid rent to him until the plots were sold. He denied any fraud in the processing of titles in favour of the 1st defendant. Upon cross-examination he stated that the 1st defendant is his distant cousin.

SUBMISSIONS.

9. The plaintiff filed his submissions on **28/2/2020**. The defendants' joint submissions were filed on **24/2/2020**. I have considered the pleadings the evidence and the submissions. It is not in dispute that the suit land was owned by Ephantus Njoroge and that he was the plaintiff's uncle. It is also not in dispute that the plaintiff is still in occupation of the suit property and that he began living on the suit land while his uncle was still alive.

DETERMINATION.

Issues for determination.

10. The following issues arise for determination in this matter.

- a. ***Whether the 2nd defendant was to hold the land in customary trust for the plaintiff after the demise of Ephantus Njoroge.***
- b. ***Whether the land was fraudulently and irregularly transferred by the 2nd defendant to the 1st defendant;***
- c. ***Whether the plaintiff is entitled to be registered the proprietor of the suit land by virtue of adverse possession.***
- d. ***What orders should issue?***

The issues are discussed as hereunder.

a. ***Whether the 2nd defendant was to hold the land in customary trust for the plaintiff after the demise of Ephantus Njoroge.***

11. In this case the 2nd defendant never filed a defence to deny the plaintiff's claim. However it is the case that a party must prove his claim even where the defendant has raised no defence to the claim at all. See the case of **Hon. Daniel Toroitich arap Moi -vs- Mwangi Stephen Muriithi (Civil Appeal No. 240 of 2011 eKLR)** and **Eastern Produce K Ltd Vs John Lumumba Mukosero 2008 eKLR (Eldoret CA 25 Of 1998.)**

12. The existence of a customary trust is established by way of evidence. In **MSA Civil Appeal No. 75 OF 2016 - Juletabi African Adventure Limited & Another v Christopher Michael Lockley, [2017] eKLR** the court observed that the law does not imply a trust and a court should not presume a trust unless in the case of absolute necessity.

13. It was also stated by the Court Of Appeal in the case of **Njenga Kimani & 2 others v Kimani Nganga K. Wainaina [2017] eKLR** as follows:

“ As was pointed out by Kuloba J, in the case of *Mbui vs Maranya (1993) KLR 726*, it is not unusual in our African societies for one to allow his relatives to live in land that he owns. The fact that a relative lives on another's land, and even has kin buried there, does not by itself prove that the registered proprietor holds the land in trust. A lot more is needed which I am afraid I do not have in this case.”

14. In view of the above, evidence of a trust is required. In the case of **Alice Wairimu Macharia v Kirigo Philip Macharia [2019] eKLR**, it was held that:

“The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that:- (a) the suit properties were ancestral clan land; (b) during adjudication

and consolidation, one member of the family was designated to hold on behalf of the family; (c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.”

15. In the case of *Isaack Kieba M’Inanga Vs Isaaya Theuri M’Lintari & Another* SCoK No 10 of 2015 the Supreme Court held that:

“.....each case has to be determined on its own merits and quality of evidence. 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. Some of the elements that would qualify a claimant as a trustee are:- (a) The land in question was before registration, family, clan or group land; (b) The claimant belongs to such family, clan, or group; (c) 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; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group.”

16. When the plaintiff states that the land was to be held by the 2nd defendant in trust for “*the family*”, the first question this court must ask is: which family?

17. At a cursory glance, perchance it is proved that the ownership of the suit land began with the 2nd defendant’s father, the plaintiff can properly claim to be a beneficiary of a customary trust held by the 2nd defendant if he proved that he was a member of the family of *Ephantus Njoroge* subject to the other factors mentioned in the case law above.

18. There are two families represented in this suit, for in as much as the plaintiff has convinced this court by way of evidence that his uncle called him and allowed him to build a permanent house on the premises, he has not shown that he was integrated into the family of his uncle formally by way of adoption so as to automatically become entitled to a part of his estate as a beneficiary. His family still remains a distinct unit from the 2nd defendant’s family.

19. There is no doubt that the plaintiff has lived on the land for a considerable period. The plaintiff avers that there was a customary trust and that the 2nd defendant was to hold the land on behalf of the family.

20. This court accepts to be genuine the evidence that the plaintiff was shown a place to erect his dwelling. No terms for the setting up of that dwelling, whether permanent or temporary were brought to the attention of the court. The only crucial part of the evidence is that the said *Ephantus Njoroge*’s last wish concerning the suit land is that the land was not to be sold. It does not alter the fact that the 2nd defendant was the only son in his family and that he claims to have inherited the suit land from his parents. If there was a pronouncement by his father that the land be not sold, his act of selling it or any portion thereof is solely between him and his ancestors and not this court. This court is more concerned with whether there was a customary trust on behalf of the plaintiff.

21. The plaintiff’s only witness, **DW2** only stated that he was present when the plaintiff was shown a place on the land to build his house. His evidence is bare and only points to the fact that between the years **2001-2002**, he had only been called to the plaintiff’s uncle’s house to greet the plaintiff’s grandfather and not to witness the creation of a trust.

22. Were it not for the production of the transfer labelled as **DExh 9** by the 2nd defendant, an inquiry into whether there arose a customary trust may not have yielded much help in the determination of this matter.

23. As far as the members of the plaintiff’s clan are concerned, the ownership of the suit land did not originate with the plaintiff’s grandfather. It originated with the plaintiff’s uncle and his wife Salome. However by the transfer dated **4/10/2006** produced in this case as **DExh 9** the 2nd defendant’s parents transferred the land to three persons: the 2nd defendant and his two grandfathers: **Peter Gachuhu Kega** of identity card number **4834227** and **Muturi Waititu Kikoma** of identity card number **5738050**. The transfer was made before a host of witnesses including the beneficiaries. This is the 2nd defendant’s own evidence.

24. The 2nd defendant did not attempt to show the court that the other two transferees named in that agreement were not entitled to any land from the two parcels subject matter of this suit. His two agreements with **DW1** dated **22/12/2014** and **2/6/2016** respectively, that is **PExh 4** and **PExh 5**, bespeak of no involvement of his two grandfathers: **Peter Gachuhu Kega** of identity card number **4834227** and **Muturi Waititu Kikoma** of identity card number **5738050** who were involved in the first agreement.

25. In this court’s view the land came into the hands of the 2nd defendant without him having to pay a single cent. That is not all: the suit land did not devolve to him alone. It also devolved to the plaintiff’s grandfather. The plaintiff’s grandfather also never paid for the land, yet it is the same land the plaintiff lives on. The plaintiff is certainly a person interested in property owned by his grandfather albeit more indirectly as a grandson and a son to his father who is his grandfather’s direct heir. The plaintiff’s parents were not mentioned in the transfer **DExh 9**. However, their interest in the suit land would arise through the plaintiff’s father in the event of the demise of the plaintiff’s grandparents.

26. The unusual reversal of the ownership by way of a transfer from the younger person, the plaintiff’s uncle and his wife to the grandparents of the parties is evidence of an intent to create a customary trust and as long as the plaintiff had possessory rights by the time the land devolved to his grandfather, the plaintiff was a beneficiary of that customary trust.

b. Whether the land was fraudulently and irregularly transferred by the 2nd defendant to the 1st defendant;

27. A vital part of the plaintiff's claim is that succession proceedings were not filed to pave the way for the registration of the suit land in the 2nd defendant's name by way of transmission from his late father's estate.

28. It is also alleged that the process of registration of the land in the 1st defendant's name was effected secretly. The 1st defendant denied these claims in his defence. He stated that there was no need to file succession proceedings.

29. This court must examine the documentary evidence by the parties to arrive at a proper conclusion to the issue.

30. The defendant produced a transfer (**DExh 9**) which I have analysed as above. It is clear by now that the 2nd defendant did not have the absolute right to transfer the land alone. It is indeed doubtful that all the beneficiaries to the unusual transfer could without consulting other concerned family members dependent on the land dispose of the suit land. It is also questionable whether the land having been transferred to three people, could have been disposed of by only one of those three without their consent, or, if they are deceased, without a grant of letters of administration to their respective estates. The purchaser, **DW1**, asserted that he entered into the sale agreements (**DExh 4 and 5**) with the 2nd defendant alone on the strength of the transfer produced as **DExh 9** in this case. By alluding to knowledge of the contents of that transfer, he must be assumed to have known that other persons were entitled to the land too before he purchased it.

31. The 2nd defendant never produced an original title and green card to show whether his name appeared on the land register before he transferred the land to the 1st defendant. The agreements labelled **DExh 4 and 5** do not evince any fact of prior registration of the suit land in his name and that of the two co-owners as they still refer to the suit lands merely as plot nos **4146 and 4147**. Nevertheless he has admitted transferring the interest in the land to the 1st defendant and the Land registry appears to have played along to his little game and issued titles to the 1st defendant over the land.

32. In this court's view the transfer of the suit land to the 1st defendant by the 2nd defendant alone is improper, irregular and fraudulent and the sale and transfer transactions between the defendants and the titles produced as **Kitale Municipality Block 2 /Tuwan 4146 and Kitale Municipality Block 2 /Tuwan 4147** must be cancelled on that ground. By that sale he has defrauded and dispossessed the other two transferees named in **DExh 9**.

c. Whether the plaintiff is entitled to be registered the proprietor of the suit land by virtue of adverse possession.

33. The plaintiff claimed adverse possession. His sole witness **PW2** testified that the plaintiff was shown a place to build on the suit land between the years **2001 -2002**. There is evidence that the plaintiff has been in possession ever since, and has developed the land considerably. The developments were erected thereon with the knowledge of the owners of the land, for a transfer **DExh 9** was made in the year **2006**, long after the plaintiff took possession. By the mere assertion that he was granted the consent of the then owner to develop the land and live thereon the plaintiff has denied himself the claim under adverse possession, for adverse possession can not arise where possession commenced by consent of the proprietor, for it would of necessity amount to a possession without the requisite *animus possidendi*. See the decision in **Mwinyi Hamisi Ali – v- Attorney General and Philemon Mwaisaka Wanaka, Civil Appeal No. 125 of 1997** it was held that:

“...adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes.”

34. In any event the doctrine of adverse possession in the African social milieu has received a sustained disapprobatory frown from our local courts. In the case of **Mbui Vs Maranya (1993) KLR 726** the court stated as follows:

“Now, in this country, go to the country side, where our largest population resides, and see for yourself how people are so caring and mindful of one another's welfare. In the countryside, a lot of people are living on other people's land, thanks to the African milk of generosity and kindness Our way of living has always been to depend on one another for mutual survival and progress. This is at every level.

To us, if you want any help, if you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given this things, because the owner knows that it does not matter for how long you borrow this things; he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman's agreement, all over the country, are actually living on the land of their friends, their clansmen, neighbours or even void land sale agreements. They do not ever think of claiming or losing title, by adverse possession..... I would be surprised if anyone pretended to be ignorant of these things. And ignorance on the part of a judge would be a calamity for the innocent.

The keeping on our land of landless relatives, clansmen...for long periods of time until they are able to buy their own land is a custom we all know.... The doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy the cherished ideals and sound cultural foundations, and destabilize the society.”

35. That decision was cited with approbation in the following decisions: **Rodgers Mwambonje V Douglas Mwambonje - ELC Civil Case No. 37 B OF 2012, [2014] eKLR, Njenga Kimani & 2 Others V Kimani Nganga K. Wainaina -Nakuru ELC NO. 585 OF 2013, [2017] eKLR and Elvis Kosgey & another V Gilbert Kosgey & 2 Others KERICHO CIVIL SUIT NO. 40 OF 2014, [2016] eKLR.**

36. This court therefore finds that the plaintiff has not established his claim of adverse possession on a balance of probabilities.

CONCLUSION.

What orders should issue?

37. In the final analysis this court finds that the plaintiff has partially succeeded in his claim. I hereby enter judgment for the plaintiff against both defendants and I issue the following orders:

a. The sale and transfer of Kitale Municipality Block 2 /Tuwan 4146 and Kitale Municipality Block 2 /Tuwan 4147 from the 2nd defendant to the 1st defendant was fraudulent, illegal, null and void and is hereby cancelled.

b. The titles issued to the 1st defendant in respect of Kitale Municipality Block 2 /Tuwan 4146 and Kitale Municipality Block 2 /Tuwan 4147 shall be cancelled by the Land Registrar who shall issue a new title bearing the names of the 2nd defendant herein Peter Gachuhu Njoroge, Peter *Gachuhu Kega* of identity card number 4834227 and *Muturi Waititu Kikoma* of identity card number 5738050 or their legal representatives.

c. The defendants shall bear the costs of this suit.

It is so ordered.

Dated, signed and delivered at Nairobi via electronic mail on this 29th day of May, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.