



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 81 OF 2012

FELISTA MUTHONI NYAGA.....PLAINTIFF

VERSUS

PETER KAYO MUGO.....DEFENDANT

JUDGMENT

By a plaint filed herein on 19th December 2012 the plaintiff **FELISTA MUTHONI NYAGA** sought judgment against the defendant **PETER KAYO MUGO** in the following terms:-

1. A declaration that the plaintiff is entitled to one (1) acre out of land parcel No. L.R BARAGWE/RAIMU/1393.

2. Costs and interest of this suit.

The plaintiff's claim is based on pleadings that at all material times, she was the legal wife of the late **LAZARUS NJAGI** (deceased) who was a cousin to the defendant and that the land parcel No. **BARAGWE/RAIMU/1393** (the suit land) was registered in the names of the defendant though given to him, one **GATUBI** and the deceased by the clan as trust land. The plaintiff added that she and her family were in occupation of the suit land until 1978 when, upon the demise of her husband, the defendant evicted them from the suit land and they now live in rental houses at Mucagara market. On or about 18th March 2010, the plaintiff filed **GICHUGU LAND DISPUTE TRIBUNAL CASE NO. 9 OF 2010** which made an award that she be given 2 ½ acres by the defendant.

The defendant filed a defence in which he denied that the suit land was given to him by the clan to hold in trust adding that he holds an indefeasible title to the same and putting the plaintiff to strict proof thereof. He pleaded further that he had given a licence to his brother one **NJAGI MUGO** to live on a portion of the suit land who then invited the plaintiff to live with him but later revoked the licence and obtained a Court order in **NYERI CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 14 OF 1981**. He added that he is not a cousin to the deceased nor related to him in any way and that the plaintiff and her five sons infact have five acres of land in parcel No. **NGARIAMA/LOWER NGARIAMA/479** and if they live at Mucagara market, they do so on their own volition. He pleaded further that he had appealed the decision of the **GICHUGU LAND DISPUTES TRIBUNAL** in **NYERI PROVINCIAL APPEAL CASE NO. 1 OF 2010** but the Tribunals were disbanded before the appeal was determined. He stated finally that the suit is time barred and he would be raising a Preliminary Objection to that effect and urged therefore that this suit be dismissed with costs.

There was no reply to that defence.

The trial commenced on 28th October 2015 with the parties being the only witnesses in their respective cases.

The plaintiff testified that the defendant is a brother to her late husband **LAZARUS NJAGI** (the deceased) and has been living on the suit land since 1965 but was evicted therefrom in 1979 following the demise of her husband who was however buried on the suit land. It is the plaintiff's case that although the suit land is registered in the defendant's names it was given to him by the clan to hold in trust for the deceased and their other brother **GATUBI** who was however given another parcel of land in Nyandarua. She testified that she had filed a case No. 9 of 2010 at the **GICHUGU LAND DISPUTES TRIBUNAL** which ordered that she be given one (1) acre (Plaintiff's Exhibit 1) but the defendant did not comply with that judgment. She said that she was not aware about any appeal filed by the defendant. Plaintiff admitted however that the deceased had been given another parcel of land No. NGARIAMA/LOWER NGARIAMA/479 where she used to farm when the deceased was alive but she was later chased away from that land which is the subject of **KERUGOYA HIGH COURT SUCCESSION CAUSE NO. 704 and 703**. She produced the deceased's death certificate (Plaintiff's Exhibit 2) and the grant of letters of administration in respect of the deceased's Estate issued in **EMBU P & A CASE NO. 412 OF 2010** (Plaintiff's Exhibit 3).

On his part, the defendant urged the Court to rely on his pleadings and statement filed in Court. In the said statement, he denied being related to the deceased pointing out that in the plaint, the plaintiff refers to the defendant as a brother to the deceased and in the statement, she refers to the defendant as a cousin to the deceased. He denies holding the suit land in trust for anybody adding that he had only given a licence to his brother **NJAGI MUGO** to live on a portion thereof who in turn invited the plaintiff to live with him but he later revoked that licence and evicted both of them. He denied that the plaintiff is a destitute adding further that she has land measuring five (5) acres at Ngariama. He states further that he had appealed the decision of the Land Disputes Tribunal at Gichugu but the Tribunals were disbanded before the appeal was determined.

Submissions have been filed by counsel for both parties.

I have considered the oral evidence by the parties together with the documentary exhibits annexed to their statements and the submissions by counsels.

Although the plaint as drafted does not specifically plead the existence of a trust, it is clear from the manner in which the parties prosecuted their respective cases and also the submissions by counsel that this suit is premised on the claim that the defendant holds the suit land in trust for the plaintiff. It is important, however, that pleadings must always contain the necessary particulars of breach of trust or indeed any claim levelled against the other party. In the circumstances of this case, it is clear that the defendant knew the case that he was expected to defend and no prejudice was caused to him by virtue of the pleadings not being so elegant. Parties must however draw their pleadings with clarity especially when they have the benefit of counsel. This Court will however do its best to serve substantial justice in this dispute notwithstanding the deficit in the pleadings.

It is not in dispute that the suit land is registered in the names of the defendant. The issue to be determined herein is whether the defendant is registered as the proprietor therefore in trust for the deceased and his family which include the plaintiff or whether in fact the defendant holds an indefeasible title to the same. It is now well settled that the registration of a party as owner of land does not relieve him of his duty or obligation to which he is subject as trustee. That is clear from **Section 28 of the now repealed Registered Land Act** under which the suit land is registered which is similar to the provisions in **Section 25 of the new Land Registration Act 2012**. The Courts have held in several cases that the registration of land in the names of one party does not extinguish the rights of other parties who may be entitled to it under a trust including a customary trust. See for example:-

1. MUMO VS MAKAU 2004 1 K.L.R 13

2. KANYI VS MUTHIORA 1984 K.L.R 712 and

3. MUKANGU VS MBUI 2004 2 K.L.R 256.

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 trustee, there must be evidence upon which a Court can conclude that in fact the registered proprietor of the land subject of the suit before it is in fact holding the same as a trustee for the benefit of others. In WAMBUGU VS KIMANI (1992) 2 K.L.R 58 and also MUIRURI VS KIMEMIA (2002) 2 K.L.R 677, the Court of Appeal held that a trust must be proved by evidence and in MBOOTHU & OTHERS VS WAITIMU & 11 OTHERS 1980 K.L.R 171, the Court of Appeal stated as follows:-

“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”

Since the plaintiff’s claim was based on trust, the law places the onus on her to prove the existence of such trust. Section 109 of the Evidence Act states as follows:-

“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”

See also the case of GEORGE KIEBIA & ANOTHER VS ISAYA M’LINTARI & ANOTHER C.A CIVIL APPEAL NO. 24 OF 2010 NYERI where the Court of Appeal held that the legal burden to prove the existence of a trust rests with the party alleging the same. Similarly, in the case of MARGARET MUIRURI VS BANK OF BARODA (KENYA) LTD 2014 e K.L.R the Court of Appeal stated as follows:-

“... he who asserts must prove”

Has the plaintiff in this case led evidence to prove that the defendant holds the suit land in trust for her and her family? That is the question that I now have to answer.

In her pleadings, the plaintiff stated at paragraph four (4) as follows:-

“The late Lazarus Njagi was a cousin to the defendant herein”

At paragraph seven (7) of the same plaint, she pleads:-

“The defendant herein was registered in it as an elder brother in trust of the others”

In his defence the defendant averred at paragraph three (3) as follows:-

“In answer to paragraph 3 and 4 of the plaint, the defendant denies that he is a cousin of the late Lazarus Njagi as alleged and states he is not related to the said Lazarus Njagi and puts the plaintiff to strict proof thereof”

In her oral testimony the plaintiff told the Court that the suit land was given to the defendant and his two brothers (including her deceased husband) by their Umbui Clan after giving the clan members money and a male goat. The other brother is **GATUBI**. The defendant denied all this and in his testimony during re-examination by his counsel, he said:-

“We were three brothers i.e. myself, Njagi Mugo and Michael Mugo the youngest of us. I had given Njagi Mugo Alias Gatubi the land to live on so he could educate his children. That land originally belonged to the clan. It was given to me by the clan. Gatubi i.e. Njagu Mugo then moved to his land in Nyandarua which was given to him by the Government. Michael Mugo is living on his land in Karaba. So each of us have their own land. I did not allow the plaintiff’s

husband to live on my land. It was Njagi Mugo who allowed him to live there. He had coffee but I paid him for his coffee then he moved.

In my view, the plaintiff has not been able to prove that the defendant was infact a brother to the deceased or that he was registered as the owner of the suit land to hold in trust for the deceased or herself. What comes out from the evidence is that infact the deceased was only a cousin to the defendant and had been invited to the suit land by the defendant's brother Njagi Mugo whose licence was later revoked and he moved away. The plaintiff herself was not even privy to how the defendant acquired the land. In her evidence in cross-examination, she said:-

"I was married to Lazarus in 1965. I was not yet married when the defendant and his brothers gave money and goats to the clan. I knew that because my husband used to tell me"

Therefore, a part from what she says her late husband told her, the plaintiff did not lead any evidence to prove a trust. With regard to the crop of coffee on the suit land, she said as follows in her evidence in chief:-

"My husband had coffee on the land. I don't know of any agreement between my husband and the defendant"

Later in re-examination by her counsel Ms Muthike, the plaintiff told the Court the following:-

"The defendant invited my husband in 1963 and allowed him to put up a home. When I married the defendant's brother Lazarus, I found them living together and that is why I named my son after defendant. It was the defendant who buried my husband"

The defendant denied all the above stating in his testimony that it was Njagi Mugo Alias Gatubi who invited the deceased to the land but later moved to his own land. And with regard to the coffee which the plaintiff says the deceased had planted on the suit land, the defendant said the coffee belonged to Njagi Mugo who sold it to the defendant before moving from the land. Among the defendant's documents is an agreement dated 17th August 1983 between the defendant and Njagi Mugo by which the defendant paid Njagi Mugo Ksh. 3,000 for some 300 coffee plants. If indeed the said coffee belonged to the deceased, it is not clear how the defendant would be paying someone else for that crop. This Court is satisfied that infact the coffee belonged to Njagi Mugo who had invited the deceased to live on a portion of the suit land and who later moved to his own land in Nyandarua.

The other issue that I have had to consider is the fact that the deceased was buried on the suit land and if that in itself would be a basis upon which the plaintiff can lay a claim to the suit land. While burial of a relative on land subject to a dispute may be a strong pointer to the fact that the relative was indeed entitled to the land, each case must be considered on its own peculiar circumstances. In this case now before me, it is the defendant's case that the deceased was neither his brother, cousin or relative but had been invited to the land by the defendant's brother who is the one that buried him there. The said brother was later evicted and the defendant compensated him for his coffee crop before evicting the plaintiff as well. The plaintiff's licence to the land therefore came to an end when Njagi Mugo who had been invited to the land was asked to move. Among the documents produced by the defendant is a letter dated 12th November 1980 from the defendant's advocate A.P. Kariithi giving the said Njagi Mugo thirty (30) days notice to vacate from parcel of land No. BARAGWE/RAIMU/88 which was the original land parcel before being sub-divided by the defendant to give rise to the suit land as per his statement. It is clear therefore that the deceased was buried on the suit land not by the defendant but by his brother who infact had no right on the said land. The plaintiff cannot cling on that to lay a claim on the suit land under those circumstances.

There is also evidence that the deceased had land parcel No. NGARIAMA/LOWER NGARIAMA/479 and infact among the documents produced by the defendant is a decree in Senior Resident Magistrate's Court Wanguru Arbitration Case No. 30 of 2007 involving the plaintiff and one Alfred Muriithi as the defendant in which it was ordered that the plaintiff be awarded five (5) acres out of that land. The

plaintiff confirmed that indeed that land is the subject of a pending Succession Cause at the High Court in Kerugoya.

The other issue that has concerned me in this case is whether in fact this suit is statute barred. The defendant pleaded in paragraph 10 of his defence that he would be raising a Preliminary Objection to that effect but that was not done. However, limitation is a matter of law which the Court can itself take up even suo-motto.

Section 20(1) and (2) of the Limitation of Actions Act provides as follows:-

(1) “None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action:-

(a) In respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

(2) Subject to Sub-section (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action occurred.

provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession”

It is provided under **Section 7 of the Limitation of Actions Act** that no action to recover land may be brought after the end of twelve years from the date on which the right of action accrued.

By her own admission, the plaintiff was evicted from the suit land in 1979. She confirmed this in cross-examination when she said:-

“I cannot remember when I was evicted but it was one year after my husband died so it was in 1979. I have come to Court seeking orders in trust”

In her pleadings which I have referred to above, she did not allege any fraud or fraudulent breach of trust to which the defendant was a party or privy to nor that the defendant converted any trust property to his own use. A party is bound by his pleadings. All that she pleaded was a trust. Since the plaintiff's claim is not protected under the provisions of **Section 20(1) (a) or (b) of the Limitation of Actions Act**, then it means that it is not one of those claims for which the limitation period doesn't apply. The cause of action having arisen in 1979 when she was evicted from the suit land, the filing of this suit on 19th December 2012 (some 33 years later) was well beyond the limitation period provided in law.

It is however clear from the evidence herein that the plaintiff has neither pleaded nor proved any of the particulars as to how the trust subject matter of this claim arose with respect to the suit land. There is really no evidence upon which this Court can make a finding that the defendant holds the suit land in trust for him. If anything, the defendant has led evidence showing that the plaintiff's deceased husband was invited to the suit land by one Njagi Mugo whose licence was subsequently revoked and the plaintiff evicted therefrom some 33 years ago. There is no evidence placed before me upon which a trust in favour of the plaintiff can be founded.

The plaintiff's suit is accordingly dismissed with costs.

B.N. OLAO

JUDGE

8TH APRIL, 2016

Judgment delivered this 8th April, 2016 in open Court

Mr. Macharia for Defendant present

Ms Muthike for Plaintiff absent but Plaintiff present in person

Right of appeal explained.

B.N. OLAO

JUDGE

8TH APRIL, 2016