



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO.70 OF 2010(OS.)

WACHIRA GITHINJI)

GATAHI GITHINJI).....PLAINTIFFS

VERSUS

KANOHI GITHINJI.....DEFENDANT

R U L I N G

The plaintiffs commenced this matter by way of Originating Summons dated 11/6/2010. In the said summons they prayed that it be declared that the defendant Kanothi Githinji holds **L.R. No.Kirimukuyu/Gachuiro/256** in trust for the benefit of the plaintiffs in equal shares and prayed for determination of the said trust.

The grounds of the Originating Summons were that;

- a. ***The defendant was registered as the proprietor of the subject land in trust for the benefit of the plaintiffs.***
- b. ***The defendant has resisted any attempts to determine the trust.***
- c. ***The parties herein have been in occupation and use of their respective shares since land consolidation.***

In the supporting affidavit the plaintiffs stated that the defendant herein is their elder brother who was registered as the proprietor of L.R. No.Kirimukuyu/Gachuiro/256 during land consolidation, to hold the same in trust for their benefit. They were all brothers born of Wangechi Githinji (deceased) who was the third wife of Githinji Karoki (deceased). The suit land herein was as a result of consolidation of several parcels belonging to their late mother in which the defendant was by consent and insistence of their late mother registered in trust for their benefit after the said consolidation as their father was then deceased. The suit land was subdivided in three equal portions sometime in 1962 and they have since been occupying and using their respective portions. They have tried to have the defendant determine the trust by having the subject parcel to be formally subdivided for subsequent registration of the three resultant parcels in their respective names but he has strongly resisted the same. That the defendant is thus not willing to acknowledge or determine the trust hence this suit.

The defendant in his replying stated that it is true that the plaintiffs are his younger siblings and that he is the registered proprietor of L.R. NO.KIRIMUKUYU/GACHUIRO/256 as a first registration in 1959. However he states that the allegation that the said parcel of land was registered in his name on trust for the plaintiff is totally false. That it is equally untrue that the suit parcel or the fragments thereof prior to land consolidation and registration ever belonged to their late mother, Wangechi Githinji as alleged by the plaintiffs. Their mother did not own any land as their father Githinji Karoki (deceased) died a "Muhoi" or a landless person in the early 1920. He purchased the fragments comprised in the suitland from the following person namely;

(I) Matayo Kibocha & Gatuiku Kibocha – Approx. 3 acres

(ii) Jani – Approx. 0.8 acres.

(iii) Muru wa Hacho – 0.6 acres

TOTAL – Approx. 4.4 acres.

That in purchasing the aforesaid fragments there was no contribution by either their mother or the plaintiffs. However, after land consolidation and registration, he permitted the plaintiffs out of natural love and affection and on humanitarian grounds to occupy part of the suitland pending their acquisition of their own land and consequently the plaintiff the plaintiffs are mere licensees. That ever since 1980s the plaintiffs have dragged him to court claiming part of the said land being the cases No.Nyeri SRM No.82 of 1981, Nyeri HCCA.2 OF 1984, Mathira Land Disputes No.9 of 2004, Nyeri HCCA No.66 of 2008. The said cases culminated in Civil Appeal No.66 of 2008 whereof the previous determinations or awards giving the plaintiffs part of his land were set aside on the basis that the Tribunals had no jurisdiction to entertain an issue pertaining to title to registered land. In the circumstances, he urged this Honourable Court to dismiss the plaintiff's claim with costs and declare that the suitland is the exclusive property of the defendant. The defendant also prayed for an order for eviction of the plaintiffs from L.R.KIRIMUKUYU/GACHUIRO/256.

On the 1/3/2010, the Originating Summons was converted into a plaint and the replying affidavit as a defence. Similarly directions were made before Justice Wakiaga on the 29/2/2012, however it was further agreed that parties were to comply with order 11 of the Civil Procedure Rules.

The matter was fixed for hearing on 24/9/2013. On the scheduled date, the plaintiffs never came to court hence the suit was dismissed for want of prosecution. There was no attempt to review the dismissal and reinstate the suit.

On the 24/5/2014 the defendant made an application under section 80 of the Civil Procedure Act and order 45 rules 1, 2 of the Civil Procedure Rule for review and amendment of judgment and decree dated 29/9/2013.

The application is made on grounds that the plaintiffs commenced the instant suit by their Originating Summons dated 11th June 2010 seeking a declaration that the defendant/applicant holds land parcel No.Kirimukuyu/Gachuiro/256 in trust for the defendant and the plaintiffs in equal shares. The defendant/applicant filed a replying affidavit sworn on 12th July 2010 seeking amongst other things and order for eviction of the plaintiffs from the suit land. That by directions given by the court on 29th February 2012, the originating summons was treated as a plaint and the defendant's replying affidavit sworn on 12th July 2012 as a defence. That the suit was set down for hearing on 29th September 2013 and plaintiffs' claim dismissed for want of prosecution. That by oversight the defendant's prayer for eviction of the plaintiffs from land parcel No.KIRIMUKUYU/GACHUIRO/256 was not considered.

In the supporting affidavit filed on 26/5/2014, the defendant states that the plaintiffs instituted this suit against him seeking a declaration of the court that land parcel No.KIRIMUKUYU/GACHUIRO/256 is registered in his name as trustee for the plaintiffs and myself in equal shares. He filed his replying affidavit in response to their claim sworn on 12th July 2010 and filed in court on 13th July 2010. That on

29th February 2012, this honourable court gave directions to the effect that the Originating Summons be treated as a plaint and that the replying affidavit be deemed as statement of defence. In his replying affidavit sworn on 12th July 2010, vide paragraphs 12 and 13 he sought a declaration of the court that land parcel NO. KIRIMUKUYU/GACHUIRO/256 was his exclusive property and also for an order of eviction of the plaintiffs from the said parcel of land. when the suit came up for hearing on 29th September 2013, the plaintiffs failed to turn in court and their suit was dismissed for want of prosecution. However by reason of oversight, he was not accorded an opportunity to adduce evidence on his counterclaim, and his prayer for an order for eviction of the plaintiffs' from the suit land. The respondents remain in occupation of the suitland and hence dispute has not been resolved conclusively and therefore, in the premises, it is necessary to review and amend the decree of this honourable court to include an order for eviction of the respondents from his land. That the dispute between myself and the respondents relating to the suit land has been running in court for well over thirty years and consequently the outstanding issue of the eviction of the respondents from his land ought to be resolved in the instant suit so as to bring the entire dispute to a close.

The plaintiffs did not file any replying affidavit but counsel made oral submissions in reply to the application.

In his submissions Mr. Muthigani argues that since the defendant sought a declaration that the suit property was his exclusively, an order of eviction of the plaintiffs from the said property should have been issued. The **gravamen** of Mr. Muthigani submission is that the order of the court will have to be varied and the defendant be given an opportunity to lead evidence.

Mr. Kingori on his part relied on grounds of opposition argued that he jurisdiction to review the decree is limited to clerical and arithmetic mistakes or accidental errors. Section 99 of the Civil Procedure Act applies. There was no counter claim as the replying affidavit was converted into defence and that there was no prayer for eviction. He argues that if the replying affidavit is treated as a counter claim then the plaintiffs will be denied a right to file a defence to counter claim, order 37 does not provide room for a counter claim. He argues that the applicant can only file a fresh suit for eviction.

This court finds that there is no need to file a fresh suit for eviction as the same was prayed for in the replying affidavit which was converted into a defence hence became a substantive prayer in the defence. This court holds that any claim made in a defence becomes a counter claim and therefore any claim and prayer in a replying affidavit in respect of the claim based on order 37 of the Civil Procedure Rules is a **counter claim**. The plaintiff in the Originating Summons has a right to reply to the replying affidavit which reply can be treated as a **defence to counter claim**. I do not agree with Mr. Kingori that treating the prayer for eviction as a counter claim will deny the plaintiffs of the right to file a defence as the replying affidavit was on record but the plaintiff failed to file a supplementary or further affidavit to deny the claim.

I have carefully looked at the provision of **section 99 of the Civil Procedure Act Cap 21 Laws of Kenya** that deals with amendment of judgments, decrees or orders. This section provides that clerical or arithmetic mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its motion or on the application of the parties

I do find that this application does not fit the clerical or arithmetical mistakes or errors, accidental, slip and omissions envisaged in the section as the suit was dismissed for want of prosecution.

Section 2 of the Civil Procedure Act which is the interpretation section defines a suit as all civil proceedings commenced in any manner prescribed. This suit was commenced by way of Originating Summons hence the dismissal of the suit for want of prosecution did not mean that the defendants claim for a declaration of exclusive ownership and evictions of the plaintiff was also dismissed with the suit, the same is still alive awaiting prosecution by the defendant. The court finds that the decree was prematurely extracted before the matter was concluded, and treats the decree issued on the 29/9/2013 and dated 21st March 2014 as the preliminary decree. The applicant is at liberty to set the matter for hearing on his

claim of exclusive ownership and eviction as the plaintiffs cannot be evicted without being heard. The costs of the application shall be in the cause.

Dated, signed and delivered at Nyeri this 10th day of October 2014.

A. OMBWAYO

JUDGE