



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO.234 OF 2012

RUTH THUGURI MATHENGE.....PLAINTIFF

VERSUS

MARGARET WARUGURU W/O GITHEGI.....DEFENDANT

J U D G M E N T

The Plaintiff is an adult female working and residing at Mathira in Nyeri Country whilst the Defendant is a female residing in same District of the same County. The plaintiff claims that the defendant was registered as the owner of **Konyu/Ichuga/782** comprising of 2.2 acres for her own behalf and on behalf of the plaintiff. According to the plaintiff, the aforesaid land was given to the plaintiff and the defendant by one Weru Mathenge deceased, a relative of the plaintiff and defendant.

The plaintiff took possession of his half share and has planted 150 coffee plants and 100 tea seedlings. She also grows food crops on the said half while the other half is occupied and used by the defendant and there has been no dispute as to the said usage.

The plaintiff is unmarried and has occupied the said land even before Weru Mathenge the initial owner and her 1st born brother died in 1952 and therefore states that she has lived on the land for over 50 years.

On or around the month of July 2012, the plaintiff approached the defendant who is the wife of her 2nd born brother, one Githegi with a request that they get a surveyor and subdivide the said land so that each party could get her share with a separate title deed, but the defendant refused and now claims that the whole of the said land belongs to her as she has the title registered in her name.

The plaintiff reported the matter to her clan who decided that the land belongs to both the plaintiff and defendant equally and that a surveyor ought to be called to subdivide the land, necessary land consent be obtained so that each party obtains their own title deed however, defendant has refused to abide by the clan's decision and determine the existing trust.

The defendant was duly served with plaint and summons to enter appearance and failed to file memorandum of appearance within the stipulated time and upon request of the plaintiff's advocate, judgment was entered against the defendant Margaret Waruguru w/o Githegi and the case was to proceed to formal proof.

On the 26/9/2013 the matter proceeded on formal proof when the plaintiff testified and stated that she lives in Ruguru village, Kiamariga location and engaged in farming activities. She referred to the statement she made on 8th May 2013 where she states that, the land in question belonged to her brother Weru Mathenge (now deceased). Her brother gave them the land with the defendant herein and they subdivided each one acre. She has been cultivating the land since demarcation and has planted 100 tea seedlings and 150 coffee plants. She has also planted gravillea, cypress, avocado and macadamia.

She approached the defendant and suggested that they jointly engage a surveyor and subdivide the said land so that each one of them would get her share with a separate title deed, but the defendant refused and said the land was hers.

That she reported the matter to the clan elders whereupon the clan sat down listened to the case and ordered that the land at Konyu/Ichuga/782 belongs to the plaintiff and the defendant equally and that a surveyor ought to be called to survey the land and thereafter necessary land consents be obtained so that each party obtains their own title deeds. The defendant has completely refused to accede to the request to survey the land, subdivide and share the same.

She produced the certificate of official search that shows that the title holder is the Defendant and stated on oath that she wrote to the defendant requesting for a subdivision of the land to enable her get her rightful share but the defendant has flatly refused to subdivide the land. She produced the letter as an exhibit.

She cautioned the land to pre-empt any dealing and uses her portion of the land for agricultural purposes and plants tea, coffee. She produced a receipt for purchase of seedlings.

She prayed that the land be subdivided to enable each person get a share and that she be awarded costs.

The plaintiff called one witness being **Mr. Bernard Macharia Thangii** who knows her and the defendant from the time they were young. In his statement he states that the land in question belonged to Weru Mathenge. After his death the land was given to the defendant and the plaintiff to share equally. This was agreed between the mother of the deceased and the then area Sub-Chief one James Gichuki (now deceased). It was agreed that Waruguru Githegi was to hold the land in her name in trust for Ruth Thuguri Mathenge. The land was divided into two equal portions and Ruth Thuguri Mathenge planted tea seedlings, coffee plants, gravillea, cypress, avocado and macadamia on her portion however when the plaintiff approached the defendant with a request that the land be subdivided and registered in their respective names to enable them have separate title deeds and finally to enable the plaintiff obtain a number to sell her tea and coffee to the factory, the defendant refused and claimed the land belonged to her.

After she refused, the plaintiff reported the matter to the clan members who held a meeting to that effect but the defendant refused to meet their request. **Mr. Bernard Macharia Thangii** personally called the clan members who came out with a solution that the land be divided into equal portions and the defendant to transfer the ½ portion to the plaintiff. The plaintiff again refused an act that made them involve the area Chief who convened a meeting to resolve the dispute. The Chief visited the land in question with the clan elders and put beacons and advised them to go to court.

To reach a valid determination, the court has considered the provision of **Sections 28,126 and 143** of the **Registered Land Act Cap 300** laws of Kenya (repealed). **Section 28 provides that the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and also subject to a contrary expression in the register, or such liabilities, rights and interests as affect the same and are declared by section 30 not to require notice on the register:**

Section 126 (1) provides that a person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words “as trustee”, but the Registrar shall not enter particulars of any trust in the register.

Section 143 provides that subject to subsection (2), the court may order rectification of the register by directing that any registration be canceled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

The above sections contemplated the holding of land in trust and the registration of the person as a trustee. There is a school of thought that believes that the word “**may**” in Section 126 (1) was mandatory and that it meant, and should read, “**shall**”. This I understand to mean that unless a registered owner is described as a trustee in the instrument of acquisition of land there can be no trust and the land cannot be said to be held in trust and hence in this case as the defendant was not registered as a trustee in the instrument of title, she cannot be said to have held half of the land in trust for the plaintiff's father.

In *Mwangi Muguthu -VS- Maina Muguthu (unreported) Madan J* held that as regards Section 126, and I agree with him, there is no need to register the defendant as a trustee as a trust under Kikuyu Customary Law is not registrable. In this case the defendant was registered as an owner as the sister in law to the plaintiff in accordance with Kikuyu custom which has the notion of trust inherent in it. Ordinarily in pursuance of Kikuyu Custom she would have transferred a half share in land to the plaintiff but she did not. In any event the section does not make registration as trustee obligatory as it states a person may be described in that capacity.

Under Section 143 of the repealed Act, a first registration could not be attacked even if it was obtained, made or omitted by fraud or mistake however this section does not exclude recognition of customary trust provided that it can be established by evidence. Parliament did not intend to abolish the Kikuyu customary law by enacting Cap 300 Laws of Kenya and I believe that is why the word may is used. Moreover customary trust is made orally and can only be proved by statements of those claiming that it exists. This court has a duty to protect the rights and privileges of the people and not to discard them. In my opinion the plaintiff is entitled to succeed in any event as she has proved that there existed a trust in land parcel no Konyu/Ichuga/782 though registered in the name of the defendant but in accordance with the Kikuyu customary law which has the notion of trust.

Having heard the plaintiff and her witness in the absence of the defendant I do find that the plaintiff has proved her case and is entitled to half share of the property through the principle of Kikuyu Customary Trust. I also find that the plaintiff is entitled to the half share due to adverse possession and do hereby grant prayers a, b, c, d. Orders accordingly.

Dated, signed and delivered at Nyeri this 1st day of October 2013.

A. OMBWAYO

JUDGE