IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, SHAH & PALL, JJ.A.)

CIVIL APPEAL NO. 76 OF 1998

BETWEEN

MARY WANJA GICHURU ..... APPELLANT

AND

ESTHER WATU GACHUHI ..... RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Hon. Justice Mbito) dated 9th October, 1996

in

H.C.C.MISC.A. NO. 284 OF 1989)

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JUDGMENT OF THE COURT

By an originating summons dated 27th April, 1989 Esther Watu Gachuhi sought the following orders from the superior court:

> **1.**The respondent (appellant here) being the registered proprietor of all those parcels of land known as DAGORETTI/RUTHIMITU/80 measuring two acres in the approximate and DAGORETTI/RUTHIMITU/T.193 measuring 0.15 acres in the approximate be declared and registered as trustee for the applicant (respondent here) of the said titles.
>
> **2.**The applicant be declared and registered as proprietor of one-half of the said parcels of land known as DAGORETTI/RUTHIMITU/T.193 and DAGORETTI/RUTHIMITU/80.
>
> **3.**In the alternative the respondent's titles be deemed to have been extinguished through adverse possession of the applicant and she be registered as proprietor of one-half thereof.
>
> **4.**That the costs of this application be borne by the respondent.

We must point out that a suit by an originating summons is not a proper mode for adjudication of any alleged trust. However, no objection was taken to the manner in which the suit in the superior court was filed.

The superior court (Mbito, J.) on 9th October, 1996 delivered judgment in favour of the respondent (Mary) and ordered that one-half of both the said parcels of land be transferred to Mary after granting prayers 1,2 and 3 (all of them) above-mentioned. That is that the learned judge held that the appellant (Esther) was holding one-half of the said two parcels of land on trust for Mary and also that Mary had acquired title to the same by adverse possession.

Esther being dissatisfied with the judgment of the learned judge has appealed against the same to this Court. We will refer to the two parcels of land as "the suit lands".

The suit lands originally belonged to the father of Mary. He died sometime in the thirties. He was also the father of James Gichuru Gachuki (James) who died in December, 1979. The suit lands were first registered in the name of James. The first registration of plot No. T 194 was made on 27th July, 1959 and that of plot No. 80 was made on 10th September, 1958. On 31st July, 1980 the suit lands were registered in the name of Mary pursuant to grant of letters of administration to her in respect of the Estate of James. Esther did not contest the succession cause and the grant was confirmed.

It was not until 4th September, 1988 that Esther lodged a caution against the title of Mary in respect of plot T.193. She did not so register a caution in respect of plot No. 80. That was done, surprisingly, by Grace Njambi who claimed an alleged beneficial interest in that plot. She is the deceased mother of James who along with Esther took the matter of the suit lands before some elders who decided that Mary should transfer plot No. T.193 to Esther and a half-acre of plot No. 80 to Grace Njambi. How the elders arrived at that decision is not germane before us. We were informed that a Magistrate's Court set that award aside.

In her evidence Esther stated that she was born in 1933 and although she never married she has five children the eldest being Ndungu Watu who was born in 1959. Her having five children assumes an important dimension in deciding whether she was at any time married. She denied ever having married whereas Mary gave evidence to the effect that at the time she was cohabiting with James, Esther was living with her husband in Dagoretti and that her husband brought six goats to Grace and further that during the time land adjudication took place, Esther was living with her husband. She also remembered that an alleged payment of Shs.500/= made to Grace was recorded somewhere.

Kimani Gatimu (Kimani) who was the witness called by Mary, knew both parties, and stated in his evidence that he received beer from Esther's husband and he witnessed the receipt of the relevant dowry by James. He also confirmed that six goats were also received towards dowry. Both Esther and Kimani named Esther's husband as Kariuki Karaini. The dowry was never refunded or returned, he said.

As against the evidence of Mary and Kimani there is the evidence of Esther and her sister Rachel Wanjiru both of whom deny that Esther was ever married. She denied knowing Kariuki Kariani.

It is a matter of notoriety amongst the Kikuyus that an unmarried daughter who becomes a mother must inform her father of the name of the father of the child so that her father would take necessary steps to preserve the rights of his daughter and her son. It is unthinkable that an unmarried daughter remaining in her father's house would give birth to five children. This only goes to show that Esther must have been married and it is settled law that under the Kikuyu custom land is inherited by sons. It is a patrilineal society.

The learned judge properly concluded that when James was registered as owner of his father's lands he held the land in trust for the heirs of his father. That is such heirs who could inherit and he was the only son. If Esther was still unmarried at the time of the death of James she could have inherited (not half) but a portion of land which she cultivated, which was probably less than half an acre.

Kwach JA in the case of **WAMBUGI V. KIMANI [1992] 2 KAR 292 said at page 301:-**

> "On the right of inheritance by daughters, the late President Jomo Kenyatta in his book **Facing Mount Kenya**, says (at page 29):

> `After some time the family began to increase. Let us imagine that each wife had three sons and perhaps some daughters. But as female children do not take part in the ownership of land, we will leave them out, because, having no system of spinsterhood in the Gikuyu Society, women do not inherit land on their father's side; they play their part in the family or clan in which they marry.'

Kwach JA continued:

Cotran in his Restatement of African Law Vol.2 says (at p8):

> `Inheritance under Kikuyu law is patrilineal. The pattern of inheritance is based on the equal distribution of man's property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried. In the absence of sons, the heirs are the nearest patrilineal relatives of the deceased, namely father, full brothers, half - brothers, and paternal uncles.'

> "Under Embu customary law, the appellant would have been entitled to inherit some land from her father if she was unmarried. This may explain why she asserted so vigorously that she was divorced from Gatimu."

Esther had everything to gain by denying any marriage at all. It is only then that (she probably was aware of this), she could have inherited some of her father's property. The learned Judge failed to consider properly the effect of the evidence of Kimani who was positive that Esther was not only married but also not divorced. The learned judge did find, contrary to Esther's assertion, that she was living with a man by whom she had children. The learned judge went on to say as follows:-

> "There is however evidence that dowry was paid from the defendant and her witness. The defendant and her witness did not however say if the Ngurario ceremony, which is binding ceremony in any Kikuyu customary marriage was ever held. In view of this coupled with the fact that the plaintiff was recalled by her mother from the person with whom she was cohabiting leads me to believe that she may not have had a valid customary marriage to the man."

The learned judge then went on to grant to Esther an equal share of her father's land. On re-evaluation of the evidence before the superior court and keeping in mind the Kikuyu tradition as regards habitation in father's home of an unmarried daughter having five children, we can only conclude that Esther must have been married which marriage was not dissolved. Obviously Esther's advantage, evidentially, was that her father and her brother were no more and it was therefore easier for her to say that she was never married.

We have gone at some length into the issue of Esther's marriage as we are differing with the learned judge on this crucial issue and hence the re-evaluation of evidence by us. We find as fact that Esther is not an unmarried daughter of late Gachuhi Kanyiri. In our view, the burden of proving that she was an unmarried daughter entitled to inherit land along with her only brother was on Esther and her bare denial of marriage was amply displaced by the evidence of Mary and Kimani. This appeal therefore must succeed on the second ground of appeal. But we must deal with other grounds of appeal.

In the first ground of appeal the appellant takes issue with the learned judge taking evidence **viva voce** in view of orders made by Pall, J (as he then was) on 30th April, 1990. Pall, J ordered that there was to be no oral evidence at the hearing of the originating summons. But when the parties appeared before Mbito, J on 6th December, 1990 no one took objection to evidence **viva voce**, all throughout the hearing. It is too late to take such objection now and in any event the originating summons could not properly have been decided on affidavits.

The third ground of appeal seeks a decision to the effect that long period of cohabitation would lend credence to presumption of marriage. That ground does not now fall to be decided.

We have already dealt with the fourth ground of appeal when we said that an unmarried daughter does not

qualify for a share equal to that of the sons. However, in view of the decision we have reached, the issue is academic.

The final ground of appeal relates to the question of adverse possession. Esther was on the lands, if her version is to be believed, with the consent of other stakeholders in the lands. Such occupation does not qualify to be adverse and the learned judge clearly erred when he decreed adverse possession in favour of Esther.

The upshot of all this is that this appeal is allowed, the orders of the superior court are set aside and as the respondent and her children have no right to remain on the suit lands we give them six months from the date of this judgment to vacate the suit lands and give the appellant vacant possession. We so order rather reluctantly but we do believe that the respondent's grown up sons are taking due care of her. As this is a dispute between two related women we make no order as to costs here and costs in the superior court as well.

Dated and delivered at Nairobi this 13th day of November, 1998.

R. O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.