



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC CASE NO. 277 OF 2015

MICHAEL GICHOHI MACHARIA.....1ST PLAINTIFF

LYDIA WANGUI KAHUTU.....2ND PLAINTIFF

NANCY WAIRIMU KAHUTU.....3RD PLAINTIFF

-VERSUS-

MARY WAIRIMU MWANGI.....1ST DEFENDANT

BEATRICE WATHANU MAINA.....2ND DEFENDANT

JULIA WANJA IRUNGU.....3RD DEFENDANT

JUDGMENT

1. The plaintiff herein, Michael Gichohi Macharia, instituted the suit herein seeking to compel Mary Wairimu Mwangi, Beatrice Wathanu Maina and Julia Wanja Irungu (hereinafter referred to as the defendants) to vacate from the parcel of land known as **LR No.Githi/Igana/8767** (the suit property) failing which they be forcefully evicted; a permanent injunction to restrain the defendants by themselves, their agents, servants or any other person claiming through them from entering, trespassing, remaining on or in any other way interfering with the suit property, costs of the suit, any other or better relief which the honourable court may deem fit to grant.

2. The plaintiff who is the son and administrator of the estate of Kahutu Gichohi (deceased), claims that the defendants have without his consent or the consent of his siblings who are the rightful heirs of the deceased, entered into the suit property and are committing acts of waste thereon-cultivating and cutting the trees in the suit property.

3. Terming the defendants' actions illegal and unlawful, the plaintiff seeks judgment against the defendants in terms of paragraph 1 above.

4. Through their statement of defence and counter-claim filed on 19th January 2016 the defendants deny the allegations leveled against them and contend that the suit property belonged to their father Gathogo Wachira who died before land demarcation, consolidation and registration, in 1940's; that the suit property was registered in the name of the plaintiff's father to hold in trust for their family as their father did not have a son; that the pleaded trust has been observed even before the land was registered in the name of the plaintiff's father and after registration;- that their family has been in use and possession of the suit property.

5. It is the defendants' case that they are entitled to the suit property as beneficiaries of the pleaded trust or by adverse possession thereof. They therefore, pray for a declaration that the suit property is held in trust for their benefit; determination of the pleaded trust or a declaration that they have acquired the suit property by adverse possession.

EVIDENCE

The plaintiff's case

6. When the case came up for hearing, Michael Gichohi Macharia (PW.1), reiterated the plaintiffs' contention that the defendants entered the suit property in 2015 without any colour of right and began cutting down trees and cultivating thereon. The court heard that PW.1 did not know the 2nd defendant's father but had met her mother whom he described as a friend of his grandmother. The court further heard that the defendants' mother died in 1997 and was buried in the suit property.

7. P.W.1 denied the defendants' contention that his father held the suit property in trust for them and explained that it is his father who gave

permission for the defendants' mother to be buried in the suit property.

8. With regard to the defendants' claim that they have acquired the suit property by adverse possession, P.W.1 stated that the defendants' claim cannot be maintained because they had never lived in the suit property.

9. The court heard that the defendants are married and live in their husbands' homes.

10. According to P.W.1, the defendants got married while living in the village way before his father and he moved into the suit property.

11. P.W.1 maintained that the defendants moved into the suit property sometime in 2014/2015 after his younger brother passed on.

12. In cross examination, P.W.1 stated that he does not know how his father came into possession of the suit property; that the defendants were their neighbours when they lived in the village and that the defendants' mother, whom he knew, began living in the suit property in 1960 and lived there until she died in 1989. After she died, she was buried in the suit property. He maintained that the defendants were neither brought up in the suit property nor lived there.

13. Concerning the developments in the suit property (house and crops therein), he stated that the house is where they grew and that the crops in the suit property were planted by his late brother.

14. He acknowledged that a caution was placed by the defendants in 2008 to restrict dealings with the suit property and stated that he did not oppose the caution or take any action towards having it removed. He also acknowledged that there was a dispute presented before the District Officer (D.O) over the suit property but does not know what the defendants claim was about.

15. He stated that the D.O found that the land belonged to his father and sent the area chief to establish the area the defendants were cultivating.

16. With regard to the demand letter sent to the defendants in 2015, he stated that it demanded that they stop cutting trees.

17. In re-examination, P.W.1 stated that he did not inform the District Officer to place a caution on the suit property in 2008. The caution was registered in 2015 and as far as he was concerned no caution was registered in 2008.

18. Lydia Kahutu who testified as P.W.2, informed the court that P.W.1 is her younger brother while the 3rd plaintiff is her younger sister. She informed the court that she was born in 1948 and never got married and that they all grew up in the suit property.

19. She stated that she is currently living in Sagana having moved out of the suit property in 1977.

20. She informed the court that her brother Joseph Wanjau (deceased), was the one who was using the suit property together with her grandmother but P.W.1 does not utilize the suit property.

21. The court heard that in 1965, her father bought Githi/Igana/765 which is adjacent to the suit property.

The defence case

22. The 2nd defendant, Beatrice Wathanu Maina (D.W.1) who lives in Thunguma stated that she has been using the suit property for many years; that she started utilizing the land before land consolidation and before she got married; that neither P.W.1 nor his siblings or parents had even utilized the suit property.

23. She acknowledged that the plaintiffs grew up on the suit property and explained that her mother had given the plaintiffs' mother a portion of the suit property to build.

24. In cross examination, D.W.1 acknowledged that the suit property is registered in the name of the plaintiffs' father, Kahutu, and that at the time it was so registered, they (read the defendants) were all married.

25. She admitted that all of them are still married and none of them has returned to their parents' home.

26. She informed the court that during land consolidation and adjudication, their mother and the plaintiffs' grandmother are the ones who lived in the suit property. Each of them lived in their own houses.

27. She acknowledged that the plaintiffs' father, wife and son are buried in the suit property.

28. The court heard that before her mother passed on, she requested the plaintiffs' father to give her a portion of the land.

29. They (the defendants) never asked the plaintiffs' father to give them land because they assumed he had an agreement with their mother.

30. She stated that they asked for land for the first time in 2008 when they went to the chief. At that time the plaintiffs' father had passed on.

31. Their claim to the land is what prompted the writing of the letter by the D.O dated 22nd July, 2008 (D exbt 2) requesting the Land Registrar Nyeri to place a caution on the title to the suit property.
32. She acknowledged that the plaintiffs' father had a brother called Kamotho.
33. In re-examination, she stated that it is her mother who allowed the plaintiffs' father, mother and child to be buried in the suit property and that they (read the defendants) allowed the plaintiffs' brother, Wanjau, to be buried on the suit property out of respect for their mother who had said she would give all of them a place to be buried.
34. D.W.2 Peterson Mbugi, a resident of Mukurweini corroborated the statement of D.W.1 to the effect that it is her mother who allowed the plaintiffs' family to live and be buried in the suit property.
35. According to D.W.2, the suit property belongs to the defendants' mother and it is the defendants' mother who had given the plaintiffs' family a place to live.
36. D.W.2 acknowledged that the plaintiffs' father had his own parcel of land.
37. Like D.W.1, he stated that none of the plaintiffs or their deceased brother, Wanjau, utilized the suit property.
38. He acknowledged that there is a house in the suit property which was used by the plaintiffs' mother before she died and that the crops in the suit property were planted by D.W.1's son.
39. He stated that the plaintiffs' father was registered as the proprietor of the suit property because the defendants' mother being a woman, could not be registered as the proprietor of the suit property.
40. D.W.2 further stated that the defendants' mother nominated the plaintiffs' father who was a close clan member for registration as proprietor of the suit property on her behalf. He got that information from his mother who was also a widow and whose issue was considered alongside that of the defendants' mother.
41. In cross examination, D.W.2 admitted that he was not present when the decision as to who was to be registered as the proprietor of the suit property was made. Contrary to his written statement to the effect that he participated in the meeting in which the decision as to who was to be registered as the proprietor of the suit property was made, he stated that he got that information from his mother.
42. He acknowledged that at the time of land consolidation and adjudication he was too young to participate in clan deliberations.
43. Despite having stated in his written statement that the plaintiffs' mother died in 1990's, he stated that he could not remember when she died and clarified that he meant the defendants' mother died in the 1990s.
44. He stated that the plaintiffs' family farms in the land bought by their father in 1962 but no one lives there.
45. He acknowledged that his written statement differs from his testimony in court but stated that what he stated in his testimony is true. He further stated that he knows the history of the suit property very well although he does not know the meaning of the term Githaka very well or that the term means people who share the same mother.
46. It was his testimony that the plaintiffs and the defendants did not share the same mother. He was not clear on the relationship of the plaintiffs and the defendants but was aware that the defendants are married and that they got married before land consolidation.
47. He acknowledged that the defendants are still in their husbands' homes and that none of the defendants have built on the suit property. He further acknowledged that neither the defendants nor their mother laid a claim on the suit property when the plaintiffs' father was alive.
48. In 2015, he accompanied the defendants to the area chief's office. He explained that at that time, the defendants were complaining about timber that had been removed from the land and not about ownership of the land.
49. In re-examination, he stated that the clan's position is that the suit property belongs to the defendants' mother; Mary Gathongo and there was no dispute concerning the suit property before 2008.
50. D.W.3 John Irungu stated that at the time of land consolidation, the plaintiffs' father and his brother Kamotho were in detention.
51. He stated that he was not aware that the signatures appended on the registration document was for the Kamotho and the land consolidation committee members.
52. He informed the court that his father, Mwaro Maina, was closer to Mary Njeri than Kahutu but the clan settled on Kahutu because his father was away (was working with the prison).
53. In re-examination, he stated that during land registration, Kahutu had left detention and was living in the village.

SUBMISSIONS

Plaintiffs' submissions

54. On behalf of the plaintiff, it is submitted that the defendants' evidence in support of the pleaded trust is too vague; that trust could not be contemplated at the time of death of the defendants' father because private ownership of land could not have been contemplated at the time of his death.

55. Because no evidence was led to show that the plaintiffs' father and the defendants' father were related, it is submitted that the cultivation of the land by the defendants' mother and her burial therein cannot create trust.

56. It is further submitted that for the defendants' to urge a case of trust, through their father or mother as they are doing, require grant of letters of administration in respect of their parent's estate.

As the defendants are not the administrators of the estate of their parents, they are said to be lacking legal capacity to defend or sue on behalf of the estate of their parents.

57. Concerning the claim for adverse possession, it is contended that none of the defendants occupies the land or have ever lived in the parcel of land—they are married and live where they are married. D.W.2 is said to have confirmed that the defendants were not living in the suit property even during the lifetime of their mother. The defendants are said to have begun laying claim to the suit property in 2008. The entry into the suit property by the defendants is said to have happened in 2015.

58. It is contended that none of the defendants have been in occupation of the suit property for continuous 12 years. According to the plaintiffs, it is the defendants' mother who could have urged a claim for adverse possession.

59. It is pointed out that the certificate issued to the plaintiffs' father was signed by his brother, Kamotho on 29th May, 1959 and submitted that the signing of the title by the plaintiffs' father's brother displaces the argument that the plaintiffs' father was registered in trust for the defendants' family.

Defendants' submissions

60. On behalf of the defendants' it is submitted that their evidence which is said to be uncontroverted is enough to prove the pleaded trust; the test for trust as espoused in the case of **Moses Mbugua v. Mary Nyambura Ng'ethe 2012 eKLR** is said to be satisfied.

Analysis and determination

61. Having carefully read and considered the cases urged in support of the respective parties' cases, I find and hold that the defendants have not proved that the registration of the plaintiffs' father as the proprietor of the suit property was subject of any trust in their favour or in favour of their deceased mother. Although there is evidence that their mother lived in the suit property for a long period of time and was buried in the suit property upon her death, that alone is not proof that the registration of the plaintiffs' father as the proprietor of the suit property was subject of any trust in their favour.

62. With regard to the claim based on adverse possession, as the evidence on record shows that the defendants' took possession of the suit property in 2008, I find their claim for adverse possession to be unmaintainable as by the time the current suit was filed, in 2015, the time provided in law for acquiring land by adverse possession had not accrued in their favour.

63. Although as at the time the defendants took possession of the suit property, time for claiming the suit property might have accrued in favour of their deceased mother who admittedly had been in use and possession of the suit property since 1960s, given that the defendants are not claiming the suit property as administrators of the estate of their deceased mother, their claim for adverse possession can only be based on their own possession which possession and claim to the suit property admittedly began in 2008, barely seven years before the current suit was instituted.

64. Being the ones who sought judgment on the basis of their assertion that the registration of the plaintiffs' father was subject of a trust in their favour, it behooved the defendants to lead evidence capable of proving that fact. The evidence adduced in this case fell far short of proving the pleaded trust as apart from showing that the defendants' mother lived in the suit property and got buried there when she died, it is incapable of establishing the circumstances upon which the plaintiffs' father got registered as the proprietor of the suit property and whether his registration was subject of any trust in their favour. The evidence of D.W.2 and D.W.3 could not help things as it was either hearsay or unsubstantiated.

65. The upshot of the foregoing is that the plaintiffs' suit has merit and is allowed as prayed. The defendants' counter-claim is found to be lacking in merits and is dismissed with costs to the plaintiffs.

66. Orders accordingly.

Dated, Signed and Delivered at Nyeri this 28th day of February, 2019.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff

Mr. King'ori for the defendants

Court assistant - Esther