



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 171 OF 2015

STEPHEN WAWERU NJOGU.....PLAINTIFF

VERSUS

NICERA WAKABU GICHIMU.....1ST DEFENDANT

PETER KIBUCHI.....2ND DEFENDANT

GRACE WAGUAMA GICHIMU.....3RD DEFENDANT

CHARLES MURIUKI GICHIMU.....4TH DEFENDANT

EVAN NDAMBIRI GICHIMU.....5TH DEFENDANT

SYMON NJAGI GICHIMU.....6TH DEFENDANT

TABITHA W. GICHIMU.....7TH DEFENDANT

JOSEPH M. GACHOKI GICHIMU.....8TH DEFENDANT

DANIEL MWAI GICHIMU.....9TH DEFENDANT

JUDGMENT

[1] The plaintiff claims that he has lived on land parcel Kabare/Njuku/76 since the year 1962. He avers that the suit land was registered in the names of Gichimu Mureu deceased in trust for himself and the plaintiff. He also claims to have planted 2500 bushes of tea. He further claims to have acquired ownership of half of the suit property through adverse possession.

[2] It is the plaintiff's claim that the defendants filed a succession cause secretly obtained letters of administration and secretly sub-divided the suit land in parcels Kabare/Njuku/1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288 and 1289. He therefore prays for an order of cancellation of the said resultant titles from L.R No. Kabare/Njuku/76 aforesaid and an order for sub-division for the said parcel No. 76 into two equal shares to be registered in his names and the names of the defendants. He wants this Court to declare that L.R No. Kabare/Njuku/76 was registered in the names of Gichimu Mureu (now deceased) as a trustee for himself and the plaintiff. He also prays for the costs of this suit.

[3] To support his claim, he relied on his own statement filed in Court on 3rd December 2015 and the statement of his wife Regina Karuana Kabugua filed in Court on the same date. He attached a Verification certificate of Kenya Tea Development Authority No. 221936 dated 2/6/1992, a Share certificate of Kirinyaga Tea Growers Savings and Credit Society Limited Housing Activity No. 438 dated 8/12/1998 and another dated 20/7/1999, a Share certificate of Kimunye Tea Factory Company Limited No. A 01388 and a Commercial Share Certificate of Thumaita Tea Factory Company Limited No. B 02863, a Kirinyaga Tea Growers Sacco Ltd membership Card No. 4107-03-03959 and Advice slip for August 2013 for Grower No. KM009 0060 2123. The slip had no source and the kilos of delivered tea yet it suggested Ksh. 100.30 was to be paid to the bank.

Finally produced was a tea plantation with houses in the background.

[4] The defendants who had given the 1st defendant authority to file the defence on their behalf, denied that the plaintiff had 2500 bushes of

tea and averred that the same belonged to their deceased father who had planted 16,000 bushes of tea. They denied that the plaintiff is in occupation of the suit land. They stated that the plaintiff was aware of the succession cause filed at Embu for the letter of administration of their fathers Estate. They averred that the plaintiff filed a Miscellaneous Application No. 32 of 1997 against the 1st defendant herein to have the letters of administration issued to the 1st defendant be annulled and revoked under Section 76 of the Law of Succession Act as read with Rule 44 of the Probate and administration rules and the said application was dismissed by the High Court at Embu.

Further, the defendants contend that contrary to the allegation of the plaintiff that there has been no suit between the parties, that there has been other suits namely LDT Case No. 16 of 2010 between plaintiff and the defendants herein. A copy was produced in these proceedings. That suit was claiming the suit land on similar grounds as the current suit. The same was dismissed by the Court on 17th April 2013.

[5] The defendants enclosed a copy of the confirmation of grant of Succession Cause No. 233 of 1995 which distributed the properties of the deceased that included land parcel Kabare/Njuku/76 to all the defendants herein in equal shares. The confirmation of grant is dated 5th December 1996. This is the grant the plaintiff unsuccessfully filed to annul at Embu in the Miscellaneous Civil Case No. 32 of 1997 aforesaid. The defendants then asked the Court to dismiss this case against them with costs.

[6] That being the case before the Court, the issue for determination is whether the plaintiff has made out his case against the defendants for:

(a) Customary trust and

(b) For adverse possession as alleged in the plaint.

[7] The plaintiff in his evidence produced documents to show that he planted tea in the suit land in 1971. However, the verification certificate shows that the same was done in 1992. The pay slips did not show from what tea factory they come from. The plaintiff in his evidence admits that he is not in occupation of the suit land. He alleges that he was evicted therefrom in 2016. There was however no evidence adduced to show such eviction.

The defendants deny that the plaintiff planted any tea on the suit land. They deny that the plaintiff is on the suit land or ever lived there at all. The plaintiff relies on that occupation to claim customary trust.

In *Karanja Wanjihia Vs Duncan Wanjihia and 4 others 2004 e K.L.R.*, the Court stated:

“Trust is an issue both of facts and law. It is a serious issue, and needs to be demonstrated through proper evidence and verification on evidence”

Once a party alleges the existence of a trust in this case a customary trust, the burden is on him to prove and ascertain the existence of the alleged trust.

In *Edith Gichunga Koine Vs Stephen Njagi Thaita and another (2015) e K.L.R.*, it was held that:

**“..... possession and occupation of a suit land is critical consideration when dealing with a claim under customary trust
..... “**

It also held that:

“Besides this having a claim under trust, it is also an equitable claim for land and as such occupation of the suit premises becomes an issue of paramount because the land is already occupied by other people who have legitimate expectations for example we were told that the sons of the registered proprietor are in occupation of the suit premises”.

[8] The plaintiff puts a claim of adverse possession on the suit land. He says he has lived there for 42 years.

Firstly, this suit has not been brought as an adverse possession claim. There was absolutely no evidence produced to show that the plaintiff was either a purchaser whose sale became void for lack of Land Control consent and consequently time started running on the sale becoming void and that a period of 12 years has elapsed since then or, the plaintiff was a trespasser, who without force and who without being given any notice to move out and vacate prior to the expiry of 12 years then acquired adverse possession of the area of ½ the land claimed. There was absolutely no evidence of such kind.

[9] In any case, Trust and Adverse possession are strange bed fellows. Trust denotes entitlement through some legal process or through customary law. Adverse possession denotes a concession that the suit land has an owner. One against whom time can run. The applicant cannot claim any entitlement. He is a trespasser or a person whose licence has been terminated and/or expired and continues to stay on without permission of the registered owner. Trust and Adverse possession cannot in my view co-exist. You will have one and not the other.

[10] The issues the plaintiff raises here were considered or should have been considered in Embu High Court Miscellaneous Civil Application No. 32 of 1997 which considered the application for annulment of the letters of administration of the defendants' father and owner of the suit land.

This Court has no jurisdiction to change the orders of distribution made by Succession Court by a Court of equal status. There still exists other options to challenge that judgment.

This suit therefore has no merits. It is dismissed with costs to the defendants. Costs are merited as this is the 3rd case between the parties on the same issues.

It is so ordered.

READ and SIGNED at Kerugoya in open Court this 22nd day of March, 2019.

E.C CHERONO

ELC JUDGE

22ND MARCH, 2019

In the presence of:

1. Mr. Mwangi Maina holding brief for Mr. Ombachi for Plaintiff present
2. Defendants/Advocate – absent
3. Mbogo Court clerk – present