



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 418 OF 2007

ELISIPHA NYANGENYE NYAGA

As administrator of the estate of

HEREMIAH NYAGA GIKANGA.....PLAINTIFF

=VERSUS=

SUSAN MUTHONI GATHINJI

As administrator of the estate of

GITHINJI GIKANGA ALIAS

GODFREY GATHINJI GIKANGA.....DEFENDANT

JUDGEMENT

1. By plaint dated 7th August 2001 and amended on 17th February 2011, the plaintiff has filed this suit against the defendant for:-.

(a) A declaration that the defendant's deceased husband Mr. Gathinji Gikanga otherwise known as Godfrey Githinji Gikanga has always held ½ of LR Fort Hall/Loc 19/Rwathia/93 measuring 1.4666 acres or thereabout in trust for the plaintiff's husband Mr. Jeremia Nyaga Gikanga.

(b) An order that the defendant as administrator of Gathinji Gikanga otherwise known as Godfrey Githinji Gikanga do transfer to the plaintiff 1/3 of LR Fort Hall Loc/19/Rwathia/93 measuring 1.4666 acres forthwith.

(c) Costs.

2. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance through the firm of M/S Omangi & Co. Advocates. She also filed statement of defence dated 17th October 2001.

3. PW1 Dishon Gitonga Nyaga the plaintiff told the court that he is the administrator of the estate of Jeremiah Gikanga (deceased). He produced the grant of letters of administration as exhibit P1. He also told the court that the 1st defendant is his aunt. He further told the court that he and his family reside in LR Fort Hall/Loc/19/Rwathia/93. He produced the green card as exhibit P2. The said parcel of land measuring approximately 4.4 acres is registered in the name of Githinji Gikanga who was the 1st defendant's husband.

4. It is also the plaintiff's case that the three brothers Jeremiah Gikanga, Godfrey Gikanga and Ngari Gikanga agreed that the said parcel be registered in the name of Godfrey Githini Gikanga. The reason was because at the time Jeremiah Gikanga was working for an Asian in Nairobi.

5. PW1 further told the court that the suit property is used by the family of Jeremiah Gikanga, Githinji Gikanga and Ngari Gikanga. He produced a sketch map of how the three families have been using the suit property as exhibit P4. That they have constructed houses and planted crops. He said some of the houses were constructed in 1963-64. PW1 also produced a certificate to show that he has tea bushes. He produced the licence and certificate as exhibit P5. He also produced a certificate and licence in the name of his late father as exhibit P6 and one in the name of Ngari Nyaga as exhibit P7. He told the court that the land was subdivided into three portion by the elders in the 1980s. Further that his father, mother and brothers were buried on their portion of the suit property. PW1 claims 1.46 acres being a portion

belonging to his late father. He also seeks costs of this suit.

6. PW2, Peter Thuo Gikanga told the court that he is the son of Gikanga Ngari. He told the court that Godfrey Githinji Gikanga held LR No Fort Hall/Loc 19/Rwathia/93 in trust for his two brothers, Jeremiah Gikanga and Ngari Gikanga. He further confirmed that the three families have their distinct portions in the said parcel of land. The three families are entitled to equal portions of the land.

7. DW1 Susan Muthoni Githinji told the court that she resides in Kihoya. That she is the widow of Godfrey Githinji Gikanga alias Godfrey Githinji Gikanga. She told the court that her husband was the youngest son of Gikanga Ngari. She told the court that her late husband bought small pieces of land to make up what is today the suit property. She also told the court that her husband was the youngest of the brothers. The suit land was registered in the name of Godfrey Githinji Gikanga in 1971. When her husband died she applied for letters of administration in respect of his estate. She also was registered as the owner of the suit land and a title issued in her name. She does not hold title in trust of the plaintiff's family as this is not ancestral land. She told the court that the plaintiff's family reside on the suit land by force. She prays that they be ordered to vacate the suit land as they are not entitled to 1.4 acres.

8. DW2 Michael Gikanga Ngari told the court that he is the son of Ngari Gikanga and a cousin of the plaintiff. He told the court that he assisted the defendant to consolidate the pieces in 1962. He said the pieces of land were bought by his father and Godfrey Githinji. He further told the court that the plaintiff's father Jeremiah Nyaga never bought any piece of land. The said Godfrey Githinji did not hold the land in trust for his brothers. He told the court that the plaintiff's family is not entitled to 1.4 acres of the suit land as this is not ancestral land.

9. I have considered the pleadings, the evidence on record, the written submissions of counsel. The issues for determination are:-

(i) Whether or not the suit herein is res judicata having been partly heard and dismissed in HCCC No. 3184 of 1992.

(ii) Whether or not Godfrey Githinji Gikanga alias Gathenji Gikanga and held the suit land in trust for his brothers Ngari Gikanga and Jeremiah Nyaga Gikanga?

(iii) Whether the plaintiff is entitled to the reliefs sought?

(iv) Who should bear costs?

10. It is the defendant's contention that this suit is res judicata. That the issues had been determined in HCCC 3184/1992. I have gone through the proceedings. In the ruling of Justice E. Githinji was the application is dismissed with costs but the applicant had the remedy of filing a fresh suit. The instant suit is therefore not *res judicata* as per section 7 of the Civil Procedure Act. The issues herein were not canvassed and a decision rendered. The applicant had brought their claim through originating summons instead of by way of plaint.

11. There is no doubt that Ngari Gikanga, Jeremiah Gikanga and Godfrey Githinji Gikanga were brothers and grandsons of Gikanga Ngari. There is also no doubt that during demarcation LR No. Fort Hall/Location 19/Rwathia/93 was registered in the name of Godfrey Githinji Gikanga alias Gathenji Gikanga. It is not in dispute that Jeremiah Nyaga Gikanga was away in Nairobi working for the Asians at the time. It is also not in dispute that upon the passing of Godfrey Githinji Gikanga the defendant, Susan Muthoni applied for letters of administration of administration of the estate of her late husband. The suit property is now registered in her name.

12. PW1 produced a sketch of the suit land showing that his family is in occupation. He also produced tea plantation licences in the name of Jeremiah Nyaga Gikanga and Robert Gibson Ngari. They show that the tea was planted in 1978. When cross examined by the plaintiff's counsel, the defendant admitted that the plaintiff's family resides in the suit plot. She also told the court that:

"We have made report to the chief and the police but they have refused to leave".

However no evidence in terms of extracts of occurrence books reports were produced to confirm this. There is no doubt that the plaintiff's family has been in occupation of the suit land. They have constructed houses and have planted crops.

13. The defendant on her part claims her father in law had no land of his own and that her husband is the one who bought the suit property. She said her husband bought several pieces from several people. Later she was assisted by Michael Gikanga Ngari to consolidate the several pieces into what is now the suit land. This cannot be true since by 1971 the land was registered in the name of her late husband. The defendant also failed to demonstrate that the suit land was bought from several people. Nothing could have been easier than to call witnesses to confirm the sale. The defendant has failed to prove that her father in law did not own any land.

14. She also told the court that they had earlier filed a case in Muranga in an attempt to evict plaintiff's family from the land she did not avail proceedings of the said case in this court.

15. DW2 Michael Gikanga Ngari told the court that the suit land was bought by his father and Godfrey Githinji. He also stated that he does not claim anything from the defendant. I find that he is not being truthful. He told the court he resides on a separate parcel of land but he could not recall the title number.

16. It is not in dispute that the plaintiff's parents and his brothers were buried on a portion of the suit land. All these farming activities and burials would not have happened if the plaintiff's family members were mere licencees. The holding of **Julius Muturi Macharia & 3 Others vs Samuel Joseph Kimachara [2018] eKLR** is distinguishable from the facts of the case herein. The plaintiff maintains that the suit land is ancestral land.

17. Section 28 of the Land Registration Act, 2012, provides:-

“Unless the contrary is expressed in the register all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without there being noted on the register.

(a) Spousal rights over matrimonial property;

(b) Trust including customary trusts;

(c)”

It follows that trust are recognized under the above section as an overriding interest which does not require registration. It is the plaintiff’s case that he has established a customary trust by the defendant as administrator of her husband’s estate for 1.4666 acres on the suit land.

18. In the case of **Mwangi & Another vs Mwangi [1986] KLR 328**. It was held that the rights of a person in occupation of land are equitable rights which are binding on the land and the land is subject to those rights.

I find that the plaintiff has proved that Godfrey Githinji Gikanga alias Godfrey Gathinji Gikanga though registered as the owner of the suit land held the same in trust for his two brothers. The plaintiff’s family members are therefore entitled to their portion of the suit land.

19. Accordingly I enter judgment in favour of the plaintiff as against the defendant as follows:-

(a) That a declaration be and is hereby issued that the defendant’s husband Mr. Gathinji Gikanga otherwise known as Godfrey Githinji Gikanga has always held 1/3 of LR No. Fort Hall/Loc 19/Rwathia/93 measuring 1.4666 acres or thereabouts in trust for the plaintiff’s husband Mr. Jeremiah Nyaga Gikanga.

(b) An order be and is hereby issued that the defendant as the administrator of Mr. Gathinji Gikanga otherwise known as Godfrey Githinji Gikanga do transfer to the plaintiff a 1/3 of LR No. Fort Hall/Loc. 19/Rwathia/93 measuring 1.4666 acres forthwith.

(c) As this is a dispute between family members I order that each party bears her own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 2ND day of MAY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant