



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC SUIT NO. 207 OF 2018

(FORMERLY H.C.C.C NO. 1055 OF 2013 NAIROBI)

EVANSON TIBANGU KAMAU.....1ST PLAINTIFF

JOHN NJENGA KAMAU.....2nd PLAINTIFF

(All Suing for and as a legal Representatives of the estate of

KAMAU NJOROGE "A"-Deceased)

-VS-

WAINAINA NJOROGE.....DEFENDANT

JUDGMENT

Introduction

1. The parties here are family. The plaintiffs are brothers and are sons of KAMAU NJOROGE (deceased), who in turn was a brother of defendant. Defendant is therefore an uncle to the plaintiffs. At the center of the dispute is a parcel of land known as L.R. KABETE /NYATHUNA/227 (the suit land) which was registered in the name of Kamau Njoroge way back in 1964, but has since been transferred to his sons, the plaintiffs. The plaintiffs want defendant to be evicted from this land where as defendant claims that this is family land.

2. The initial plaint was filed on 2.9.2013. An application to amend the same was filed on 30.7.2018, which was allowed by consent on 14.8.2018. Therein, the plaintiffs seek the following Orders;

a) **An Order of eviction do issue forthwith against the defendant, his servants, agents or any person from the suit land L.R. No. Kabete/Nyathuna/227 and/ or an order of vacant possession against the defendant.**

b) **A permanent injunction restraining the defendant his agents and/or servants or any other person(s) claiming through him from trespassing, entering into, occupying or making any constructions or erections therein or otherwise whatsoever interfering with the plaintiff's possession, enjoyment or occupation of the property known as L.R. No. Kabete/Nyathuna/227.**

c) **Any other remedy that this court may deem fit and just to grant**

d) **Cost of this suit**

e) **Damages for trespass and damage to property.**

3. The defendant filed his defence on 8.10.2013 wherein he admitted that he had filed a suit in **HCCC No. 2099** of 1999 against his brother claiming entitlement to the suit land by way of adverse possession, but the suit was dismissed on 22nd June 2017.

4. The present suit was transferred to Thika ELC court vide a court order of 28.6.2018.

5. Vide an application dated 30th August 2013 the Plaintiff sought temporary Orders restraining the defendant from making any construction or erections, developments interfering with the Plaintiff's possession, enjoyment or occupation of **L.R. NO. KABETE/NYATHUNA/227** pending hearing and determination of this suit. The application was allowed by the consent of the parties filed on 6th October 2013.

Evidence of the Parties

6. **PW1, John Njenga Kamau**, adopted as his evidence his written statements dated 30.08.13 & 31.8.18 respectively. He also produced as his exhibits the bundle of documents filed on 14.9.2018 item 8-17 as Plaintiff Exhibit 1-10 respectively (running from page 15 to 27 in his bundle).

7. Plaintiffs Case is that they are the registered proprietors of parcel L.R. No. KABETE/NYATHUNA/227 as heirs and beneficiaries of the deceased pursuant to Nairobi High Court **succession Cause No. 2769 of 2005**. It is averred that the dispute has spilled over in court on several occasions but defendant always lost. For instance, defendant sued the late Kamau Njoroge (deceased) in **H.C.C.C No. 2099 of 1999** claiming a portion of the suit premises but the case was dismissed vide the Courts judgment on 22.06.2007. Defendant was at one time charged in **Kiambu RMCC No, 443 of 2001** for destroying structures in the suit premises. There was another case where defendant sought to bury his mother (defendants mother) on the suit property but this did not materialize as a Kiambu Court held that the land belonged to plaintiff's father. Still there was another case where Defendant sought to cut down trees in the suit property. Plaintiff's father had then filed **Case No. 151 of 2001 at Kikuyu Law Courts** where the court allegedly ordered defendant to leave the land. According to PW1, his father became too ill to enforce that Judgment. Pw1 further states that the dispute was also arbitrated before the elders (Muhiriga-Clan), who advised him (defendant) to move out but he remained adamant.

8. Defence case was advanced by defendant, his wife and a step brother. **DW1 Wainaina Njoroge** adopted as his evidence, his written statement filed on 5.12.2018. He also produced as exhibits the list of documents in the list dated 5.12.2018 item 1-3 as D-Exhibits 1-3 respectively.

9. DW1 avers that the suit premises ought to have been registered in the name of their mother but during that time women were not granted ID's hence the same was registered in the name of his elder brother. He claims that they have been cultivating the land since 1958. He however conceded that there have been disputes relating to the land and that he had filed the suit in **HCCC No. 2099 of 1999 (O.S.)**, which was eventually dismissed. He however categorically stated that the judgement in the suit did not diminish his rights in the suit premises.

10. **DW2, Grace Wangui Wainaina** adopted as her evidence, her witness statement recorded on 5.12.2018. She testified that she is the wife of the defendant having been married in the year 1957 and that they moved on the suit premises in the year 1961. She stated that Kamau Njoroge (deceased) held the suit land in trust for the family and it was only after his demise that the plaintiffs have sought to evict them. She also admitted that there have been other suits relating to the suit premises.

11. **Dw3 Robert Kamau** also adopted as his evidence his witness statement recorded on 5.12.2018. He is a, a step brother of the defendant. He testified that it was common during the colonial period and the demarcation process for land to be registered in the name of the first sons and that this was the position in relation to their own land. He also stated that he was aware of the conflict between the plaintiff's father and the Defendant herein. He however stated that Kamau Njoroge (deceased) was of age and had bought land which was consolidated with the suit premises.

Submissions

12. Both Parties in their submissions basically restated the evidence on record. The plaintiff also relied on the cited authorities of; **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR** and the case of **Priscila Jesodin Chumo vs. Nelly Jebor (2018) eKLR**. Defendant relied on **Section 4 of the Trespass Act Cap 294 Laws of Kenya** and the case of **Isaack M'Inanga Kiebia v Isaaya Theuri M' Lintaria & Anor (2018) eKLR**.

Analysis and Determination

13. The issues arising for determination after analysing the pleadings, the evidence and the submissions are;

a. Whether defendants claim of entitlement to the suit land on basis of trust is merited.

b. Whether the prayers sought for by the plaintiffs can be granted.

(i) Whether defendant's claim of entitlement to the suit land on basis of trust is merited.

14. The plaintiffs have contended that the issues raised by defendant were dealt with in High court Civil Suit No. 2099 of 1999. Defendant has admitted the existence of this suit and that he lost the same. He has stated that he wanted to appeal against this Judgment but he never managed to get the certified copies of proceedings so he is yet to file an appeal. The proceedings and Judgment in the aforementioned case have been availed by defendant as his exhibit 1 & 2 respectively, while plaintiffs side has availed the copy of decree thereof (to be found on page 15 of plaintiffs bundle). A keen look at these documents reveal that the parties are the same, so is the suit property. However, it is clear that the issue for determination before that court was **whether defendant was entitled to the suit land by way of adverse possession**. The issue of trust was neither raised nor determined.

15. In the present suit, the defendant has not clearly claimed anything. There is no counterclaim. He simply prays for the dismissal of plaintiff's suit. However, in paragraph 6 of his defence statement, defendant has averred that the suit property is ancestral land hailing from the parents of the deceased and defendant. I find it necessary to determine the issue as to whether the suit land is ancestral land or not so as to bring some kind of closure on this dispute once and for all.

16. It is not in dispute that the suit land was originally registered in the name of Kamau Njoroge "A"-see the land title on page 14 of plaintiffs bundle. It was issued on 8.10.1964. The two plaintiffs herein acquired the title to this land on 24.12.2013 via succession. What the

court has to interrogate is whether this land was ancestral land by the time Kamau Njoroge was being registered as the proprietor of the land.

17. In the Supreme Court of Kenya Case **Petition No. 10 of 2015 Isaak M’Inanga Kieba Vs Isaaya Theuri M’Lintari and Another, (where Judgment was delivered on 14.9.2018)**, the court while dealing with the question of customary trust set out Some of the elements that would qualify a claimant as a trustee as follows:

- 1) **“The land in question was before registration, family, clan or group land.**
- 2) **The claimant belongs to such family, clan, or group**
- 3) **The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.**
- 4) **The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.**
- 5) **The claim is directed against the registered proprietor who is a member of the family, clan or group”.**

18. The court further stated that **“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust.....”**

19. I have carefully analysed the evidence and there is nothing to indicate that the suit land was ancestral land. Defendant has advanced a claim that the suit land belonged to his father, then his mother bought two more parcels which were combined with the land allocated to their house by their father. However, this evidence is inconsistent with the evidence adduced by his own witness, Robert Kamau Njoroge who stated as follows during cross examination;

“In the 1960s, Kamau Njoroge was an adult and was married. He was also doing business. He had however bought the suit land.”

20. In Re-examination, again Robert stated as follows;

“Kamau Njoroge (Plaintiff’s father) was an adult and had a business. He had bought the land”.

21. This witness is a step brother of both defendant and plaintiffs’ father. I would take it that he knows the intricate details of the family history more than defendant’s wife as the latter joined the family upon marriage. Thus it appears that plaintiff’s father had actually acquired the land on his own and not through ancestry.

22. Another issue to consider is with regard to the history of occupation of the suit land. The extended family of the parties appears to be rather large. Defendant has stated that his father had three wives where each wife had her own children. However, this larger family does not appear to have settled on the suit land. There is nothing to indicate that defendant’s parents had settled on this land as the family land. Even DW3, the step brother does not live on this land. Thus it cannot be stated that the land emanated from the father of defendant.

23. I have also considered the lifespan of the freehold title. The document on page 14 of plaintiffs bundle is the **Certificate of Freehold title issued on 8.10.1964 under the Native Lands Registration Ordinance of 1959**. Defendant’s mother died 30 years later in 1994 (as per the burial case **2364/1994** in Kiambu Court), while Kamau Njoroge passed on in June 2004 (see the grant in plaintiff’s bundle). This clearly shows that plaintiff’s mother lived on for 30 years without wresting the title from her son Kamau Njoroge. If this was her land as defendant would want this court to believe, certainly she would have attempted to ensure that she got it back in her life time. As it came to be she was not even buried on this land. The policy of women being denied identity cards or not being allowed to own land had long been discarded. The holder of the title, Kamau Njoroge also lived on for 40 years during which time defendant never managed to assert his claim that the suit land was family land.

24. What is apparent is that there have been multiple cases involving the Plaintiffs, the Defendant and the deceased. In defence exhibit 3, it is a Replying affidavit of Kamau Njoroge where in paragraph 14, reference has been made to the case, **Kiambu PMCC No. 2364 of 1994**. In that case, defendant herein had tried to bury his mother on the suit land but the case was decided on appeal in the high court whereby defendant herein lost. In his evidence here in, defendant confirmed that the burial dispute did spill into the court. He avers that he never managed to bury his mother on that land.

25. I have also considered that the pleadings of the defendant do not contain any counter claim. The statement of defence was filed way back on 8.10.2013. On 14.8.2018, the prayer for amendment of the plaint was allowed, where by defendant was also allowed to put in his amended defence within 14 days. No such amendments were done. A party is bound by his/her pleadings. In the present case, defendant does not state with precision what his claim is. He simply wants plaintiffs’ case to be dismissed.

26. All the circumstances of this case give a pointer to the fact that the suit land belonged to plaintiffs’ father. I therefore find that the said land was not ancestral land.

(ii) Whether the plaintiffs warrant the Orders Sought.

27. Having established that defendant herein has no legal claim in the suit premises, then plaintiffs claim must succeed as they are the registered owners of the suit land, But this is only in terms of the prayers for eviction and injunction. The amended plaint does contain a claim for damages for trespass. However, I will refrain from determining this claim considering that defendant was occupying the land as a family member. Further, no evidence was adduced in respect of assessment of such damages for trespass.

28. **Final Orders**

1) An Order of eviction is hereby issued against the defendant, his servants, agents or any person from the suit land L.R. NO. KABETE/NYATHUNA/227 and/or an order of vacant possession against the defendant.

2) A permanent injunction is hereby issued restraining the defendant his agents and/or servants or any other person (s) claiming through him from trespassing, entering into, occupying or making any constructions or erections therein or otherwise whatsoever interfering with the plaintiffs' possession, enjoyment or occupation of the property known as L.R. NO. KABETE/ NYATHUNA/227.

3) As to Cost, the court has considered that the parties are family. As such each party is to bear their own costs of the suit.

Dated, signed and delivered at Thika this 2nd day of May, 2019.

MBUGUA LUCY

JUDGE

2/5/2019

In the presence of

Court Assistant: Diana

Muturi H/B for Kinyua for Defendant

1st Plaintiff: Present

2nd Plaintiff: Present

Defendant – Absent