



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 760 OF 2013

PRISCILLA MUTHONI NJAGI.....PLAINTIFF

VERSUS

JOHN MURIITHI KARIUKI.....DEFENDANT

JUDGMENT

BACKGROUND

The original plaintiff Mugo Njagi Ndega sued his brother John Kariuki Njagi (both deceased) for the following orders:

(a) A declaration that the defendant holds land parcel No. BARAGWE/THUMAITA/1406 in trust for the plaintiff and that the trust be determined and the defendant do transfer land parcel No. BARAGWE/THUMAITA/1406 to the plaintiff.

(b) A declaration that the plaintiff has acquired land parcel No. BARAGWE/THUMAITA/1406 by adverse possession and the defendant's registration be cancelled and the plaintiff be registered as absolute proprietor of land parcel No. BARAGWE/THUMAITA/1406. ALTERNATIVELY

(c) A declaration that the proceedings before the Gichugu Land Disputes Tribunal and the Provincial Appeals Land Tribunal were incompetent and void abinitio as the Tribunal has no jurisdiction to order sub-division or transfer of registered land under Cap 300.

(d) The costs of this suit.

(e) Any other relief this Honourable Court deems fit to grant.

The original plaintiff and the original defendant were step brothers and were substituted by his daughter-in-law Priscillah Muthoni Njagi while the original defendant was substituted by his son, John Muriithi Kariuki.

In a statement of defence dated 2nd September 2009, the defendant denied the plaintiff's claim and put her to strict proof thereof.

PLAINTIFF'S CASE

The substituted plaintiff testified and stated that her father-in-law was Njagi Ndiga (deceased) who had two wives. Her mother-in-law and the defendant's mother. She further stated that during land demarcation, her father-in-law was working in Nairobi while the defendant's father was at home. The Unjiru Clan gave land parcel No. BARAGWE/THUMAITA/578 measuring approximately 12 acres to the defendant's father on the understanding that he would give half share of the land to her father-in-law. She also stated that after the return of her father-in-law from Nairobi in the year 1964, the defendant's father gave him half of the land on which he built and planted coffee and food crops. She said that sometimes in the year 1990, a dispute arose between the parties whereby the clan elders resolved that the defendant's father sub-divides his land and transfers to her father-in-law three (3) acres out of the land. Following that resolution, the defendant's father sub-divided land parcel No. BARAGWE/THUMAITA/578 into two portions being BARAGWE/THUMAITA/1405 measuring approximately 9 acres which the defendant's family occupies and land parcel No. BARAGWE/THUMAITA/1406 measuring three (3) acres where the plaintiff's family members occupy. The plaintiff further stated that when the dispute arose between the original plaintiff and the original defendant, the matter went before the Gichugu Land Disputes Tribunal and the Provincial Disputes Appeals Tribunal and the award of the Land Disputes Tribunal was upheld. That award is now being challenged by the plaintiff for having been made without jurisdiction. The plaintiff supported her case producing exhibits listed in her list of documents dated 2nd August 2017.

DEFENDANT'S CASE

The defendant on the other hand stated that the father-in-law to the plaintiff and his father was one Njagi Ndiga (deceased) who had two wives. Njeri was the 1st wife and had two sons namely Eliud Ndiga and Mugo Njagi, the original plaintiff herein. The 2nd wife was known as Wangari who was mother to John Kariuki Njagi. Eliud Ndiga, the 1st born son from the first house, died sometime in 1954 before the land demarcation and consolidation. The parcels of land were allocated by the clan being land parcel No. BARAGWE/THUMAITA/588 which was registered in the name of Juda Gateri, a son to Eliud Ndiga of the 1st house while parcel Number BARAGWE/THUMAITA/578 was registered in the name of John Kariuki Njagi, the original defendant, from the 2nd house. Registration of both parcels of land was done on 15th November 1958. According to the defendant, during the registration period, the original plaintiff was living in Nairobi. By the time he came back, the land parcel No. BARAGWE/THUMAITA/588 registered in the name of Juda Gateri had been sold and Juda had purchased another parcel of land No. NGARIAMA/RUNGETO/568 measuring 1.94 Ha. When the original plaintiff came back, he settled on land parcel No. BARAGWE/THUMAITA/578 with the consent of the original defendant John Kariuki Njagi. Sometime in 2004, the original plaintiff filed a reference before the Gichugu Land Disputes Tribunal seeking 3 acres from land parcel No. BARAGWE/THUMAITA/578 which by then had been sub-divided by the original defendant giving rise to 2 resultant portions being land parcel No. BARAGWE/THUMAITA/1405 measuring 3.55 Ha and BARAGWE/THUMAITA/1406 measuring approximately 1.2 Ha. The original plaintiff was demanding the whole of L.R. No. BARAGWE/THUMAITA/1406. Upon hearing all the witnesses, the Tribunal gave an award that the original plaintiff was entitled to 1½ acres out of land parcel No. BARAGWE/THUMAITA/1406. Being dissatisfied, the original plaintiff moved to the Provincial Land Disputes Appeals Committee which upheld the decision of Gichugu Land Disputes Tribunal. That award by the Provincial Land Disputes Appeals Committee was adopted as the judgment of the Court on 5th August 2009 and a decree subsequently issued. The plaintiff then filed this case which was initially commenced in Embu High Court as HCCC No. 134 of 2009 and later transferred to the ELC Kerugoya and registered as ELC No. 760 of 2013.

ISSUES FOR DETERMINATION

The issues for determination are as follows:

- (1) *Whether the defendant hold land parcel No. BARAGWE/THUMAITA/1406 in trust for the plaintiff.*
- (2) *Whether the plaintiff has acquired land parcel No. BARAGWE/THUMAITA/1406 by adverse possession.*
- (3) *Who shall bear the costs of this suit?*

ANALYSIS AND DETERMINATION

This is a case of a registered proprietor of a suit land which is being challenged by the plaintiff on grounds of customary trust. The first issue for determination that this Court must deal with is whether the defendant held the suit parcel of land No. BARAGWE/THUMAITA/1406 in trust for the plaintiff. The plaintiff in her testimony explained that the original land parcel No. BARAGWE/THUMAITA/578 measuring approximately 12 acres was given by Unjiru Clan to her father-in-law one Njagi Ndiga (deceased) who had two wives. She further stated that her father-in-law Njagi Ndiga (deceased) had two wives. The plaintiff's mother in-law and the defendant's mother. She further testified that during land demarcation, her father in-law was working in Nairobi while the defendant's father was at home and after he returned home in 1964, the defendant's father agreed to share the land with him and even showed him his portion which he developed by building and planted coffee and other food crops. The plaintiff also testified that sometime in the year 1990, a dispute arose between them which was referred to the Land Disputes Tribunal who resolved by dividing the land into two portions being land parcel No. BARAGWE/THUMAITA/1405 and 1406. The first portion is measuring approximately 9 acres which the defendant occupies while the second portion is measuring approximately 3 acres where the plaintiff occupies with her family. The defendant has not controverted the plaintiff's evidence in any way.

In *HCCC No. 146 of 2000 (Meru)*, between *Peter Gitonga Vs Francis Maingi M'Ikiara*, the Court held:

“A ‘trust’ can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This is what led Mule J. to say this, “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether the trust was envisaged”.

The plaintiff has stated that the suit land is a clan land which was given by the Unjiru Clan to the defendant to hold in trust for himself and the family of the plaintiff who by then was in Nairobi. When the plaintiff came back in 1964, he was shown a portion where he built his house and commenced developments. My conclusion from the evidence adduced is that the plaintiff has proved that she is entitled to the portion of land she is claiming where she has built and developed and are currently living with her family. The land is measuring approximately three acres registered as number BARAGWE/THUMAITA/1406. The final orders are as follows:

- (1) It is hereby declared that the plaintiff is entitled to three (3) acres registered as land parcel No. BARAGWE/THUMAITA/1406 by way of trust.***
- (2) The defendant's registration be and is hereby cancelled and the plaintiff be registered as absolute proprietor of the said land parcel No. BARAGWE/THUMAITA/1406.***
- (3) Since the plaintiff and the defendant are relatives, each party to bear its own costs.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 12th day of July, 2019.

E.C. CHERONO

ELC JUDGE

12TH JULY, 2019

In the presence of:

1. *Mr. Ngigi holding brief for Ms Makworo for Plaintiff*
2. *Ms Kiragu holding brief for Mr. Maina Kagio for Defendant*
3. *Okatch Court clerk – present*