



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.26'A' OF 2017

(FORMERLY NAIROBI ELC NO.5911 OF 1992(OS))

PETER MUIRURI KIGERA.....PLAINTIFF

VERSUS

JOHN GITAU GATHENYA.....1ST DEFENDANT

DAVID MWAURA GATHENYA.....2ND DEFENDANT

JUDGMENT

By an **Originating Summons** dated 3rd November 1992, **Kigera Muiruri (now Deceased)** sought for the following orders against for Respondents;-

- 1. That the Respondents being the registered owner of all that parcel of land known as Kiambaa/Waguthu/T.75 measuring 0.088 acres in the approximate be declared and registered as Trustees for the Applicant of the said title.**
- 2. That the applicant be declared and registered as the owner of the land parcel known as Kiambaa/Waguthu/ T.75.**
- 3. That in the alternative and without prejudice to the foregoing the Respondents title be deemed to have been extinguished through adverse possession of the Applicant and he be registered as proprietor of the aforesaid parcel of land.**
- 4. That the costs of this application be provided for.**

The **Originating Summons** is supported by the Affidavit of **Kigera Muiruri** (deceased) sworn on even date who had deponed that the Respondents are the registered owners of the land parcel **No.Kiambaa/ Waguthu/T.75** as is evident from annexure KM-1, copy of the original Green Card. Further that on or about 1959, the Respondents' father and the former registered owner of the suit property herein **No.Kiambaa/Waguthu/T.75, Githenya Gichuri** sold the land to the Plaintiff at a consideration of **Kshs.350/=** and a written Agreement was drawn to that effect. That upon payment of the said consideration in 1959, the Plaintiff commenced occupation, developed the same, cultivated and built permanent houses on the aforesaid parcel of land. He also deposed that on several occasions, the Respondents' father, the Vendor and himself had approached the Land Control Board so that transfer of the suit property could be effected but to no avail. Further that the Respondents' father and the registered owner of the suit property died on or about 1964 and subsequently the Respondents herein were registered as the owners of the suit property on **18th August 1975**. That was done without his Notice and in disregard of his interest thereon.

He alleged that he had approached the Defendants severally to transfer the suit property to himself but they had refused, failed and/or are unwilling to do so. He acknowledged to having filed several other suits over the suit property. The matter had even been referred to elders for determination, who heard the dispute and found that the suit property belongs to the Plaintiff herein. The said elders led by District Officer, Kiambaa as the Chairman ordered that the suit property be transferred to the Plaintiff. The said Award was filed at Kiambu Law Courts vide **Land Case No.19 of 1987**. The said Award was adopted as the Order of the court and the Executive Officer of the court was directed to sign all the relevant transfer forms. However, the Respondents filed an application in the said **Kiambu Land Case No.17 of 1987** and the whole suit was dismissed for having been filed without following the proper procedure. It was his contention that he has worked on, developed, occupied and has been living on the suit property ever since 1959 continuously and uninterrupted believing that the land was his. He urged the Court to allow the prayers as contained in the Originating Summons.

Though the Defendants herein appointed the **Firm of Wachira, Nderitu, Ngugi & Co. Advocates** to act for them vide a Notice of Appointment of Advocates dated **2nd December 1996**, the Court has not seen any Replying Affidavit herein by the Defendants herein.

However, the matter had several interlocutory applications. The Court has noted that on **10th November 1993**, one **Eunice Wambui Kigera** filed an application to be substituted as the Plaintiff in the suit instead of **Kigera Muiruri** (deceased) who allegedly died on **16th July 1993** as is evident from Certificate of Death attached to the said application.

From the court record, the said application was allowed on **29th September 1994**, by Pall J. It is also evident that the Plaintiff **Eunice Wambui Kigera** appointed the **Law Firm of Gachoka Mwangi & Co. Advocates** to act for her vide a Notice of Appointment dated **27th November 2003**, and filed in court on **2nd December 2003**.

After that, appointments on **25th November 2004**, **Peter Muiruri Ngugi**, the Plaintiff herein sought to be substituted as the Plaintiff instead of **Eunice Wambui Kigera** due to her old age. However, from the court record, it is alleged that she died before the said application was heard. Thereafter several other interlocutory applications were filed, canvassed and determined.

Eventually, the hearing of the matter via viva voce evidence commenced before this court on **19th June 2018**, wherein the Plaintiff gave evidence for himself and called no witness.

PLAINTIFF'S CASE

PW1 – Peter Muiruri a businessman in Kiganjo stated that the suit property **Kiambaa/Waguthu/T.75** was given to him by his father. That his father had purchased the suit land in 1958 from the Defendants' father. That his father was **Kigera Muiruri** who had filed other cases before in connection to this parcel of land. He adopted his written statement as part of his evidence and also produced proceedings and Ruling from Karuri Land Disputes Tribunal as exhibits in court. It was his testimony that the said Tribunal at Karuri had found and held that the suit property should be registered in the name of his father. Further that the said Award of the

Tribunal was adopted as the Order of the court by the Kiambu Magistrate's Court. However, the said Order was later set aside, and the whole suit was dismissed. He produced the original written Agreement dated **29th June 1958** as exhibit No.3 and the Agreement Note as exhibit No.4. He urged the Court to allow the instant Originating Summons. In cross-examination, he averred that the houses on the suit property are dilapidated because the court ordered that none of the parties should deal with the suit property at all. He further averred that though born in 1954, he lived on the suit property with his family from 1958 to the year 2006 when their mother died. That the Defendant refused to transfer the suit property to his father after the death of their father. That the Defendants had filed a case at the Chief in the year 1970 and the Tribunal case was in 1980s. He acknowledged to have filed this suit after the Award of the Tribunal was rejected. He also admitted that he did not know what transpired at the Chief's Office because he did not attend the said meeting. However, his mother Eunice lived on the suit property until the time of her death. However, after her death, the houses got dilapidated and fell off due to non-occupation and non-repair of the same.

After the Plaintiff's case, **Mr. Kamau** for the Defendants sought adjournment to call the 1st Defendant. It was alleged that 2nd Defendant was now deceased. The court granted the Defendant last adjournment and matter was set for hearing on **24th July 2018**. However, on **24th July 2018**, the matter was adjourned to **22nd November 2019** which date the 1st Defendant and his advocate failed to attend court. The court then directed that the Defence case be deemed as closed and Plaintiff was directed to file written submissions.

From the court record, it is evident that the Plaintiff did file his written submissions on **20th December 2018**, and urged the Court to allow his claim. The Defendants too through their advocates filed their submissions on **31st January 2019**, and urged the Court to dismiss the Plaintiff's case with costs to themselves.

The Defendants also relied on the case of **Sospeter Wanyoike..vs...Waithaka Kabiri(1979) KLR 236**, which was annexed to the said written submissions.

The Court has now carefully considered the rival written submissions, the pleadings and exhibits herein. The Court too has considered the available evidence and the relevant provisions of law and render itself as follows:-

The parties had on **30th September 2011** filed List of Agreed Issues as follows:-

- 1. Were the Plaintiffs in continuous and uninterrupted occupation of plot T.75 for a period of over 12 years before the Respondents laid claim to the land?**
- 2. Has the Plaintiff been in possession of plot T.75 since 1958?**
- 3. Did the father of the Plaintiff (deceased) buy plot No.T.75 from Gathenya Gichuhi (also deceased)?**
- 4. Have all previous tribunals that have adjudicated over the matter ruled in favour of the Plaintiffs?**
- 5. Who is the legal and/or lawful owner of the plot in issue?**
- 6. If the answers to question 5 above is in favour of the Plaintiff, should the title currently registered in the names of John Gitau Gathenya and David Mwaura Gathenya be cancelled and a new one be issued in names of the Plaintiff?**
- 7. Who is to bear costs of this Originating Summons?**

However, the Court finds that it is not bound by the above drawn statement of issues. It thus finds that the issues that crystalizes herein for determination are:-

1. **Whether the Plaintiff's suit is time barred?**
2. **Whether the Respondents were registered as the owners of the suit property to hold in trust for the Plaintiff?**
3. **In the alternative, have the Respondents title to the suit property be deemed to have extinguished through adverse possession?**
4. **Are the Plaintiffs entitled to any of the Orders sought?**
5. **Who is to pay costs of the suit?**

The Court will now consider the available evidence and applicable law in arriving at a response to the above drawn issues.

1. **Whether the Plaintiff's suit is time barred?**

Even though the Defendants did not adduce evidence, the Court had noted in their various applications and the final submissions filed on **31st January 2019**, that they have alleged that the Plaintiff's suit is caught up by Limitation of Actions Act. That since the Plaintiff has alleged that his father purchased the suit land in 1958 and has annexed a Sale Agreement to his claim, a claim of land ought to have been brought to court within a period of 12 Years. However the Court notes that the Plaintiff's claim is for declaration that the Defendants are holding the land as trustees for the Plaintiff. Further the Court notes that the issue of Limitation of Actions was dealt with by Justice Nyamweya in a Ruling dated **5th December 2012**, wherein she held that the suit was not time barred. It was her finding in Page 6 of the said ruling that the Limitation of Actions Act is clear that none of the periods of Limitation prescribed by the Act apply to action by a beneficiary under a trust, which includes action to recover property from trustees. Further, it is evident that as regard Limitation periods in actions to recover land, time runs against the person claiming to recover land and not the adverse possessor. The Court concurs with the above findings of Nyamweya J and reiterates that since the Plaintiff's claim is based on trust, then it is not time barred and is not caught up by Limitation of Actions Act. See the case of **Irungu Kibe v John Maina Kibe (Suing as the Legal Representative of Ruth Njeri Kibe (Deceased) [2019] Eklr:-**

"In regard to the issue of the claim under trust being statute barred, Limitation of Actions is inapplicable to the issue of trusts. The Court of Appeal case of Stephens & 6 others v Stephens & another [1987] eKLR the Court stated thus :

"The philosophy underlying the English Limitation Act seems to be, that where confidence is reposed and abused, a defaulting fiduciary in possession of trust property or which he converted to his use, should not be shielded by time bar. So no plea of limitation is available to a fiduciary in such a case. (See section 19 (1) of the Limitation Act 1939). The Parliament of Kenya clearly shares that policy and in the Limitation of Actions Act (cap 22) enacted a similar provision in almost identical language. Section 20(1)(b) of the Limitation of Actions Act (cap 22) provides that:

"None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust which is an action:

"to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use."

That was precisely the reliefs which the Appellants sought in regard to the suit plot. In my opinion, no period of limitation applies in this case and I am in respectful disagreement with the learned judge's contrary holding on this point. If this is the right view to take, the same must hold good for the consequential relief of account.'

Further as was held in the above stated Ruling, Section 37(a) of the Limitation of Actions Act provides that the title of the person registered is held by the registered proprietor in trust for the person who has acquired title against him by operation of law under the Act.

2. **Whether the Respondents were registered as the owners of the suit property to hold it in trust for the Plaintiff?**

It is evident that the Plaintiff herein has produced a Sale Agreement between his father **Kigera Muiruri** and the Defendants' father. It is also evident that the Defendants' father died before he could transfer the suit land to the Plaintiff's father. The matter has been litigated in several fora wherein the Plaintiff's father was held to have been the lawful owner of the suit property having purchased the same from the Defendants' father. The Defendants did not call evidence to dispute that allegation. From the available evidence, it is evident that the Plaintiff's father **Kigera Muiruri** had taken possession of the suit property as early as 1959. After the demise of the father of the Defendants, the Defendants filed a Succession Cause and included the suit property as part of the estate of the said deceased and the same was devolved to the Defendants. The Plaintiff's father **Kigera Muiruri** continued to claim the suit property from the Defendants and finally filed the current Originating Summons. The Court finds that from the circumstances of this case, a constructive trust can be implied herein. A constructive trust is an equitable remedy resembling a trust (implied trust) imposed by a court to benefit a party that has been wrongfully deprived of its rights due to either a person obtaining or holding a legal property which they should not possess due to unjust enrichment or inference or due to breach of fiduciary duty. (See Black Law Dictionary 9th Edition)

Further see the case of **Twalib Hatayan Twalib Hatayan & Ano. Vs. Said Saggah Ahmed Al-Heidy & Others [2015] eKLR**, where the

held that:-

“In the absence of an express trust, we have trusts created by operation of the law..... A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...”.

The Court finds and holds that the Defendants though registered as the owners of the suit property, there exist a constructive trust in favour of the Plaintiff and the Defendants are holding the suit property in trust for the Plaintiff.

3. In the alternative have the Respondents’ title to the suit property be deemed to have extinguished through adverse possession?

Having found that there exist a constructive trust in favour of the Plaintiff, the Court finds that there is no need of delving into the issue of adverse possession. Further it is evident that the Plaintiff’s possession has been interrupted by the several litigations over the suit property and the Court cannot find and hold that the said possession has been continuous and without disruptions. Therefore, this Court will not deal with this alternative prayer.

4. Is the Plaintiff entitled to any of the Orders sought?

Having found that the Defendants as the registered owner of the suit property are holding the same as trustees for the Plaintiff due to the existing constructive trust in favour of the Plaintiff, the Court finds that the Plaintiff is entitled to prayer Nos.1 and 2 of the instant Originating Summons. See the case of **N W K ...v... J K M & Another [2013] eKLR**

“This finding notwithstanding, it is however possible that a constructive trust may arise in the Plaintiff’s favour in the circumstances of the case. The requirements for a constructive trust to arise are explained in more detail in Halsbury’s Laws of England, 4th Edition, Volume 48 at paragraph 690 that I shall quote *in extenso*:

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate”.

5. Who is to pay costs of the suit?

It is evident under Section 27 of the Civil Procedure Act that costs are awarded at the discretion of the court. Further costs do follow the event. In the instant suit, the Plaintiff is the successful litigant and is therefore entitled to costs of this suit.

Having now carefully considered the instant Originating summons and the available evidence, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities. Consequently, the Court enters Judgment for the Plaintiff against the Defendants in terms of prayers No.1 and 2 with costs to the Plaintiff.

It is so ordered.

Dated, Signed and Delivered at Thika this 15th day of November 2019.

L. GACHERU

JUDGE

15/11/2010

In the presence of

No appearance for Plaintiff though notified

No appearance for 1st Defendant

No appearance for 2nd Defendant

Jackline - Court Assistant.

Court – Judgment read in open court.

L. GACHERU

JUDGE

15/11/2019