



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO. 400 OF 2017

JKN -A - **1ST PLAINTIFF**

SNN - **2ND PLAINTIFF**

JKN -C - **3RD PLAINTIFF**

VS

**TMN (suing as the next friend of SNK alias NK –
person of unsound mind)** - **1ST DEFENDANT**

MURANGA LAND REGISTRAR - **2ND DEFENDANT**

HON. ATTORNEY GENERAL - **3RD DEFENDANT**

JUDGMENT

1. The Plaintiffs are the sons of JNK, deceased. SNK and JNK, deceased are the only sons of KN and his wife JNK, both are deceased. TMN is the wife of SNK, who is said to be of unsound mind.
2. The parties therefore are all related with a common ancestry.
3. The Plaintiffs sought the following orders as against the Defendants;
 - a. A declaration that the registration of SNK in respect of Land parcel No LOC4 /GAKARARA/xxx (suit land) approximately 7 acres was done in trust of himself and his brother JNK (deceased) and his entire family.
 - b. A declaration that the Plaintiffs are entitled by way of adverse possession having occupied ½ of LOC 4/GAKARARA/xxx for a period exceeding 12 years and hence the Defendants title to ½ portion of the suit land be extinguished by operation of law and transferred to the Plaintiffs.
 - c. An order of cancellation of the title held by SNK and the same be subdivided as follows;

SNK	-	3.5 acres
JKN B	-	1.17 acres
SNN	-	1.17 acres
JKN C	-	1.17 acres
 - d. That an order of transfer of land parcel No LOC4/GAKARARA/xxx as prayed in clause b above be implemented by the Executive Officer of this honourable Court in place of the registered owner SNK
 - e. Costs of the suit.

- f. Any other further relief that this honourable Court deems fit to grant.
4. The Plaintiffs' case is that they are entitled to ½ share of the suit land on account of customary trust and adverse possession.
5. The 1st Defendant denied the Plaintiffs' claim and filed a Counterclaim in which she sought the following orders;
 - a. That the Plaintiffs suit be dismissed with costs to the 1st Defendant.
 - b. That judgement be entered in favour of the 1st Defendant as per the Counterclaim with costs and interests thereon.
 - c. That an order of eviction do issue against the Plaintiffs, their agents, kin and or relatives in respect to the area they occupy on land parcel LOC4/GAKARARA/xxxx.
 - d. That further to prayer No 3 above the OCS Muranga Police Station or the relevant in charge of security by order of the Honourable Court supervise the eviction process and provide security for the exercise.
 - e. That a permanent injunction does issue against the Plaintiffs their workmen claimants' servants and or agents from trespassing on constructing on subdividing selling undertaking any form of developments or otherwise interfering or dealing with land parcel No LOC4/GAKARARA/xxx.
6. The 2nd and 3rd Defendants filed a defence in which they denied the Plaintiffs claims.
7. The 1st Plaintiff testified that the 1st Defendant is his paternal uncle, he being the only brother of his late father. That KN owned the following lands;
 - a. LOC4/GAKARARA/xxx (suit land) (Muciini) - 7 acres registered in the name of SNK
 - b. LOC4/GAKARARA/xxx (Kariko) – 2.2 acres -registered in the name of JNK
 - c. LOC4/GAKARARA/xxxx (Kiumiunii) – 1.2 acres – registered in the name of SNK
 - d. LOC4/GAKARARA/xxx (Thika) 1.6 acres – registered in the name of NK.
8. The witness informed the Court that parcel LOC4/GAKARARA /xxx though registered in the name of the 1st Defendant was in trust for his only brother JN and their respective families. He was born in 1948 on the suit land. That the two families live on each ½ of the suit land as shared by her grandmother before her death. That this was done with the help of Muhiriga (clan). Each piece was initially fenced with (mukuguno trees). He informed the Court that his father J consequently shared his ½ portion of the suit land among his three wives consequence of which he resides and farms with his family on the suit land portion of his mother, ENN. The sons of the other two wives and their families too live and farm on their portions.
9. It was his evidence that they have lived on the suit land since birth, a period in excess of 12 years, uninterrupted, openly and continuously.
10. The witness informed the Court that several of their kin have been buried on the suit land, of significance being their grandparents, father and 3 mothers interalia. He stated that he has not obtained any letters of grant of administration for the estate of his father. The estate of their grandmother N too is yet to be succeeded.
11. PW2 – SNN reiterated the evidence given by PW1 and added that he is 51 years old and he and his family too live and farm on the suit land.
12. He led evidence that though S is younger than J, the suit land was registered in his name because J was in detention at the time of land demarcation and registration.
13. When shown PEX No 16(plaint of 1975) in respect to a case between the two brothers in 1975, he informed the Court that the document has no case No and therefore difficult to know what it referred to.
14. PW3- JKN stated that he is 56 years old and gave similar testimony to PW1 and PW2. That parcel 288 was reserved for any of the married daughters of his grandmother (his aunts) in the event that they came back home to settle.
15. DW1 – TM testified and adopted her written statement dated the 22/2/18 as her evidence in chief. That she has sued on behalf of SN who is of unsound mind. That she is the wife of S, the registered proprietor of the suit land.
16. Further she added that upon getting married to S, she found the family of J and her mother in law living on the suit land.
17. She informed the Court that NK, her mother in law bequeath the suit land to S among other lands. She however retained parcel LOC4/GAKARARA/ xxx which is a family land. J was given parcel LOC4/GAKARARA /xxx but he and his family refused to relocate

there. That Simon allowed J and family to live on the suit land as they prepared to relocate to their own parcels which they have refused to do so. She contended that the Plaintiffs are wasting the land and occupying it illegally and urged the Court to grant her eviction. She averred that this suit should be dismissed on account of another pending suit No KANDARA PMCC No 91 of 2016 between the parties.

18. DW2- AK stated that he is 50 years old. He reiterated the evidence of DW1 and stated that he is the son of the 1st Defendant. He led evidence that the 4 parcels of land belonged to his grandfather KC and were shared out to his two sons by his grandmother N. He denied that the Plaintiffs are entitled to ½ share of the land through trust. He justified this by saying that in Kikuyu it is always the elder son that is registered in trust but in this case the land was registered in the name of S, the younger son.

19. He further added that J and other family members were buried on the suit land.

20. The 2nd and 3rd Defendants did not attend Court nor tender any evidence thereof.

21. The parties have filed written submissions which I have read and considered along with the evidence adduced at the trial

22. There are three key issues for determination; whether the Plaintiffs have proved trust; whether the Plaintiffs have established title by adverse possession; whether the Plaintiffs should be evicted from the suit land.

23. The suit is anchored on parcel LOC4/GAKARARA /xxx which is the suit land. The Plaintiffs' claim is based on customary trust and adverse possession. It is their case that though the title to LOC4/GAKARARA /xxx was registered in the name of the 1st Defendant, it was held under trust in favour of J and his family. The 1st Defendant on the other hand claims that Simon is the absolute owner of the land and deny any existence of trust in favour of the Plaintiffs. His case is that J's family was allocated parcel LOC4/GAKARARA /xxx measuring 2.2 acres which they have refused to relocate to. He has urged the Court to evict the family of J.

24. Customary trust is one of the overriding interests that affect registered land and subsists on the title without their being noted on the register. It is an interest that attaches on to the land. Section 28 (b) of the Registered Land Act states as follows;

“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 their being noted on the register

b).trusts including customary trusts

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions

25. Similar provisions existed under section 30(g) of the Registered Land Act (now repealed).

26. Has the Plaintiff proved trust? The principles of proving customary trust are clear. In the case of **Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR** which quoted with approval the holding in the case of **Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42**, the Court of Appeal held that Customary Law Trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.

27. PW2 led evidence that the land became registered in the name of S during demarcation of the land. I have seen receipts issued in the name of S in respect to land demarcation issued in 1975 in respect to the land. He informed the Court that J though the eldest son in the family was in detention and because of that intervening event, it fell on Simon who was available to be registered as owner but in trust for his brother. The book on Casebook on **Kenya Customary Law, 1995 by Eugene Cotran** has extensively discussed about the detention and the effects of registration in land in Central Kenya. Subject to proof, it is commonly accepted that land was registered in trust in the name of the 1st born son unless there were other reasons that gave rise to exceptions. In this case J the 1st born son was said to have been in detention at the time of demarcation and registration of the suit land in the name of Simon.

28. Evidence was led that when S sold the suit land secretly to BN, the family held a fundraiser to refund back the money to the purchaser and saved the suit land. J contributed the money too. This leads the Court to believe that this was family land and that is why the whole family including J made effort to save the land.

29. I have perused the minutes of the elders meeting that was called to discuss the issue of the suit land. The 1st Defendant categorically admitted that the suit land is family land. It is commonly accepted by the parties that the lands including the suit land belonged to the family patriarch and it is their mother N who demarcated and registered them in early 1960s. In the absence of evidence to show that Simon purchased the land, it is plausible to conclude that the land was indeed family land.

30. It is commonly accepted by the parties that the family of J live on the suit land and that family members have been buried on the land. That the land is occupied in two halves on the ground; separated by mukuguno trees which have been depleted over the years leaving only one existing on the land. On the one part is S and on the other portion is the family of his late brother J whose portion has been shared into 3 parts according to his 3 deceased wives. Evidence was led that the sons of each of the 3 wives have demarcated the land into 3 parts where they each live with their families.

31. The import of the above is that the suit land is family land. There is no explanation by the 1st Defendant as to why he would be given a large parcel of land of 7 acres alone and his brother J gets 2.2 acres. The Plaintiffs have explained that Simon held the land in trust for the rest of the family.

32. The evidence adduced in Court supports the view that the suit property is family land that was registered in the name of S as a trustee or a "Muramati" in Kikuyu language to hold for J, his late brother. The Court is persuaded that on a balance of probabilities that Defendant held the share of his brother in trust and the issue of trust is hereby determined in the affirmative.

33. Turning to the claim of adverse possession, the common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land [animus possidendi]. Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion [nec vi, nec clam, nec precario] for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted. In the case of **Titus Kigaro Munyi v Peter Mburu Kimani, CA No 28 of 2014**, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.

34. It is commonly accepted that the Plaintiffs being sons of J have lived on the suit land since their birth. They carry out farming on ½ portion of the land while Simon has confined himself on ½ share of the suit land. Evidence was led that they have buried their kin on the land. The period they have occupied is over 50 years.

35. Going by the evidence on record I am satisfied that the Plaintiffs have established title to ½ share of the land by way of adverse possession. The Court's finding on adverse possession is similarly found in the affirmative.

36. The Plaintiffs enjoy an overriding interest on the suit land that entitles them ownership and title through adverse possession. It is trite that a person cannot trespass on his own land. It is for that reason that the claim of eviction fails.

37. In the end I make orders as follows;

- a. The counterclaim of the Defendants fails. It is dismissed.
- b. A declaration that the registration of SNK in respect of Land parcel No LOC4 /GAKARARA/xxx (suit land) approximately 7 acres was held in trust for himself and his brother JNK (deceased) and his entire family.
- c. A declaration be and is hereby made that the Plaintiffs are entitled by way of adverse possession having occupied ½ share of LOC4/GAKARARA/xxx for a period of exceeding 12 years and hence the title held by the 1st Defendant has been extinguished by operation of law to the extent of ½ share.
- d. The said title be and is hereby rectified and the same be subdivided and reissued as follows;
 - i. SNK - 3.5 acres
 - ii. JK - 1.17 acres
 - iii. SNN - 1.17 acres
 - iv. JKN -C - 1.17 acres
- e. The subdivisions on the ground to conform as practicable as possible to the position of settlement on the suit land.
- f. Each party to meet the cost of the subdivision and registration of titles.
- g. The 1st Defendant is ordered to execute the requisite documents to effect the said orders in default the Deputy Registrar of this honourable Court is mandated to do so.
- h. Parties being related, I make no orders as to costs.

38. It is so ordered.

DELIVERED DATED & SIGNED AT MURANG'A THIS 11TH DAY OF DECEMBER 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Wangari HB for Kanyi for the 1st – 3rd Plaintiffs

Kuria HB for Mr Nderitu for the 1st Defendant

2nd & 3rd Defendants – Absent

Irene and Njeri, Court Assistants