



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL SUIT NO. 25 OF 2016

FLORENCE GACHERI MBAABU.....1ST PLAINTIFF

IRENE MWENDWA.....2ND PLAINTIFF

VERSUS

LYDIA MWITHIABU M'MUNYUA..... 1ST DEFENDANT

MARY KARIMI M'MUNYUA.....2ND DEFENDANT

FRANCIS MURIUNGI.....3RD DEFENDANT

MUNGANIA MUTHOMI EDWARD.....4TH DEFENDANT

JUDGMENT

Background

1. The 1st plaintiff is the mother of 2nd plaintiff. 1st plaintiff was also a wife of one Naftali Mbaabu Munyua (deceased) who was a son of 1st defendant. The 2nd defendant is a grandchild of 1st defendant hence a niece of 1st plaintiff. 1st defendant is therefore a mother in law of 1st plaintiff.
2. At the heart of the dispute is land parcel no. Nyaki/Mulathankari/1154 which has since been subdivided into several parcels numbers Nyaki/Mulathankari/2957 – 2961.
3. The original parcel of land no. Nyaki/Mulathankari/1154 was owned by one Daudi M'Munyua M'Mwongera in 1984. In year 2002, the land was jointly registered in the name of Naftali Mbaabu M'Munyua and Lydia Mwithiabi. The land then came solely into the hands of the 1st defendant who allegedly caused subdivisions on that land, where by some of the parcels were sold to 3rd and 4th defendants respectively.
4. The plaintiffs claim that the suit land Nyaki/Mulathankari/1154 was family/ancestral land and hence defendants hold the same in trust for them.
5. The defendants aver that 1st defendant became the registered owner of the land Nyaki/Mulathankari through a succession cause no. 45 of 2000.

Plaintiff's case

6. The plaintiffs suit was filed on 19.4.2016 where in paragraph 7 it has been pleaded that;

“The suit land is ancestral/family land and has been utilized by the family from time immemorial and the same has and was always held by the 1st defendant and the said Naftaly Mbaabu M’Munyua (deceased) for the benefit of the plaintiffs and their family”.

7. The plaintiffs have further pleaded that they solely live and cultivate the suit land, but the 1st defendant has stealthily subdivided the suit land and has sold the same.

8. The plaintiffs therefore seek for the following orders;

(i) A declaration that the defendants hold parcels no’s Nyaki/Mulathankari/2957 – 2961 in trust for the plaintiffs and that the 1st defendant is in breach of trust.

(ii) An order for the rectification and cancellation of titles in Nyaki/Mulathankari/2957 – 2961 and for the amalgamation back to Nyaki/Mulathankari/1154 and that Nyaki/Mulathankari/1154 be held by the plaintiffs and the 1st defendant.

(iii) A permanent injunction restraining the 1st defendant whether by herself or through the other defendants and/or anyone acting at their behest from interfering whatsoever with the plaintiffs’ entitlement to Nyaki/Mulathankari/1154.

(iv) Costs of the suit and interests at court rates.

9. During the trial, 1st plaintiff, Florence Gacheri testified and also adopted her statement recorded on 19.4.2016 as her evidence. She reiterated the averments made in the plaint. She added that the suit land is their family home from time immemorial, that is where they have always lived and they have greatly developed this land. The developments are itemized as follows;

- A permanent 3 bedroomed house, 2 semi-permanent houses, 3 self-contained rental houses, 1 pit latrine, one external bathroom.

- Cultivated assorted crops and trees like bananas, avocados, macadamia and mangos.

10. Pw 1 also stated that her deceased husband Naftaly Mbaabu M’Munyua is buried on the suit land and so is her daughter Purity Ngugi.

11. PW 1 claims that 1st defendant subdivided the suit land and shared it amongst the defendants. Further, the 2nd defendant started threatening her with forceful eviction as from April 2016. She avers that plaintiffs shall be rendered homeless if evicted. Pw 1 also stated that although Daudi was the 1st registered owner of the suit land, he got the same from their father who in turn got it from their father.

12. PW 2 is one Priscilla James Mwebia who adopted her statement dated 19.4.2016 as her evidence. She is the daughter of 1st defendant. She averred that the suit land has always been family land since time immemorial, hence her father one Daudi M’Munyua M’Mwongera and subsequently the 1st defendant and Naftaly Mbaabu M’Munyua have always held the land on behalf of the family members.

13. PW 2 confirmed that the suit land was developed with permanent and semi-permanent buildings as well as crops. She also confirmed that Daudi M’Munyua M’Mwongera, Naftaly Mbaabu and Purity Ngugi, a child of Naftaly are all buried on the suit land. PW 2 further stated that plaintiffs have nowhere to go and that the succession process did not change the fact that the suit land is ancestral land, hence the same is family land.

14. PW 3 one Erasmus M’Mwongera adopted his statement dated 19.4.2016 as his evidence. When he

appeared in court to testify the court observed that this witness is not only very old but he is also blind. He said he is 94 years old. He is a brother of Daudi M'Munyua M'Mwongera, (the deceased husband of 1st defendant). He also stated that the suit land was always family/ancestral land and his testimony is more or less like that of PW 1 & 2.

15. In cross examination PW 3 stated that Daudi (his brother) got the land as '*Mburago*' which means it was clan land and so Daudi got the land from his father as ancestral land. He added that the three bedroomed permanent house was built by Daudi while the semi-permanent rental houses were built by Daudi's children, though he is not very certain as to which child built the rental house.

16. In support of the plaintiff's case, the documents in plaintiff's list of 19.4.2016 items a-d were produced as plaintiffs' exhibit 1-4 respectively. These documents are;

(i) Green card for the parcel no. Nyaki/Mulathankari/1154.

(ii) Photographs capturing developments on the land.

(iii) Certificate of official search for parcels Nyaki/Mulathankari 2957 – 2961.

(iv) Demand notice for the eviction.

Defence case

17. A statement of defence was jointly filed on 13.5.2016 for all the defendants where plaintiffs' claim is denied. Therein, it is averred that the suit land was never ancestral land. The 2nd, 3rd and 4th defendants added that they are purchasers for value without notice.

18. DW 1 is the 1st defendant, Lydia Mwithiabi who adopted her statement dated on 13.3.2018 as her evidence. The court observed that the witness is very old and was walking with assistance. She averred that she is the widow of Daudi M'Munyua M'Mwongera who owned the suit land, which was never ancestral land and that all the developments on the land are hers.

19. Upon the death of her husband, DW 1 states that the land was registered in the joint names of herself and her son Naftaly Mbaabu M'Munyua who died. So she became the sole proprietor of the suit land. She then subdivided it and transferred the same to 3rd and 4th defendants. She denies holding the suit land in trust for the plaintiffs.

20. During cross examination DW 1 stated that 1st plaintiff was staying on another parcel of land where she has built, but as at now she stays on the suit land, while herself, she stays at her daughter's house. DW 1 confirmed that Naftali Mbaabu is buried on the suit land.

21. DW 2 is one Mary Karimi who adopted as her evidence her statement dated 13.3.2018. she confirmed that 1st defendant is her grandmother whereas 1st plaintiff is a wife of her uncle. She averred that the suit land was owned by her grandmother jointly with Naftaly Mbaabu but after the latter's death, the land reverted back to 1st defendant. She averred that her grandmother subdivided the land and gave her a portion of it.

22. During cross examination, DW 2 stated that 1st plaintiff stays on the suit land for all the years she has been there. She further stated that plaintiff cultivates on the portion of the land which DW2 wanted her evicted from. DW 2 identified this portion as parcel No. 2957 which she (DW 2) was given by Lydia.

23. DW 3, one Edward Muthomi Mungania is the 4th defendant. He adopted as his evidence his statement dated 7.5.2018. he avers that he is an innocent purchaser of ¼ acre out of the suit land. He bought this land from 1st defendant in year 2012 and he has a title. He avers that the land is cautioned so he is unable

to utilize the same.

24. During cross examination, DW 3 stated that he had found the owner of the land staying on that land with other family members but he did not find Florence Gacheri on that land.

25. DW 4 is one Francis Muriungi who is the 3rd defendant. He adopted as his evidence, his statement dated 24.4.2018. He avers that he bought ¼ acre from the 1st defendant and he got his title in 2013.

26. In support of defence case, the documents in defendants list dated 22.5.2018 items 1 – 3 were produced as exhibits. These documents are:

- The green card for the suit land parcel no. Nyaki/Mulathankari/1154.
- Death Certificate of Naftaly Mbaabu
- Advocates letter dated 25.10.2010.

Submissions

27. In their submissions, the plaintiffs reiterated what was advanced as evidence by the plaintiffs' side. In particular, it was submitted that the suit land is ancestral land and that 1st defendant who had denied that the land was not ancestral land was not able to state how her husband Daudi M'Munyua got the land. It was further submitted that plaintiffs have always resided on the suit land but have not been provided with any portion of the sub-divided land.

28. The plaintiff's proffered the case of **George Mbiti Kiebia & another vs Isaya Theuri M'Lintari & another (2014) Eklr** to support their case.

29. For the defence, it was argued that the suit land Nyaki/Mulathankari/1154 was registered as joint proprietors vide the succession cause no. 45 of 2000. However, Naftaly died hence the mother became the absolute owner of the suit land as per section 49 of the Land Act and section 91 (4) (b) of the Land Registration Act.

30. The defence also denies that the land was ancestral land. It is averred that the land was owned initially by Daudi M'Munyua, the husband of 1st defendant. Citing the case of **Njenga Chogera vs Maina Wankira Kimani & 2 others (2005) Eklr**, it was emphasized that customary trust is proved by leading evidence on the history of the suit land and the relevant customary law on which trust is founded.

31. It was further submitted that the joint registration of the suit land between Naftaly and 1st defendant did not envisage the creation of a trust. Reference was made to the case of **Julebati African Adventure Limited & another vs Christopher Michael Lockley (2017) eKLR** where the court held that;

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. This is because the law never implies the court never presumes a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must clearly be determined before a trust will be implied....”

32. It is further submitted that plaintiff has no grant in respect of the estate of Naftaly M'Munyua hence she has no locus standi. On this point, reference is made to the case of **Nairobi ELC No. 585 of 2013 Teresia Wairimu Kirima vs Father Romeo & another**. It has been argued that the plaintiffs ought to have appealed in the succession cause no. 45 of 2000.

33. The defence has also argued that this case is Res judicata to High court succession cause no. 45 of 2000 where the estate of deceased was distributed.

Determination

34. I have duly considered the pleadings, the evidence adduced by the parties and the submissions thereof. I find that there are undisputed issues which are well captured in the brief history outlined at the beginning of this judgment. I also find that I dealt with the issue of locus standi as well as res judicata in my ruling in this file dated 15.11.2017 where I dismissed the preliminary objection raised on issue of locus standi and res-judicata.

35. I now frame the issues for determination as follows:

- 1) *What is the impact of joint registration of the suit land in the name of 1st defendant and one Naftali Mbaabu?*
- 2) *Whether the subdivision of the land was lawful.*
- 3) *Whether the suit land Nyaki/Mulathankari/1154 was (is) ancestral land.*
- 4) *Whether plaintiffs are entitled to the prayers sought in the plaint.*

Joint proprietorship

36. **Section 49 of Land Act** provides that;

“If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate”.

37. **Section 91 (4) (b) of the Land Registration Act** provides that;

“If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently— (b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly”.

38. The aforementioned provisions of law echoes the former legal regime on joint proprietorship which was anchored under section 102 (b) of the Registered land act cap 300 laws of Kenya (repealed) which provided that;

“On the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.

39. The Registration of the suit land in the name of 1st defendant and one Naftaly M’Munyua as joint proprietors has not been challenged. The fact that Naftaly died is also not disputed. It follows then that defence exhibit 3, the letter to the Land Registrar written on 25.10.2010 was anchored in law.

40. In the case of **Isabel Chelangat vs, Samuel Tiro Rotich & 5 Others (2012) eKLR ELC NO. 915 OF 2012 ELDORET**, it was held that joint tenants are in law regarded to be one, and on the death of a joint tenant, that tenant’s interests shall vest in the surviving tenant or tenants jointly.

41. It follows then that the registration of the suit land in the name of 1st defendant after the death of Naftali Mbaabu was lawful.

Whether the subdivisions of the suit land undertaken by 1st defendant were lawful

42. Having established that 1st defendant’s registration of the land as a sole owner was lawful, then it follows that she had the rights and interests of an absolute proprietor pursuant to provisions of section 24,

25 and 26 of the Land Registration Act **BUT** subject to the overriding interest set out under section 28 of the aforementioned act.

43. Section 28 of the Land Registration Act provides that:

“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”

44. The doctrine of joint ownership just like a sole proprietor of land doesn't extinguish or defeat a claim based on customary trust.

Whether the suit land was ancestral land

45. There are tell-tale signs that the suit land was ancestral land. Firstly, it has emerged that this was where the larger family of Daudi M'Munyua ordinarily resided. That is why when Naftaly got married to 1st plaintiff, the latter was brought to the homestead and she started staying there. This piece of evidence is derived from 1st defendant's testimony.

46. It has also emerged that when family members died, like Naftaly Mbaabu and his daughter Purity they were buried on this land.

47. I find that the evidence of PW 3, Erasmus M'Makathimo M'Mwongera has put this issue in a better perspective. I noted that this witness is very old and was blind. He also has no interest in the suit land. He is the only witness who elaborated on where the suit land came from unlike the 1st plaintiff (pw1) and the 1st defendant (DW1) who were economical with the truth on this issue. Erasmus stated that the suit land was 'Mburago' which means it was clan land acquired by his own father but was given to his brother Daudi, the husband of 1st defendant. I have no doubts in my mind that the land in question was ancestral land.

Whether plaintiffs are entitled to the prayers sought in the plaint

48. The 1st plaintiff is the wife of Naftaly Mbaabu (deceased) and it appears she has been residing on the suit land. In the case **SCOK petition no. 10 of 2015 Isack M'Inanga Kiebia vs Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari**, the court set out some of the elements that would qualify a claimant as a trustee as follows:

(i) The land in question was before registration, family, clan or group land.

(ii) The claimant belongs to such family, clan, or group.

(iii) 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.

(iv) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

(v) The claim is directed against the registered proprietor who is a member of the family, clan or group”.

The Supreme 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”.

49. Even though plaintiffs are part of the family members occupying the suit land, it was incumbent upon them to adduce evidence regarding the extent of their claim on the suit land. After all, this land doesn't belong to plaintiffs alone. 1st plaintiff's mother in law (DWI) occupied this land long before her. She has other children too. It was incumbent upon 1st plaintiff to state with certainty which part on the suit land she was occupying. On this point, I have found 1st plaintiff rather economical with the truth. She even distorted the truth when she itemized the developments on the land, particularly the 3 bedroomed permanent house, the 2 semi-permanent houses, and the 3 self-contained rental houses – see paragraph 8 of the plaint.

50. It is common ground that land is a precious commodity in this country. It is even more precious when it has been developed with such structures like permanent and rental houses. Plaintiff has even availed photographs which confirm these developments. The question is, were these her developments, or were such developments carried out by her husband? Much as one can claim land to be family or ancestral land, the reality is that each family member knows their extent of use and occupation of such family land, where such an individual carries out their own particular developments. Thus land may be traced to the ancestors and is handed down to generations in terms of intergenerational equity. But it is not used in a communal manner. The user and occupational rights for each individual or nuclear family are clearly defined on the ground.

51. In the instant case, again I have found PW 3 to be the witness who shed light on how the developments on the land came to be. PW 3 stated as follows:

“The three bedroomed house was built by Daudi. This is a permanent house. There are two semi-permanent houses which were built by Daudi's children, I don't know who built it”.

52. The logical conclusion to make is that the developments on the land belong to 1st defendant. However, it has emerged that the old lady, 1st defendant has even left her land ostensibly because of 1st plaintiff's occupation of it.

53. The fact that plaintiffs have even listed the houses built by Daudi as theirs is a clear manifestation that they simply want the whole land. They ought to have been able to pin point their extent and occupation of the suit land. They have failed to do so.

54. It has also emerged that a part from plaintiff and her daughter, 1st defendant and 2nd defendant, the family also has other family members too, like the person being called Patrick, and PW 2 too. The suit land is only 0.405 ha. (approximately 1 acre). It was incumbent upon the plaintiffs to state exactly the part of the suit land where they were occupying instead of appearing to claim the whole land.

55. Further, I find that it is not economically and even legally viable for each family members to keep on holding unto such ancestral land. when the land is too small to be shared.

56. Customary trust is an overriding interest that runs and attaches to the soil. It is not the place of this court to define the extent of plaintiff's attachment to the soil. The court has taken cognizance that there are other family members who are also entitled to this land. The 1st defendant ought not to have been subjected to the process of living her home because of plaintiffs' claim. It is not lost to this court that 1st defendant is now very old. Subjecting her to a reverse process of the subdivision of the land is also very traumatic.

57. The upshot of my findings is that plaintiffs case is not merited and the same is hereby dismissed. Each party to bear their own costs, as some parties like plaintiffs and 1st and 2nd defendants are family members.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 4TH DECEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muriithi J. Holding brief for E. Kimathi for plaintiff

2nd and 3rd defendants

HON. LUCY. N. MBUGUA

ELC JUDGE