



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 589 OF 2013 (OS)**

**RAKERI WAIRIMU KIHARA (Suing as the Administrator of the  
Estate of the Late James Kihara Gatei).....PLAINTIFF**

**AND**

**JOSEPH THUKU GATEI.....DEFENDANT**

**J U D G M E N T**

**Background**

1. On 21/5/2013, the plaintiff, on behalf of the estate of the late James Kihara Gatei, took out Originating Summons dated 20/5/2013 seeking the following orders:-

**a. That the respondent be declared to have been holding in trust for the benefit of the deceased estate, a half (½) portion of Land Parcel No Githunguri/Kiairia/T 477 and the respondent be ordered to transfer the said half (½) portion of the suit land to the applicant.**

**b. That in the alternative Rakeri Wairimu Kihara be declared to have acquired title by adverse possession to a half (½) portion of the suit premises known as Githunguri/Kiairia/T 477 and the respondent be ordered to transfer the same to the applicant.**

**c. That costs for the proceedings herein be borne by the respondent.**

2. The plaintiff is the widow of the late James Kihara Gatei (**the deceased**). The late James Kihara Gatei and the defendant in this suit, Joseph Thuku Gatei, were brothers. The defendant was a younger brother to the deceased. They were sons of the late Naomi Wangari Gatei.

3. The suit property, Land Parcel Number Githunguri/Kiairia/T477 measures approximately 0.21 Acres and was transferred into the name of the defendant on 21/7/1967. Both the plaintiff and the defendant agree that the suit property belonged to the late Naomi Wangari Gatei, mother to both the deceased and the defendant herein. Prior to acquisition of the suit property by the late Naomi Wangari Gatei, it belonged to one Githuthu Gitumuta. It is agreed by both parties that Naomi Wangari Gatei bought the land and caused it to be transferred directly into the name of the defendant. Both the deceased and the defendant have continuously lived and raised their respective families on the suit property for more than 50 years, each occupying one half of the suit property.

**Plaintiff's Case**

4. The plaintiff's case is that the suit property is family land which belonged to the late Naomi Wangari Gatei. She further contends that the defendant was registered as proprietor of the suit property to hold the same in trust for the family of the late Naomi Wangari Gatei and her two sons; the defendant herein and the late James Kihara Gatei. She seeks an order compelling the defendant to transfer one half of the suit property to the estate of her late husband, James Kihara Gatei (the deceased).

**Defendant's Case**

5. The defendant's case is that the suit property was given to him by his mother, Naomi Wangari Gatei. He contends that his deceased brother, James Kihara Gatei, was similarly given a piece of land situated at Ruiru by their mother. He does not however, disclose the details of the land given to his late brother. He further contends that his late brother subsequently sold the land he was given in Ruiru and they jointly bought another piece of land, Parcel Number Githunguri/Gathangari/2098 (Parcel No 2098). He contends that he had all along been under the impression that his deceased brother would relocate his family to Parcel No 2098 which is jointly owned by him and the deceased.

## Evidence

6. The originating summons was canvassed through both oral and affidavit evidence. The plaintiff testified and called one other witness. The defendant too gave testimony but did not call any witness.
7. PW1- Rakeri Wairimu Kihara (plaintiff) adopted her affidavit in support of the originating summons as part of her sworn evidence in chief. She stated that she is the administrator of the estate of the late James Kihara Gatei who is her late husband. She added that her late husband and her late mother in law, Naomi Wangari Gatei, bought the suit property and her mother in law caused it to be registered in the name of the defendant to hold it in trust for both himself and his late brother, James Kihara Gatei. She further testified that subsequently, the suit property was demarcated into two equal portions and the two brothers took their respective portions, and together with their respective families, they have lived on the land, cultivated their respective portions and co-existed peacefully. PW1 further testified that since the death of her husband in 2010, the defendant has been trying to sell the whole of the suit property including her late husband's portion. This prompted her to seek assistance from the local administration and to lodge a restriction on the suit property. Lastly, she testified that the defendant's refusal to transfer her late husband's one half portion of the suit property prompted her to initiate this suit.
8. PW2- Serah Wanjiku Muhinja testified that she was the late James Kihara Gatei's first wife, having gotten married to him in October 1960. They got one child. She stated that when she got married to James Kihara Gatei, the defendant was a young boy schooling. She testified that the suit property previously belonged to her uncle Githuthu Gitumuta who sold it to her former mother-in-law, Naomi Wangari Gatei, for a sum of Kshs 300. She further testified that around 1965, the seller insisted that her mother-in-law had to top up the purchase price to make it Kshs 1000 in order for him to transfer the land to her mother-in-law. Because her mother-in-law did not have the demanded top up money, her late husband, James Kihara Gatei, paid the additional purchase price. After that, her mother-in-law caused the suit property to be transferred into the name of the defendant to hold it in trust for herself and for the two brothers. She stated that throughout the subsistence of their marriage, they lived on the suit property. She separated with the late James Kihara Gatei in 1967, the same year the land was transferred from Githuthu Gitumuta to the defendant.
9. DW1 - the defendant, testified that she was given the suit property by his mother. He added that deceased brother too was given a piece of land situated in Ruiru. He stated that he did not have details of the land given to his late brother. He further stated that his late brother sold his land in Ruiru and they jointly bought Parcel No 2098. Lastly he stated added that his late brother passed away before relocating his family to Parcel No 2098.

## Issues and Determination

10. This suit raises two issues. The 1st issue is whether the defendant holds one half of the suit property in trust for his late brother, James Kihara Gatei's Estate. The second issue is whether the late James Kihara Gatei had, prior to his death, acquired title by adverse possession to one half ( ½ ) portion of the suit property. I will deal with the first issue first
11. It is common ground that the suit property was purchased by the late Naomi Wangari Gatei who caused it to be registered in the name of one of her two sons, Joseph Thuku Gatei (the defendant). It is also common ground that both Joseph Thuku Gatei and the late James Kihara Gatei together with their respective families have lived on the small piece of land since their mother bought it more than 50 years ago, each occupying and cultivating clearly demarcated one half portion (1/2) of the suit property. PW1 and PW2 contend that the defendant was registered as proprietor to hold the title in trust for the two brothers. The defendant disputes this and contends that his late mother gave him the suit property and similarly gave his late brother, James Kihara Gatei, an unidentified piece of land in Ruiru. The family of the late James Kihara Gatei still leaves on the one half portion of the suit property to date.
12. Evidence was presented to the effect that on the ground, the tiny piece of land is clearly demarcated into two equal portions, one occupied by the defendant and his family and the other occupied by the family of the deceased. There is no evidence of any past or present attempt by the defendant to get his late brother or his late brother's family out of the one half portion which they have occupied ever since their late mother, Naomi Wangari Gatei, bought the suit property more than 50 years ago. PW2 testified that the suit property was registered in the name of the defendant to hold it in trust for the family because the defendant was the youngest of the two siblings and their mother felt that the younger son required protection against possible disinheritance.
13. The evidence presented to the court supports the view that the suit property was acquired by the late Naomi Wangari Gatei as family property for her two sons. It also discloses that Naomi and her two sons together with their respective families have lived on the suit property for over 50 years. The totality of the above evidence is that, it points to the existence of a customary trust in which the defendant has been a trustee, or a *Muramati* in Gikuyu language. The court is therefore convinced, on a balance of probabilities, that the defendant held and still holds one half of the suit property in trust for his late brother, James Kihara Gatei's estate. The court's finding on the issue as to whether the defendant holds one half of the suit property in trust for his late brother's estate is therefore in the affirmative.
14. The second issue is whether the late James Kihara Gatei had, prior to his death, acquired title by adverse possession to one half portion of the suit property. 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 **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.
15. The doctrine of adverse passion has its statutory underpinnings in **Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act**. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in **MTAMA LEWA v KAHINDI NGALA MWAGANDI, [2015] eKLR** and found that the doctrine does not offend the spirit and letter of

the Constitution of Kenya 2010 on protection of the right to property.

16. From the evidence outlined above, it is clear that the late James Kihara Gatei's occupation of the suit property fully satisfies the mandatory requirements for acquisition of title under the doctrine of adverse possession because all the essential features of the doctrine are present in the circumstances of the present suit. The court's finding on the second issue is therefore similarly in the affirmative.

17. In light of the above findings, the Originating Summons herein is successful on both limbs and is allowed in the following terms:-

**a. It is hereby declared that the defendant, Joseph Thuku Gatei, holds in trust for the benefit of the estate of his late brother, James Kihara Gatei, one half (½) portion of the suit property, Land Parcel No Githunguri/Kiairia/T477.**

**b. The defendant is hereby ordered to transfer the said one half (½) portion of the suit property to the plaintiff, Rakeri Wairimu Kihara to hold the same as Administrator of the estate of the late James Kihara Gatei.**

**c. Subdivision, title, transfer, processing and related costs shall be born equally by the parties to this suit.**

**d. The Deputy Registrar of this court is directed to execute relevant instruments should the defendant fail to execute them within 30 days.**

**e. Each party shall bear own costs of this suit.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF MARCH 2018.**

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**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Gachuhi for the plaintiff

No appearance for the Defendant

Halima - Court clerk