



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 30 OF 2017 (Formerly Meru H.C.C. No. 128 of 2002)

CHARLES KABURU.....PLAINTIFF

VERSUS

MUNYUA NDATHO.....DEFENDANT

JUDGEMENT

Background

1. Plaintiff is a younger brother of defendant, both born of the same father and mother. They both reside on land parcel number Abothuguchi/Kariene/601 (the suit land). The said land is registered in the name of defendant. During the trial, this land was referred to as the Kariene land.
2. Plaintiff is claiming for half a share of the suit land on the basis that defendant is holding the land in trust for him.
3. The case has had a turbulent history, having been in court since year 2002. Plaintiff testified and even produced some exhibits on 7.3.2006. he was to be cross examined five years later on 8.3.2011!, and he was recalled to give further evidence almost six years later on 13.3.2017.

Plaintiff's case

4. In the plaint filed on 10.7.2002, plaintiff claims that the suit land is family land but during the time of registration on or about 15.12.1966 defendant became the registered owner of that land by virtue of being the eldest son of their father M'Ndatho M'Imwera. Plaintiff avers that at that time, he was a minor aged 12 years and was in school.
5. Plaintiff has further pleaded that in 2001 he requested defendant to transfer to the plaintiff, the latter's rightful share of land, but defendant declined hence the filing of the suit in 2002.
6. Plaintiff gave evidence and also relied on his statement filed on 23.11.2016. He also called one M'bagiri M'Meru as his witness who also testified and relied on his statement filed on 23.11.2016.
7. Plaintiff was emphatic that although he farms on land parcel Abothuguchi/upper-Kaongo/749, he resides with his family on parcel No. Abothuguchi/Kariene/601 (the suit land).
8. PW 3, M'bagiri M'Meru gave a history of the relationship between the parties as well as the history of the suit land. He informed the court that he is a son of M'Meru M'Imwera who in turn was son of

M'Imwera. He further says that plaintiff and defendant are sons of Ndatho M'Imwera who was son of M'Imwera and hence PW 3's father the (M'Meru M'Imwera) and the litigants' father (Ndatho M'Imwera) are brothers (sons of M'Imwera) , while himself, he is a cousin of plaintiff and defendant. PW 3 says that the suit land initially belonged to M'Imwera and during the time of demarcation and consolidation the land belonging to M'Imwera was divided into two. One was assigned to Ndatho M'Imwera and the other went to M'Meru M'Imwera. M'Meru's portion was then subdivided into two whereby PW 3 got one portion whereas his brother one M'Mugo got another portion. This happened because apparently PW 3's father had died way back in 1931.

9. PW 3 further explained that during that time of demarcation/consolidation, Ndatho M'Imwera was still alive and he had instructed defendant to be the one to be registered in respect of the suit land because plaintiff was young.

10. PW3 further told the court that Ndatho M'Imwera had another small piece of land which is 20 points. This is the Kaongo land.

11. Plaintiff testified that he has always lived on the Kariene land and his sons have also built on that land. He has planted crops like coffee and bananas and he has mature trees on the farm. His parents were buried on the suit land (at Kariene).

12. Having lived on this land from the time he was born in 1954 plaintiff is now demanding for a share of his alleged entitlement of the land at Kariene.

13. In support of his claim, plaintiff produced the following documents as exhibits;

- Pexh 1 – copy of green card for parcel No. Abothuguchi/Kariene/601, which shows that this land was registered in the name of defendant way back on 15.12.1966.
- Pexh 2 – copy of the green card for parcel No. Abothuguchi/Kariene/749. Which shows that this land was registered in the name of Ndatho M'Imwera on 23.6.1977.
- Pexh 3 demand letter to plaintiff from defendants advocate dated 25.6.2002
- Pex 4 – Another green card for parcel No. Abothuguchi/Kariene/601 (certified on 8.3.2011). It shows that an inhibition was issued in this suit on 19.8.2002 against the suit land, and it was to remain in place until this suit is finalized.
- Pex 5 - Judgment in Nkubu SPM's Criminal case No. 957/04 whereby plaintiff had been charged with offence of malicious damage to property. The complainant was the defendant.

Defence case

14. Defendant filed his statement of defence and counter claim on 11.7.2002. He has pleaded that he is the registered owner of the suit land Abothuguchi/Kariene/601. He also avers that plaintiff has his own land, the same being Abothuguchi/Kaongo/749 even though the land is in the name of their father Ndatho M'Imwera. Defendant has further pleaded that he only generously allowed plaintiff to occupy the suit land pending his shifting to his own land at Kaongo. That is why in his counter claim, defendant is seeking for eviction orders against the plaintiff.

15. In his statement filed on 13.10.2016, defendant avers that he acquired the suit land Abothuguchi/Kariene/601 by the process of gathering. This averment is repeated by defendant's witness DW 2 one M'Ikiara Kirimunya a neighbor. The two claim that defendant's father never gathered any land. The two also aver that plaintiff was only allowed to stay on the suit land because plaintiff was young.

16. Defendant has admitted the existence of the Nkubu case and that he was satisfied with the decision given thereon.

Determination

17. I have considered the issues raised herein as well as the submissions of the parties, including cited case law. The authorities proffered by plaintiffs are;

(a) **Mumo versus Makau (2002) 1 EA 170.**

(b) **Mbui Mukangu versus Gerald Mutwiri Mbui Nyeri Civil Appeal NO. 281 of 2001**

(c) **Kanyi versus Muthiora (1984) KLR 712.**

(d) **Mwangi & another versus Mwangi (1986) KLR 328.**

(e) **M’Mwirichia & another versus M’Ikiugu & others.**

The Authorities proffered by the defendants are:

(a) **D.T Dobie & Company (K) LTD versus Wanyonyi Wafula Chebukati (2014) eKLR.**

(b) **Kanyi Murugu versus Zipporah Wanjiru Mwoni (2008) eKLR.**

18. It is not disputed that plaintiff and defendant are brothers, that they both stay on the suit land and that defendant is the registered owner of the suit land (Abothuguchi/Kariene/601).

19. The issues for determination are; **whether the land parcel No. Abothuguchi/Kariene/601 is ancestral land, whether defendant holds the land (part of it) in trust for the plaintiff and whether plaintiff should be evicted from the suit land.**

20. 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— trusts including customary trusts”.***

21. In **Peter Gitonga vs. Francis Maingi M’Ikiara Meru HCCC 146 of 2000 Lenaola J** (as he then was) held that; **“registration is a creation of the law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”.**

22. I therefore have to consider the evidence adduced herein in totality to determine whether defendant holds the suit land in trust for his brother on the basis that this was ancestral land.

23. I have considered the family history particularly when and who settled on the land as narrated by each opposite side. The evidence adduced by both sides is that plaintiff has for the longest time lived on the suit land. Defendant however has added that plaintiff’s occupation of the suit land was on the basis of a license. Quoting R.H. Maudsley & Burn in **“LAND LAW CASE AND MATERIALS”**, 4th edition, defendant has submitted that ***“a licence is a permission to enter land. It makes lawful what would otherwise be a trespass, and in the absence of special circumstances, it’s revocable at the will of the licensor”.***

24. Plaintiff claims that he was born on the suit land, but defendant states that plaintiff came when he was young boy. In his testimony defendant had stated that ***“Kaburu has been on that land since he was a child. You can’t chase a child away.....”.*** If defendant could not chase his brother when the latter was a child, then why didn’t he do so when the latter attained age of majority?. There is no evidence to indicate that defendant attempted to revoke the **“Licence”** he had given his brother even in plaintiff’s adult life until around year 2001 – 2002. This is the time plaintiff had started agitating for his share of the land, even calling upon their clan to intervene.

25. It is not disputed that the parents of the litigants had actually settled on the suit land and that is where they were buried.

26. A claim has been made by defendant that their father's land was the one at Kaongo, which land now belongs to the plaintiff.

27. True, the Kaongo land Abothuguchi/Kaongo/749 is in the name of Ndatho M'Imwera, the father of the litigants. However, there is no clear evidence to indicate that this was the ancestral land. In defendant's statement of 13.10.2016, he has stated that **"My father's land is at Kaongo where we used to live as a family before I moved out"**. However, when he was testifying Defendant had stated that **"plaintiff was circumcised at Mauro where we used to stay at a place where my father had been given a piece of land by Mzee called M'Arimba. I took them from Maura with my parents to Kariene....."**.

28. This evidence is in tandem with the testimony of PW 3 in relation to the issue of Marua. PW 3 had stated that **"The parents of the parties came to that land during the time of land consolidation. It is a long time ago. They used to stay at a place called Maura before settling on the present land. Munyua and Kaburu came when they were very young and they came with their parents....."** .

29. Regardless of whatever era of time the family of the litigants came to settle at Kariene, the fact remains that they came from Maura and not Kaongo.

30. There is no logical explanation as to why DW 2, the neighbor of the two litigants has claimed that he knew the family well and that the father of the litigant used to stay at Kaongo, when defendant himself has given contrary evidence.

31. It is not also clear as to when the Kaongo land became available as ancestral land or land of the father of the litigants. Going by the green card produced as plaintiff exhibit 2, Ndatho M'Imwera was issued with the title deed for parcel no. Abothuguchi/Kaongo/749 on 11.9.1992, whereas the registration was opened on 23/6.1977. This evidence does not in any way indicate that Kaongo land was ancestral land.

32. How was the suit land acquired?. Both defendant and his witness DW 2 claim in their statements that defendant is the one who had gathered the suit land. However, when defendant was testifying, he told the court that **"There was no one there when I bought the land....."** in reference to the suit land. Why this contradiction?.

33. I find that the evidence of PW 3 is rather consistent and plausible. He appears to have a good grasp of the family history. He has given an account of how his grandfather's (I'Mwera) land was shared out between his two sons, Ndatho and M'Meru. According to PW 3, the family had land both at Kaongo and at Kariene. For PW 3, he settled at Kaongo but his children stay at Kariene.

34. Defendant also acknowledges that some family members of PW 3 stay at Kariene, but was evasive as to how his cousin's family came to settle at Kariene. At some point defendant stated that the brother of PW 3 bought the land at Kariene, then he went on to state that he would not know if the Kariene land belonged to the father of PW 3 or not as that family was rich.

35. I have found DW 2 to be a rather unreliable witness who appears to distort facts. This witness had opened his testimony as follows; **"I am M'Kiara Kirimunya from Kariene. I only hear about Kaburu but I don't know him"**. He then proceeded to give a rather lengthy narration about the family even stating that Plaintiff settled on the suit land because he had nowhere to stay. But in his statement filed in court on 13.10.2016, DW 2 states that plaintiff has extensively developed the Kaongo land and is in active occupation. This is an indication that the witness is not a credible one.

36. From his testimony, plaintiff avers that he not only lives on the suit land but that the land is clearly demarcated. It is their father who divided the suit land into two. Plaintiff has raised his children on this land and he has 280 coffee trees, bananas macadamia, gravellier, yams, goats and cows etc. In the Nkubu criminal case no. 957 of 2004, where plaintiff was accused of having cut a macadamia tree belonging to the defendant herein, witness for the defendant (read prosecution witness no. 2) had stated that he had seen accused leaving his farm and went to complainant's farm and cut a macadamia tree. This again gives credence to plaintiff's contention that their respective portions of the land are clearly demarcated on the

suit land.

37. From the fore going analysis, it is clear that the litigants have never settled at Kaongo, that the family came from Mauro to Kariene, that the parents of the litigants were buried at Kariene and that plaintiff has known no other home except the one at Kariene.

38. The case of **Kanyi Murugu vs. Zipporah Wanjiru civil Appeal no. 141 of 2002 Nyeri** cited by the defendant is distinguishable from the present case in that in the Kanyi Murugu case, the appellant desired to inherit the property of a deceased person but he was at pains to establish his relationship with the deceased, and in the final analysis, he was declared to be a stranger by the court.

39. On the other hand, the authorities cited by the plaintiff do support the claim of customary trust. In particular, I make reference to **M'Arithi M'Ichudi vs. M'Muthamia M'Ichudi, Meru H.C Civil Appeal no. 24 of 2005**, (cited by the plaintiff), where **Kasango J** observed that; **"the area of customary trusts has been the subject of many decisions of the courts. In all the decided cases that I have come across, the courts have found that trusts can be found where there is possession and occupation by family members over the property. The courts have found that in such situations such as occupation and use of land give rise to a trust which is capable of protection under the Registered Lands Act."** Also see-**Mbui Mukangu vs. Gerald Mutwiri Mbui Nyeri Civil Appeal no 281 of 2000**.

40. In **Jason Gitimu Wangara versus Martin Munene Wangara ELC case No. 278 of 2013 Kerugoya**, the court was dealing with a more or less similar situation. The dispute over the land was between two brothers whereby evidence adduced disclosed that members of the plaintiff's family had been buried on the land. It was held that; ***"It was probable that plaintiff was given the land in his capacity as the family's first born son in accordance with Kikuyu customary law, he held the land in a trust situation for the benefit of the family"***.

41. I am inclined to believe that plaintiff settled on the suit land because the same was family land. That is why he has been in occupation and possession of a portion of the suit land. It was therefore probable as claimed by plaintiff and PW 3 that defendant was registered as the owner of the land because he was the first son in the family, whereas plaintiff was a minor, even if their father was alive.

42. Defendant desires that his brother, the plaintiff, be evicted from the Kariene land, as the latter's land is the one at Kaongo. However, the undisputed fact is that the Kaongo land is in the name of Ndatho M'Imwera, the father of the litigants who is deceased. The applicable law regarding the distribution of such land is the law of succession Act. This is hence not the forum to determine how the Kaongo land should be shared out.

Conclusion

43. I proceed to grant the following orders;

(i) A declaration is hereby made that Munyua Ndatho holds half a share of parcel number Abothuguchi/Kariene/601 in trust for Charles Kaburu.

(ii) An order is hereby issued for Abothuguchi/Kariene/601 to be subdivided into two equal shares. One such equal share shall be registered in the name of Charles Kaburu and it will include the portion of the land he is already occupying, while the other equal share shall be registered in the name of Munyua Ndatho.

(iii) The land registrar is granted leave to dispense with the necessity of the original title.

(iv) The Deputy Registrar or the Executive Officer of this court is hereby authorized to sign any documents to facilitate the subdivision of and transfer of land parcel no Abothuguchi/Kariene/601 to put into effect the judgment of this court.

(v) As to costs, I have taken into account that the litigants are brothers and that defendant is quite old. I have also considered the lengthy litigation history which may have taken a toll on the litigants resources. In the circumstances, I direct that each party bears their own costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 25th APRIL, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Mrs. Ntarangwi holding brief for plaintiff for Nyamu present

Miss Nyaga for defendant present

Plaintiff – present

Defendant – present

HON. LUCY. N. MBUGUA

ELC JUDGE