



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 702 OF 2003

(FORMERLY HCCC NO. 702 OF 2003)

NGANGA KAHUHA.....PLAINTIFF

VERSUS

MUNYUA KAHUHA.....DEFENDANT

JUDGEMENT

1. The Plaintiff and Defendant were brothers. The Plaintiff filed this suit on 10/7/2003 seeking a declaration that the Defendant held half a share of L.R. No. Kiamba/Ruaka/104 (“the Suit Property”) in trust for him. He also sought a declaration that he had acquired half share of the Suit Property by prescription and an order directing the Defendant to execute a transfer of half share of the Suit Property to him together with the costs of the suit.
2. The Plaintiff claimed that he purchased the Suit Property from Mbugua Wangai at a cost of Kshs. 2600/= in 1959. This was in addition to the exchange for the Plaintiff’s developed plot in Ndereru. The Plaintiff claimed that upon completion of the sale transaction he moved into the Suit Property with his wife, mother and the Defendant and that he planted coffee trees on the land.
3. He stated that the Defendant was registered as the owner of the Suit Property in 1959 to hold in trust for him since he had just returned from detention as a freedom fighter. It was expected that land would be given to the former freedom fighters who were landless and the Plaintiff hoped to benefit as a former freedom fighter. Their mother was buried on the Suit Property in 1962 or thereabouts.
4. The brothers lived on the Suit Property until 1997 when trouble started over the portions each was to occupy and cultivate. The misunderstanding led to criminal charges being preferred against the Plaintiff of which he was acquitted in **Kiambu Criminal Case No. 575 of 1995** and **Kiambu Criminal Case No. 1164 of 1997**.
5. The Plaintiff referred the matter to the Kiambu District Land Tribunal and the Nyeri Provincial Land Tribunal. Both tribunals decided that the land ought to be divided equally between the two brothers.
6. Being dissatisfied with this decision, the Defendant lodged **High Court Civil Appeal No. 502 of 2000** in which the court found that the two tribunals had no jurisdiction and set aside the decisions of the tribunals. The Plaintiff thus filed this suit.
7. The Defendant denied the Plaintiff’s claim and averred that he solely purchased the Suit property from Mbugua Wangai without the Plaintiff’s help and only allowed the Plaintiff and his mother to reside on his land.
8. The Defendant counterclaimed for a permanent and perpetual injunction to restrain the Plaintiff from remaining, entering or continuing with his occupation of the Suit Property. Additionally, he sought a mandatory injunction compelling the Plaintiff and his agents to vacate and remove themselves from the Suit Property; an eviction order to issue against the Plaintiff; mesne profits and costs of the suit.
9. The case was filed at the High Court. It was heard by Justice J.L.O. Onguto in January 2015. When the matter was transferred to the Environment and Land Court following the Supreme Court’s decision on the jurisdiction of the Environment and Land Court, the old case number was retained. Parties indicated that they were happy with another Judge taking over the matter and writing the pending judgement. This is the basis for my writing this judgement. Proceedings were typed and placed on the file.
10. By the time this case was heard, both the Plaintiff and Defendant had died. The Plaintiff’s son testified that his father owned the Suit Property even though the title was only registered in the name of his father’s brother, Munyui Kahuha. His father told him that he bought the land with his brother, the Defendant in this case.
11. It was his evidence that the title was not registered in his father’s name because at the time his father had hoped to benefit from the white

settler farms which they had been informed would be distributed among the former freedom fighters. The rumour was that those who owned land and were registered as owners of land would not be allocated the former white settler farms. He stated that his father was released from detention in 1959 and that the Suit Property was purchased the same year.

12. He stated that his family had lived peacefully on the Suit Property for many years. The dispute began when the Plaintiff's children grew up and wanted to build on the Suit Property. He produced copies of the High Court ruling and the decisions of the Kiambu and Nyeri Tribunals. He stated that his father had planted coffee trees on the Suit Property and maintained that the title over the Suit Property was registered in the Defendant's name to hold in trust for the Plaintiff.

13. The defence called a man who stated that he knew both the Plaintiff and the Defendant to give evidence on its behalf. He was 86 years old when he gave evidence. He testified that the Defendant, who was his friend, told him he bought the Suit Property while the Plaintiff was in detention and built a house for his mother on the land. He confirmed that the parties had other siblings who did not reside on the Suit Property, one of whom bought land in Ngong.

14. The Defendant's son also gave evidence. He maintained that his father who was learned bought the Suit Property. He relied on the green card and the notebook which he stated his father made an entry in about the purchase of the Suit Property. The entry reads as follows:

5/10/59 money paid by Munyua Kahuha for Mbugua Wangai's land 4.18 acres is:-

Cash= 1869/=

House at Ndenderu 1000/=

15. He stated that his father gave him the diary and told him he owned the Ndenderu plots. He denied the claim that his father held the Suit Property in trust for the Plaintiff.

16. Parties filed and exchanged written submissions which the court has read and considered. The issue for determination is whether the Plaintiff is entitled to a share of the Suit Property as he claims or whether the Defendant is entitled to the orders he seeks in the counterclaim.

17. The Defendant argues that the Plaintiff failed to prove that the Defendant held the Suit Property in trust for the Plaintiff. The Defendant argued that the title his father held was conclusive evidence of ownership and that it had not been impeached for fraud. The Defendant urged the court to dismiss the suit and claimed that he is entitled to mesne profits for the period the Plaintiff has been in occupation of part of the Suit Property.

18. It is not in dispute that the Plaintiff lived on the Suit Property with his family from the time he was released from detention in 1959. This means he was on the land from the time Kenya attained independence. No explanation was given as to why the Defendant did not evict the Plaintiff from the land for all these years. The evidence that the Plaintiff planted coffee trees on the Suit Property was not challenged. The Defendant could have evicted the Plaintiff from occupying the Suit Property in the 1960's.

19. By the time this suit was heard, both parties had died. Their sons gave evidence based on what they had told them since their sons were not there when the Suit Property was purchased. Mbugua Wangai, the man from whom the Suit Property was purchased was not called to give evidence as to who he sold the land to. It may well be that he is no longer with us. Claims ought to be made expeditiously and cases heard before witnesses die or their memories fade.

20. The witness called by the defence admitted that what he stated in court he had been told by the Defendant who was his friend. The court is unable to attach much weight to his evidence since he did not witness the purchase of the Suit Property. No evidence was adduced as to who between the Plaintiff and the Defendant owned the house in Ndenderu which was exchanged for the Suit Property, as part of the consideration.

21. A person must file a claim for the recovery of land within twelve years from the date the right of action accrued to that person; or if it first accrued to some other person through whom he claims, to that person. The Defendant ought to have filed his claim to recover the portion of the Suit Property which he claims the Plaintiff should not have occupied within twelve years of 1959 when he claimed he purchased the land.

22. The court finds that the Defendant's claim is barred by statute and dismisses the counterclaim with costs to the Plaintiff. Having lived on the Suit Property for over fifty years without any objection by the Defendant, the court finds that the Plaintiff was entitled to half share of the Suit Property. The court grants the orders sought in the Plaintiff.

Dated and delivered at Nairobi this 23rd day of April 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Chepkurui holding brief for Mr. Wandago for the Plaintiff

Ms. Nduta Kamau for the Defendant

Mr. V. Owuor- Court Assistant