



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 73 OF 2013 (O.S)

KIRAGU WAITITU.....1ST PLAINTIFF

GLADYS WAIRIMU KIRAGU.....2ND PLAINTIFF

VERSUS

DANIEL KIBUI WAITITU.....DEFENDANT

JUDGMENT

(Suit claiming certain land by way of trust or adverse possession; 1st plaintiff being brother of defendant; claim that the suit land belonged to their mother and defendant registered as trustee; evidence tendered is overwhelming that the land was never allotted to their mother but to the defendant by virtue of his employment; no evidence that their mother ever owned this land or transferred it to defendant; claim of trust fails; claim of adverse possession also fails as the possession of the plaintiffs has been with the permission of the defendant; suit dismissed with costs)

PART A : INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of an Originating Summons said to have been taken out pursuant to the provisions of Order 37 Rule 1 (g), 7, of the Civil Procedure Rules, and Section 38 (1) of the Limitation of Actions Act, and all other enabling provisions of the law. The principal prayer sought by the applicants is for an order that the applicants have acquired by way of adverse possession a portion of 7 acres out of the land parcels Nyandarua/Kirima/1716 and Nyandarua/Kirima/1717 whose combined acreage is 14 acres. In the alternative, the applicants have sought a declaration that the respondent holds half share, equivalent to 7 acres of land of the abovementioned land parcels, in trust for the 1st applicant, and for termination of the said trust. The applicants thus wish to be registered as proprietors of 7 acres out of the two suit properties. The respondent filed a replying affidavit vide which he contested the claim of the applicants.

2. The 2nd applicant is wife to the 1st applicant, whereas the 1st applicant is the younger brother to the respondent. The case of the applicants (whom I will hereinafter refer to as the plaintiffs, and the respondent as defendant) is that in the year 1966, their mother, Beth Ngima Waititu, was allotted by the Settlement Fund Trustees, the Plot No. 27 in Kirima Scheme which comprised of 14 acres. It is averred that the defendant pleaded with their mother, to have the said land registered in his name so as to enable him boost his chances of being employed at Ol Kalou Salient Board, and that out of love and affection, Beth Ngima acceded to the request, but on condition, that the defendant would hold the land in trust for

her and members of the family. It is averred that the registration of the defendant as proprietor of the Plot No. 277, made him secure employment, and because it was his name which was registered, all payments and receipts made, bore the defendant's name. It is contended that at the time of her death in 1995, Beth Ngima, was the beneficial owner of the Plot No. 277, and because their sisters got married, the property was thus to be divided equally between the 1st plaintiff and the defendant, as brothers. In 1999, the defendant subdivided the Plot No. 277 into two portions being Nyandarua/Kirima/1716 and Nyandarua/Kirima/1717, comprising of 4.79 and 1.21 hectares respectively, both of which are registered in the defendant's name. It is averred that the above subdivision notwithstanding, the plaintiffs have been occupying 7 acres of the land since the year 1973, which possession has been adverse to the defendant's registration. That is the reason why the plaintiffs believe that they are entitled to 7 acres of the suit properties by way of adverse possession or through trust.

3. The position of the defendant is that he was the one who was allocated the Plot No. 277 in Kirima Scheme by the Settlement Fund Trustees (SFT), and after full payment, which he contends he did by himself, the land was transferred to him. He has averred that the land was allocated to him by virtue of being an employee of one of the farms managed by Ol Kalou Salient Board on behalf of the SFT and only employees qualified for allocation of land at the farms ran by the said Board. He has contended that Beth Ngima did not qualify for allocation of land by the SFT and was never allotted this land. It is further averred that neither the 1st plaintiff nor Beth Ngima, contributed towards payment of the SFT loan, and that in fact, they were both unemployed and did not have means to pay. It is his position that he moved the entire family to the suit land from Gatondo Village, and built houses for them, because they did not have means and were wholly dependent on him, and they therefore occupied the land with his permission. Following this, he has contended that the 1st and 2nd plaintiffs have been occupying 3 acres, and not 7 acres, and all this with his permission and therefore the plaintiffs' suit should be dismissed.

PART B : EVIDENCE OF THE PARTIES

(i) The plaintiffs' evidence

4. PW-1 was the 2nd plaintiff. She testified inter alia that Beth Ngima was allocated the land in the year 1966 and her photograph was taken for proper identification. She then took possession in the year 1973 and settled on the land together with her two sons and their families. She testified that Beth, in the year 1973, transferred the land to the defendant, because one of the requirements for employment was that the person had to acquire land within the farm. Beth thus gave the land to the defendant but on condition that he would return it when required. She testified that it was Beth who used to attend the farm meetings and that she is the one who paid the initial fee of Kshs.500/=. She testified that in the year 1982, Beth asked the defendant to transfer the land back to her but the defendant refused. She stated that the portion that she and her husband occupy is about 1/4 of the whole land and that they have been occupying the land since the year 1973. She also testified that before her death in the year 1995, Beth had tried in vain to have the defendant give back the land, as she wished to subdivide it equally between her two sons. She testified that she (Pw-1) filed a case before the Land Disputes Tribunal which gave an award for the land to be subdivided equally. She also mentioned that the defendant has presented criminal charges against her children and at times he was violent.

5. In cross-examination, she testified that Beth had 2 sons and 6 daughters all of whom got married. She herself got married to the 1st plaintiff in the year 1971 and was not present with the family in the year 1966 when the land was allotted. She did not have any document to show that Beth was allocated this land. She also did not have a photograph which was to be taken when one was allocated land and in fact she has never seen this photograph. Neither did she have the receipt of Kshs. 500/= which she claims was paid by Beth. She acknowledged that the defendant was employed as a mechanic and contended that Beth was also employed in 1966 by the Ol Kalou Salient Board to tend sheep, but she (Beth), was not employed in 1971 when she got married into the family. She stated that Beth ceased working after transferring the land to the defendant. She however did not have any document to show that Beth was indeed working at the Board as claimed. She averred that the land was transferred to the defendant in 1967 but she conceded that she was not within the family in this year. She did not have any documents of transfer of the land from Beth to the defendant. She acknowledged that it was the defendant who paid the

SFT loan but said that he was told to do so by Beth, since it was him who was employed. She stated that they moved to the land in dispute in the year 1973 and built houses close to each other but they moved to a new location in the year 1994. She however denied that they were moved by the defendant. She agreed that they use about 3 acres of the land and the other portion is used by the defendant and his sons who have made developments. She was also aware that the Tribunal decision was quashed by the High Court.

6. PW-2 was Henry Mugo. He testified that he and Beth were given land in Salient Scheme but he did not know Beth's land as it was in a different section. He stated that it was Beth who used to attend the meetings by virtue of being land owner. He testified that the defendant was not allocated any land and was not attending the farm meetings.

7. Cross-examined, he did acknowledge that on employment, one would be photographed. He did not have his photograph as he stated that it got lost. He asserted that Beth was also an employee of the Board and that she was also photographed. He agreed that one needed to be an employee of the Board to be allocated land. He did not have any document to show that Beth had been allocated land.

8. PW-3 was Kiragu Waititu. He is step son to Beth Ngima. He testified that he was summoned by Beth, when she got ill, and she told him that the land in dispute was hers, and that he (PW-3) should inform the defendant to share it equally with the 1st plaintiff. He passed this message to the defendant who became violent and refused to accept. In cross-examination, he testified that Beth passed this information to him in the year 1985. She did not however show him any document. He acknowledged that he was only giving evidence based on what had been told to him by Beth.

9. PW- 4 was Margaret Warigia Njuguna. She is sister to the 1st plaintiff and defendant. She testified that the disputed land was acquired by their mother, Beth. She testified that they previously used to live in Gatondo village and Beth used to work in a white settler farm. They then moved from the village to the white settler farm which was being distributed to workers. She stated that their mother balloted, paid for, and moved into the land with her whole family. Her mother was however old and she instructed the defendant to pay the remaining small amount. She stated the Beth never transferred the land to the defendant but the defendant took advantage of her advanced age and changed the name to himself. She mentioned that their mother is buried on this land and she had instructed that the land be shared equally between her two sons. She contended that each uses 7 acres although she changed this to say that the 1st plaintiff utilizes only 3 acres of land.

10. Cross-examined, she refuted that the defendant was allocated the land by the SFT. She asserted that he used fraudulent means to have the land transferred to him. She herself did not have any documentation to show that Beth owned the land. She asserted that Beth bought the land in the year 1972 and she moved her family into it in the year 1973. She was born in 1958 and was a teenager around this time. She stated that her mother left work in 1973 and left it for the defendant. She testified that the 1st plaintiff stayed at home because he was deaf. She testified that in 1973, he was still young and had not married. She conceded that from 1973, the 1st plaintiff has been using 3 acres of the land.

11. PW- 5 was Priscilla Njeri. She is also sister to the 1st plaintiff and defendant. Her evidence was that their mother acquired the land in the year 1966, although she also mentioned that she was given land in the year 1973, because she used to work with the white settler. She offered that she was born in the year 1956 and that they moved into this land in the year 1973. She stated that their mother was very old and that the defendant cheated to have her give him the land. She testified that the defendant has only allowed the 1st plaintiff 3 acres of the land but their mother instructed that the land be equally subdivided between the two. She further testified that it was their mother who paid the whole amount for the land.

12. Cross-examined, she acknowledged that she has never seen any document showing that the land was ever allotted to their mother or any evidence that their mother paid for the land. She stated that their mother was not employed by the Board but by a white settler. Her brother, the 1st plaintiff, was never employed.

13. The 1st plaintiff testified as PW6. He has a hearing challenge, and also challenge of speech, and he

therefore expressed himself through an intermediary. In his evidence, he acknowledged that he does not have documents to show that the Plot No. 277 was given to Beth Ngima by the SFT. He stated that he has never gone to check with the SFT who was registered as proprietor. He conceded that he has been using 3 acres since the year 1973. He acknowledged not paying anything for this land. He mentioned that their mother was employed by white settlers and the Board but had no document to this effect. He stated that it was their mother who changed the names for the land from herself to the defendant's so that he can pay for it.

14. With the above evidence, the plaintiffs closed their case.

(ii) the defendant's evidence

15. In his evidence, the defendant testified inter alia that their father had 3 wives, and in the year 1966, they used to live in Gatondo village. It is also that year that he went to look for employment at Ol Kalou Salient Board and he was employed as a mechanic. He produced his employment card which bore his photograph. He stated that in the year 1967, he was allocated a plot No. 550 of 2.5 acres which he paid for. He produced receipts to prove this. He testified that in the year 1973, he was allocated the Plot No. 277 in Kirima Scheme because the allocation of Plot No. 550 was temporary. He produced as exhibits the allotment letter and the SFT charge instrument. He stated that he paid off the SFT loan and produced the receipts in evidence of payment. He also paid rates to the Nyandarua County Council of which he produced receipts. He stated that he got title to the 14 acres comprised in the Plot No. 277 in the year 1994. He then subdivided this land into the parcels No. 1716 and 1717, measuring 11 acres and 3 acres respectively. He stated that when he got the land in the year 1973, he built houses for his mother and brother (1st plaintiff), and himself, and they settled on the land. He moved them here because they were not well off, as his mother and brother was not employed, and his sisters were in school. He stated that he paid off the loan using his own money and the same was being paid out of his salary. He worked at the Board from 1966 to 1973 when he joined the Forest Department where he retired in the year 1984. He testified that his mother never contributed a cent to pay for the land and neither did his brother. He denied that he was given the land so as to be employed. He testified that one first had to be employed in order to be given land and nowhere does the name of Beth Ngima appear.

16. In the year 1994, he asked his brother to move his house from the original site, which he did. He then called a surveyor and instructed him to measure 3 acres so that his brother can have some land to cultivate. He then fenced off this 3 acre portion and that is where the 1st plaintiff lives to date. This 3 acres is what is comprised in the land parcel No. 1717. He testified that between 1973 and 1994, his brother only used to cultivate 1 acre, and it was in 1994, that he gave him the 3 acres to use. He stated that his brother is on the land with his permission. He denied ever being a trustee for his brother.

17. Cross-examined, he testified that they were originally from Nyeri. He stated that between 1959 and 1966, their mother was doing some cultivation in a white settler farm but was not formally employed. In these years, she was living with her daughters who used to do casual jobs. He stated that the plot No. 550 was a temporary plot and he was later moved to another area. It was in 1967 that he was assigned the Plot No. 277 and shown it. All persons who were employed were entitled to be allotted land and they were about 2000 of them. He denied that it was his mother who paid the deposit for the land. He insisted that he made payments, much earlier than the year 1986, which is the date of the charge. He asserted that he did the survey in the year 1994 although it was pointed out to him that the titles to the subdivision bear the year 1989. He testified that he gave his brother the 3 acres because he was not well off and in fact he intends to transfer it to him. He denied that before her demise, their mother asked that he gives his brother 7 acres of the land.

18. DW-2 was Esther Mugure Kariuki. She is sister to the 1st plaintiff and defendant. She mentioned that she got married in the year 1973, and before that, she used to live with her mother in Gatondo village. In 1973, she was living in the disputed land with the rest of the family under the authority of the defendant as this was his land. She testified that from their family, only the defendant got employed, and that he got the suit land by virtue of his employment. She denied that the land belonged to their mother, because if it did, the rest of the siblings would also be entitled to a share. In cross-examination, she testified that it was

the defendant who used to go to the farm meetings. She stated that it was out of his good heard that the defendant gave the 1st plaintiff the 3 acres of land.

20. DW-3 was James Muchiri Waititu. He is the step brother of the 1st plaintiff and defendant. His evidence was also that the land parcel No. 277 belonged to the defendant and that he was allotted the same by virtue of his employment at Ol Kalou Salient. He stated that Beth was in fact happy that the defendant had deemed it fit to give the 1st plaintiff 3 acres of land and he wished to appreciate him.

21. With the above evidence, the defendant closed his case.

PART C : ANALYSIS AND DECISION

22. I invited counsel to submit and they filed written submissions which I have taken note of and considered in my judgment.

23. The case of the plaintiffs has two limbs. The first limb is that of adverse possession and the second limb is the claim of trust. I opt to start with the claim based on trust.

24. It is the contention of the plaintiffs that the suit land is held by the defendant in trust for them. It is their case that the land, then comprised in one title, Plot No. 277, was actually owned by their mother Beth Ngima Waititu and not the defendant. It is further their claim that their mother agreed to have the defendant registered as owner of the land so that he can procure employment at Ol Kalou Salient Board.

25. In his submissions, Mr. Kinyua Njogu, learned counsel for the defendant, argued that this claim of trust should be dismissed summarily as it was brought through Originating Summons. He referred me to the case of *Francis Gitonga Macharia vs Muiruri Waithaka (Court of Appeal, Civil Appeal No. 110 of 1997)* where an alternative claim for trust was dismissed, for being incompetent, as it was brought through the same Originating Summons that claimed adverse possession. I do note that this was a 1998 decision rendered before the promulgation of the Constitution of Kenya, 2010. Under Article 159 of the Constitution of 2010, the Court is enjoined to do justice without undue regard to technicalities. I would consider the issue to be a mere technicality. No prejudice was caused to the defendant in this case by the fact that the claim for trust was commenced by way of Originating Summons. In fact, the claim was continued as if it was commenced by way of a plaint and oral evidence was taken. I really see no problem and this objection is dismissed.

26. Now, from the evidence tendered, both parties appear to be in agreement that for one to be allocated land, they had to be employees of the Ol Kalou Salient Board. PW-1 testified that Beth acquired the land in the year 1966 and then transferred this land to the defendant in the year 1967. It was her evidence that since it was a condition of employment for one to acquire land, Beth gave out this land to the defendant for him to procure employment. It was also her evidence that Beth was an employee of the Board. PW-2 also testified that Beth was an employee of the Board and that she got allotted the land. Despite the oral allegation, I do not have any evidence that Beth was ever employed by the Board as none of the plaintiffs' witnesses produced any. Nothing would have been easier than to produce a record of employment or a pay slip. These of course could have been obtained by going through the employment records of the Board which I presume must exist.

27. I also have nothing to show that Beth was ever allotted this land by the SFT or any other body. When land is allotted, there must be a document of allotment. I was given none to show that the land was allotted to Beth Ngima. Land that was under the SFT used to be allotted, and the allottee was charging that land, and paying off the SFT in instalments. Upon conclusion of the payments, the SFT would issue a discharge, and the allottee would be entitled to be registered as absolute owner of the land. If indeed, Beth was allotted the land as claimed, you would expect that there be a charge in favour of the SFT and some record of allotment. There is none given to me by the plaintiffs.

28. Further, if indeed the land was allotted to Beth, and then transferred to the defendant, there would be an instrument of transfer, for land is not transferred orally. In addition, if Beth Ngima paid anything for

this land, there would have been receipts evidencing payment, for which there is none. In short, I have absolutely nothing, other than the oral assertion, that the land parcel No. 277 was ever owned by Beth Ngima, as claimed by the plaintiffs.

29. On the other hand, the defendant produced the allotment letter which reads Plot No. 55. He also produced receipts to prove that he paid money to the SFT for this Plot No. 55. It is not very clear whether indeed this plot No. 55 was reassigned the number 277 for I have no evidence of this. What I have is an SFT charge for the Plot No. 277, drawn in the year 1989, and receipts for payments for the SFT loan over Plot No. 277 issued in the 1980s and 1990s. I do not have a very good explanation on the fact that the documentation is of the 1980s and not the 1970s when the plot is said to have been reassigned the number 277. Mr. Nderitu Komu, learned counsel for the plaintiffs, in his submissions, tried to make heavy weather of this, but I do not think that it changes anything. What is important is that I have nothing before me that shows that Beth was ever allotted the land parcel No. 277. The documents that I have, demonstrate that the plot No. 277 was allotted to the defendant and that the defendant paid for the same. I am unable to impute any ill motive by the defendant not producing documents of 1973, or payments made in the 1970s, for if such existed in favour of the plaintiffs, then the plaintiffs could very well have availed the same, and they could have got the documents by simply going to the offices of the SFT. I do not think the defendant has failed to show how the land was acquired as argued by Mr. Nderitu who referred me to the case of *Chogera Kimani vs Kimani (2005) 2 KLR 214* to press this argument. It is clear to me that the land was acquired through an SFT loan, which the defendant paid for, and the land was then transferred to him. No oral evidence can dispel the sheer weight of what is contained in these documents. The documents speak for themselves and I have no contrary documentary evidence from the plaintiffs to enable me dispel the same.

30. I find no difficulty in arriving at the conclusion that Beth Ngima Waititu was never allotted the land parcel No. 277, never transferred it to the defendant, and never paid for it. It is my finding that the plot No. 277 was allotted to the defendant by virtue of his employment with Ol Kalou Salient Board, and that the defendant singlehandedly paid for it.

31. The plaintiffs cannot therefore sustain any claim of trust. I have absolutely no evidence that can lead me to conclude that there is a trust. As stated by the Court of Appeal in the case of *Mumo vs Makau (2004) 1 KLR 13* and *Gichuki vs Gichuki (1982) KLR 285*, relied upon by Mr. Njogu, trust is a question of fact that needs to be proved through evidence. I have no evidence of any trust. As I have stated, my findings are that this land was solely acquired and paid for by the defendant. It cannot by any stretch of imagination be said that the defendant was registered as trustee for the plaintiffs or for his mother Beth. The claim based on trust therefore fails.

32. What about the claim for adverse possession? In the pleadings, the claim is one for 7 acres of land with the contention of the plaintiffs, being that they have been in possession of the claimed 7 acres of land. From the evidence, and indeed, the evidence of the plaintiffs themselves, they have never been in occupation of 7 acres of land. Their evidence is consistent that they have only been in occupation of 3 acres of land and not 7 acres of land. They cannot purport to claim 7 acres of land through adverse possession but at most 3 acres of land. This indeed was conceded by Mr. Nderitu, counsel for the plaintiffs, in his written submissions.

33. But even then, it is clear that this possession of 3 acres has been with the permission of the defendant. From the evidence, which is not contested, the family of the plaintiffs and defendant moved to the plot No. 277 in the year 1973. They built structures in this year, and in the year 1994, the plaintiffs moved to the new site which they cultivate. The evidence of the defendant is that he purchased barbed wire and fenced off this 3 acres. The plaintiffs in their evidence never purported to have been the ones who did so. My own assessment of the evidence leads me to the conclusion that the possession of the 3 acres by the plaintiffs was because the defendant permitted them to occupy the same. Such possession cannot be said to be adverse to the title of the owner because one cannot lay a claim for adverse possession where such possession is with the permission of the land owner. The suit for adverse possession must therefore fail.

34. In essence I find no merit in the case of the plaintiffs and the same is hereby dismissed.

35. On costs, I have agonized whether to award the defendant costs, given the relationship that they have. I have concluded that despite this relationship, the defendant deserves costs. The case was wholly unmerited especially given the fact that there has never been possession of 7 acres of land as claimed by the plaintiffs in their pleadings. I also find that the plaintiffs are biting the very hand that has feedeth them, and I am unable to allow them get away with this softly. I therefore award the defendant the costs of this case.

36. Before I close, I think the plaintiffs need to thank the defendant for allowing them to use the 3 acres of land, for which they did not contribute, and for which they have no legal entitlement. They have however continuously been antagonizing the defendant by claiming more land yet the defendant has still allowed them possession of the 3 acres. I think it is time that they made peace with the defendant, and if the defendant wishes to give them the 3 acres, they should be thankful for it and live with that fact. As it is, the defendant has every right to have them removed from the land. I however hope that the parties, given their relationship, will make peace with each other.

37. As to the final orders, they are, that this suit is dismissed with costs to the defendant.

38. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 18th day of April 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Cheruto holding brief for Mr. Nderitu Komu for the plaintiffs.

No appearance on the part of Mr. Kinyua Njogua for the defendant .

Court Assistant : Carlton Toroitich.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU