



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO 35 OF 2017

PLISILA WAIRIMU NDEGWA.....PLAINTIFF

VS

JANE WAIRIMU NGANGA NDUNGU.....1ST DEFENDANT

DISTRICT LAND REGISTRAR MURANGA.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendants on the 13.6.14 seeking the following orders;

- a. A declaration that the Plaintiff is the legitimate owner of parcel No Loc 4/Ngararia/2043 and an order to the 2nd Defendant to remove the lodged caution on the parcel on land namely LOC 4/Ngararia/2043.
- b. Restraining orders against the Defendants from encroaching onto, lodging further cautions, alienating disposing of and/or interfering with the Plaintiff's quiet possession of LOC 4/Ngararia/2043.
- c. Costs of the suit.

2. The parties in this suit are related. The 1st Defendant is the sister in law of the Plaintiff and wife of the late Peter Ndungu Kimani. Kimani Gatui, the family patriarch was the father of the Plaintiff and the husband of the Defendant. Upon the death of Kimani Gatui his estate was succeeded by his children, James Kamande Kimani, the Plaintiff and the Defendant, each getting No Loc 4/Ngararia/1928, 1927 and 1926 respectively to own solely. That notwithstanding the distribution of the estate the 1st Defendant has illegally filed a caution on her property No Loc 4/Ngararia/2043 (subdivision of No Loc 4/Ngararia/1927) claiming beneficial interest.

3. The 1st Defendant denied the Plaintiffs claim in her defense filed on 3.7.14. In her counterclaim she averred that the family patriarch had bequeath the portion of land comprising of Loc 4/Ngararia/1927 to the grandsons named after his name, one of whom is her son John Ngugi. That she has been in possession of the suit land since 1989 utilizing the same for cultivation and has established title by way of adverse possession.

4. The Plaintiff during trial stated that she is the daughter of Kimani Gatui who was the registered owner of No Loc 4/Ngararia/1926, 1927 and 1928. That upon his death letters of grant of administration were granted James Kamande and Peter Ndungu Kimani initially and later to the Plaintiff and James Kamande Kimani now deceased to administer the estate. That the estate was vested absolutely as follows;

- a. Jane Wairimu Ndungu - No Loc 4/Ngararia/1926
Succeeded Peter Ndungu Kimani)
- b. Plisila Wairimu Ndegwa - No Loc 4/Ngararia/1927
- c. James Kamande Kimani - No Loc 4/Ngararia/1928

5. That she sold a portion of No Loc 4/Ngararia/1927 to AIPCA Waitwa Church leaving a balance of 1.03 acres comprised in No Loc 4/Ngararia/2043 registered in her name (hereinafter called the suit land).

6. That through the Succession Cause No 292 of 2003 aforesaid, the Court made sufficient provisions for the 1st Defendant by allocating her No Loc 4/Ngararia/1926, her husband's share. That the said succession cause has not been set aside or appealed against. That the 1st

Defendant did not object to the same nor challenge the determination.

7. That notwithstanding the 1st Defendant has placed a caution on her land for no lawful reason as she has no legal claim over the suit land.
8. In response to the 1st Defendant's counterclaim, the Plaintiff denied that the 1st Defendant is in possession of the suit land. She denied that her father Kimani Gatw had gifted the suit land to his grand sons' , the 1st Defendant son included. She also denied any conspiracy with her brothers in obtaining the letters of grant of administration of the estate of Kimani Gatw.
9. At the trial the 1st Defendant averred that her father in law, Kimani Gatw owned No Loc 4/Ngararia/304 which he subdivided into parcels numbers Loc 4/Ngararia/1926, 1927 and 1928.
10. That during a family gathering held in 2000, Kimani Gatw allocated the lands to the east to Peter Ndungu Kimani (1st Defendant's husband) and to the west to James Kamande Kimani and the one in the middle which comprised No Loc 4/Ngararia/1927, he gave it to her son John Ngugi and the son of James Kamande, all named after Kimani Gatw. That since the said John Ngugi was still a minor he directed that the said land be utilized jointly by the family of the 1st Defendant and that of James Kamande Kimani. That the Plaintiff was present and did not object to the directives of the old man. That she took possession of the said land and cultivated it until her husband and James Kamande Kimani conspired to sell a portion of the same to AIPCA Church without the consent of her son John Ngugi who is the alleged owner of the land as per the wishes of the old man.
11. That the Succession Cause No 292 of 2013 was done secretly and under concealment from her and that as a result the Plaintiff acquired the suit land through grant of letters of administration obtained irregularly. That the Plaintiff colluded with James Kamande Kimani as a result of which the Plaintiff was included as a beneficiary. That the Plaintiff is not entitled to inherit from the estate of Kimani Gatw on account of her marriage status.
12. She stated that she has no personal interest in the suit land, having filed the suit to assert title on behalf of her son John Ndungu as per the wishes of her father in law uttered in 2000. On cross examination, she admitted that she does not have a power of attorney from the said John Ndungu who is an adult aged over 30 years to file the case on his behalf.
13. DW2 – Mbugua Ndungu testified that he was present in the year 2000 when the said Kimani Gatw allocated 3 acres each to his two sons and the remainder 3 acres in the middle he decreed that it would be inherited upon his death by his two grandsons in equal shares namely John Ngugi Ndungu and Kennedy Kimani Kamande being sons of Peter Ndungu Kimani and James Kamande Kimani respectively. He admitted on cross examination that there are no minutes for such meeting and that he was unaware who was in occupation of the suit land.
14. DW3- John Ngugi Ndungu testified that his claim through the 1st Defendant is 1.3 acres out of Loc 4/Ngararia/2043. That he was a child during the alleged distribution of the land by his grandfather and it is through his mother that he learnt of his supposed inheritance. That he has not challenged the certificate of confirmation of grant in the estate of his grandfather. That his grandfather did not transfer the suit land to him in his lifetime. That there is no documentary evidence of any bequest to him of the suit land. He confirmed that though his father's share of the family land is registered in the name of the 1st Defendant, his mother, he is claiming the suit land as per the alleged wishes of his grandfather.
15. The 2nd Defendant filed a defense on 11.1.2016 denying the Plaintiff's claim and stated that the actions of the 2nd Defendant were done in accordance to its statutory duty and put the Plaintiff to strict proof. It however did not tender any evidence at the trial.
16. The parties elected to file written submissions which I have carefully considered.
17. It is not disputed that the family patriarch Kimani Gatw who died aged 89 years was the registered owner of Loc 4/Ngararia/1926, 1927 and 1928 which vested in his 3 children namely Peter Ndungu Kimani (deceased), James Kamande Kimani (deceased) and the Plaintiff.
18. The 1st Defendant in her defence raised an issue that this Court does not have territorial jurisdiction to determine this matter as the same should have been filed either in Kandara or Thika Law Courts. This matter was transferred from Kerugoya ELC Court in 2017. Neither party applied to transfer the matter to the lower Court nor canvassed the issue at the trial or in their submissions and I say no more other than to state that this Court is seized of proper jurisdiction by dint of Article 162 of the constitution and section 13 of the ELC Act.
19. As to whether the 1st Defendant has established a claim of title under adverse possession, the law on adverse possession as contained in section 7, 13, 17 and 38 of the Law of Limitations Act is clear. I need not reproduce the sections.
20. To succeed in a claim under adverse possession, one has to prove the following; the intruder resisting the suit or claiming the right by adverse possession must make physical entry and be in actual possession of the land for the statutory period; the entry must be with some claim or colour of right or title; the occupation of the land by the intruder must be non-permissive, the non-permissive actual possession must be unequivocally exclusive and with the clear intention of excluding the real owner (*animus possidendi*) and the acts of the owner must be inconsistent with the owner's enjoyment of the soil.
21. **Francis Gicharu Kariri vs. Peter Njoroge Mairu Civil Appeal No.293 of 2002(Nairobi)** approved the decision of **Kimani Ruchire vs. Swift Rutherfords & Co.Ltd. (1980) KLR 10** at page 16 letter B, where Kneller J. held that:

“The Plaintiffs have to prove that they have used this land which they claim as of right; nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So, the Plaintiff must show that the company had knowledge (or the means of knowing actual or

constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it by way of recurrent consideration”.

22. In the case of **Mwinyi Hamis Ali – v- Attorney General and Philemon Mwaisaka Wanaka, -Civil Appeal No. 125 of 1997** the Court held as follows;

“Adverse possession does not apply where possession is by consent and in a Court of law, sympathy takes a second stand as the Court is governed by statutes”.

23. In this case the 1st Defendant claims to have been in possession of the land for a period of over 30 years. The Plaintiff in her uncontroverted evidence has stated that the suit land is unoccupied. It belongs to her absolutely. That the 1st Defendant lives on her own parcel of land Loc 4/Ngararia/1926. The 1st Defendant claimed in her evidence that the old man allowed his two sons’ households to so cultivate the land jointly. If her evidence is to be believed, then the 1st Defendant had no exclusive possession of the suit land. This was corroborated by her son John Ndungu in his evidence in chief when he stated that “since I was a minor, my father and my uncle took possession of the land and cultivated it”. The parties being relatives, there is a strong presumption of consent. The 1st Defendant bears the burden of disapproving the consent as she is seeking to rely on adverse possession. She has not led any evidence to show that indeed she was in possession of the land if any in a manner to dispossess the Plaintiff or in conflict with the Plaintiff’s right to the enjoyment of the soil.

24. Given the reasons advanced above the Court finds and holds that the claim of adverse possession is not founded and the counterclaim fails.

25. As to whether the 1st Defendant has any beneficial claim on Loc 4/Ngararia/2043. It is on record that the 1st Defendant lodged a caution claiming a beneficial interest. A beneficial interest is defined in Blackstone Dictionary as follows;

“a right or expectancy in something (such as a trust or an estate) as opposed to a legal right to that thing”

The 1st Defendant stated on trial that she had no personal interest in the suit land and that she filed the suit to assert title for her son. It is noted that by the time the caution was lodged in 2014 her son had attained the age of legal majority competent to file suit if he so wished. This brings the question of locus in reference to her claim and that of her son, if any.

26. It is unclear why the 1st Defendant has claimed the whole suit land for her son only and yet in her evidence she had alleged that the land was given to two grandsons of Kimani Gatu. The Plaintiff has not explained the change of mind/ glaring contradiction.

27. The 1st Defendant has not led evidence by way of documentary evidence to show that the suit land was gifted to her son as she alleges. The Plaintiff is the registered owner of the suit land having become so registered pursuant to a confirmed grant in Succession Cause No 292 of 2003. No evidence was adduced by the 1st Defendant that the grant has been set aside or appealed. The 1st Defendant has alleged that the grant was obtained illegally. No material has been placed before the Court for the Court to appreciate the claim. In any event the right forum to prosecute such a claim would be in the Court that granted the grant pursuant to section 76 of the Law of Succession Act. It is a hollow allegation. It is on record that the 1st Defendant and her family was provided for in the estate of Kimani Gatu. If the 1st Defendant felt that the same was inadequate nothing stopped her from challenging the grant. To the extent that she did not would be concluded that she is content with the provision. There is also an unsupported claim that the Plaintiff conspired with James Kamande to include her as a beneficiary.

28. Under section 26 of the Registration of Land Act, the Plaintiff’s title can only be challenged on grounds of fraud or misrepresentation to which the Plaintiff is proved to be a party or where the certificate of title has been proved to have been acquired illegally, unprocedurally or through a corrupt scheme. None of these have been adduced and or proved by the 1st Defendant.

29. The 1st Defendant has claimed that the Plaintiff is not entitled to the suit land on account of her marital status. It is on record that the Plaintiff is the daughter of Kimani Gatu and that she inherited the suit land pursuant to a succession cause in respect to her late father’s estate. She enjoys protection by dint of Article 27(3) of the Constitution which outlaws any form of discrimination. Section 26 of the Law of Succession provides that the Plaintiff being a daughter of the deceased is entitled to provision in the estate of the deceased notwithstanding if she is married or not.

30. This Court finds that there is no lawful reason for the subsistence of the caution on the suit land.

31. In the upshot the Plaintiff’s case succeeds and the following orders are proper;

a. It is hereby declared that the Plaintiff is the legitimate owner of parcel No. Loc 4/Ngararia/2043

b. The 2nd Defendant is hereby ordered to forthwith remove the caution registered on the Loc 4/Ngararia/2043.

c. The 1st Defendant is restrained from encroaching onto the land of the Plaintiff or interfering with the Plaintiff’s quiet possession of Loc 4/Ngararia/2043.

32. The costs of this suit are payable by the 1st Defendant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF APRIL 2018.

J.G. KEMEI

JUDGE