



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO 616 OF 1993

M'RINGERA M'MBWIRIA.....PLAINTIFF

VERSUS

SARAH KAIMURI.....DEFENDANT

JUDGMENT

INTRODUCTION

1. This suit is very old, the same having been filed in 1993 (about 24 years old). After perusing the file, I find that some crucial documents including the plaint are torn. The last page of the pliant is missing. Nevertheless I am still able to discern what the claim is all about. The claim is based on customary trust.
2. Plaintiff is a brother of one M'Itunga M'Imanyara who died in 1987. M'Itonga M'Imanyara was the husband of Sarah Kaimuri the defendant. M'Itunga was also the registered owner of parcel no. NTHIMBIRI/KIUTHA/140 as from 1963. Plaintiff and M'Itunga were the children of M'Imanyara (born of same mother and father). However M'Imanyara had another wife who had children namely M'Imbui father of PW 2 (David Gikunda), PW 3 (Erastus M'Ikiara) and DW 2 (M'Rukaria M'Mbui).
3. At the heart of the dispute is the land parcel no. 140 which plaintiff is claiming entitlement to an equal share with his deceased brother's family.
4. The evidence of plaintiff is that his brother, M'Itonga M'Imanyara was registered as the owner of the suit land in 1963 because him (plaintiff) was not around. Plaintiff sued defendant as the administrator of the estate of M'Itonga.
5. Plaintiff further stated that at some point, him and deceased (M'Itonga) had leased the land to David Gikunda (son of M'Imbui). Gikunda and Erastus also testified that the suit land was always meant to be shared equally between the two brothers (M'Ringera and M'Itonga).
6. In support of his case plaintiff produced as exhibits a copy of a green card in respect of the suit land and a certificate of the confirmed grant in succession cause no. 118 /1989.
7. Defendant has denied plaintiff's claim vide her statement of defence dated 21.3.1994. She avers that plaintiff never raised his claim with his brother when the brother (M'Itonga) was alive and she further states that plaintiff was well aware of the succession cause where by the Suitland was distributed as per the court's order.
8. Defendant and her witness DW 2 contend that plaintiff had sold his share of the` land at Nthimbiri.
9. In support of her claim defendant produced the following documents as exhibits; Copy of the green card in respect of the suit land, copy of the confirmed grant and other documents filed in respect of succession cause no.118 of 1989 including copy of guarantee by personal surety.
10. When defence case was closed on 10.10.2017, I gave directions for submissions to be availed by 5.12.2017. There was no compliance with this order. On 5.12.2017, I gave plaintiff's side a last chance to file and serve their submissions within 14 days while defence side was to file their submissions thereafter within 14 days from date of service. Again there was no compliance. It is against this background that I have disregarded plaintiffs submissions filed on 26.2.2018.
11. I have analyzed all the issues raised herein. I find that the relationship between the parties is not in dispute, where by defendant is a wife of M'Itonga (deceased), who in turn was a brother of the plaintiff. It is also not disputed that M'Itonga was the registered owner of the suit land NTHIMBIRI/KIUTHA/140.

12. The only issue for determination is whether the land was registered in name of M'Itonga in trust of his brother the plaintiff. 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”.***

13. It was up to the plaintiff to adduce evidence in support of the customary trust claim. What is apparent is that plaintiff is quite old. He was 96 years old (as at the time of his testimony), which means he was around 41 years in 1963 when M'Itonga became the registered owner of the land. Plaintiff was therefore an adult and he ought to give plausible reasons as to why he could not be registered as the owner of the land in respect of his share of the land.

14. In his own testimony plaintiff had testified that **“My father had 3 sons. The oldest was M'Imbui M'Imanyara, followed by M'Itonga M'Imanyara and then myself (M'Ringer). Each one of us was given their own portion of land”.**

15. If that be the case and it happened that plaintiff's portion was incorporated with that of his brother then what steps did plaintiff undertake to ensure that he got his rightful share during the life time of his brother?. After all, his brother, (M'Itonga) died in 1987. There is no evidence to indicate that plaintiff attempted even in the slightest manner to assert his claim in respect of the suit land when his brother was alive. It is not enough for plaintiff to state that the reason he never asserted his claim was because he had no bad blood with his brother.

16. It has emerged that plaintiff has never utilized the suit land. He stays at a place called Naari. Plaintiff has not explained his reasons for not utilizing the land even when his brother was alive if indeed he was entitled to this land.

17. I also find that when M'Itonga died, his wife the present defendant filed a succession cause No. 118 of 1989. The disputed land was listed as one of the properties comprising the deceased's estate. In that cause, the present plaintiff was one of the guarantors (by personal sureties). It follows that plaintiff was aware of the case. He never filed any objection or protest in respect of that cause nor did he seek for the revocation of the grant which was issued on 19.3.2013.

18. The estate of deceased having been distributed in accordance with a lawful court order, and plaintiff having heard knowledge of the proceedings, plaintiff cannot now turn around to take claim that he is entitled to the property of the deceased.

19. Further, the land NTHIMBIRI/KIUTHA/140 is no longer available as the same has been shared out in accordance with the confirmed grant.

20. Plaintiff cannot also base his claim on the resolutions of the clan as this came about allegedly in 2003, long after the death of M'Itonga, long after the filing of the succession cause (1989) as well as long after the present suit (1993).

21. Registration of titles are a creation of the law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged or not, and this was held in **Mwangi Versus Mwangi (1986) KLR-332 (Shah J).**

22. My conclusion is that plaintiff has never had possessory rights over the suit land and further, he was 40 plus years in 1963, and there is no plausible reason as to why he waited for deceased to pass on to start claiming the land from the defendant.

23. I find that plaintiff's claim on the basis of customary trust is unmerited. The suit is dismissed with costs to defendant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 11th APRIL, 2018

IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Plaintiff – present

Defendant – present

Mbijiwe holding brief for plaintiff

Mutuma holding brief for Murango Mwenda for defendant present

HON. LUCY. N. MBUGUA

ELC JUDGE