



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 60 OF 2014

SAMUEL KIHARA WAMBUGU.....PLAINTIFF

-VERSUS-

JAMES KARIUKI MUKUA (*Sued in the*

capacity of administrator and legal

representative of the late Mukua Kamau).....DEFENDANT

JUDGMENT

1. This suit relates to the parcel of land known as Mahiga/Kihome/386 registered in the name of the defendant's father, Paul Mukua Kamau (deceased).
2. The plaintiff who is a relative of the defendant, claims that the deceased held a portion of the suit property measuring one (1) acre in trust for his mother, his younger brother and him.
3. The pleaded trust is said to have arisen during the time of adjudication, demarcation, consolidation and registration of the suit property sometime in 1958.
4. It is the plaintiff's case that the pleaded trust has been observed since 1962 when they took possession of the portion and began utilizing it.
5. The defendant through the statement of defence he filed on 16th May, 2014 denies the plaintiff's claim and contends that the deceased was registered as the absolute proprietor of the suit property. He further contends that if the plaintiff had any claim against the title held by the deceased (his father) he should have raised it when the deceased was alive.
6. Concerning the plaintiff's occupation and use of the suit property, it is the defendant's case that it was by consent of his family members.

EVIDENCE

The plaintiff's case

7. When the matter came up for hearing, the plaintiff informed the court that the suit property was not inherited from their grandfather but bought (he did not explain whether his father is one of those who bought it or how his father's share of the suit property came to be). Be that as it may, based on information given to him by his mother concerning the suit property, he maintained that the suit property contained one acre belonging to his father.
8. Contrary to his pleadings, which are to the effect that his father was dead at the time of registration of the suit property, the plaintiff explained the reason for registration of the portion of the suit property belonging to his father in the name of the defendant's father and son as the fear of his father's parcel to wit LR. No. Mahiga/Kihome/387 being taken by the colonial government because his father was a Mau Mau freedom fighter.
9. The plaintiff also based his claim on the allegation that he is the one who planted the 700 tea bushes on the portion he claims; He claims that his mother and he lived in the suit property and that his mother is buried in the portion he claims.
10. He admitted that he no longer lives in the suit property but stated that he benefits from the tea bushes thereon.

11. Concerning the circumstances surrounding his entry and use of the portion he claims, he explains that it was shown to him by the defendant's father. He admitted that there were previous proceedings concerning the suit property for instance, the dispute he had preferred before the Kangema Land Disputes Tribunal.

12. He informed the court that the award of the Tribunal was quashed by the High Court for want of jurisdiction to hear and determine the dispute preferred before it.

13. The court further heard that there is a succession cause in respect of the suit property which has been stayed pending the hearing and determination of this suit.

The defence case

14. The defendant, D.W.1, maintained that the suit property belongs to his father and that the plaintiff does not have any claim or entitlement to it whatsoever.

15. The defendant informed the court that the plaintiff's mother once lived in the suit property and that her house was demolished but stated that he was not sure whether she was buried thereon.

16. The defendant further informed the court that the plaintiff's father had his own parcel of land next to the suit property to wit Mahiga/Kihome/387 which he exchanged with the local school, Mumwe Primary School.

17. Concerning the plaintiff's contention that he lives in the suit property, the defendant stated that currently the suit property is occupied by his uncle Gitahi and his family, with his permission.

18. The defendant denied the plaintiff's contention that he is the one who planted the tea bushes in the suit property and explained that they were planted by Peter Gitahi.

19. D.W.2, William Kagiri Gichohi, a relative of the plaintiff and the defendant, informed the court that the suit property was bought by the defendant's father from a person called Kanyote. The defendant's father had also bought another parcel from a Mr. Wanoru. The court heard that it is the two parcels which became the suit property after consolidation.

20. Like D.W.1, D.W.2 stated that the plaintiff father had his own parcel of land near the suit property, to wit Mahiga/Kihome/387, which he exchanged with the local primary school, Mumwe.

21. Like D.W.1, D.W.2 stated that the tea in the suit property was planted by Peter Gitahi.

22. D.W.3, Sammy Kamau Gitahi, another relative of the plaintiff and the defendant, informed the court that the suit property belongs to the defendant's father. Currently, his family lives in the suit property with permission of the defendant's family.

23. Concerning the tea in the suit property, he stated that it was planted by his father, Peter Gitahi which is picked by his family and the plaintiff. The court heard that the plaintiff picks the tea despite having been asked to vacate the the suit property.

24. Like D.W.1 and D.W.2, he stated that the plaintiff's father had his own parcel of land adjacent to the suit property, which he exchanged with the local primary school referred to herein above.

Submissions

25. At close of hearing, parties filed submissions which I have read and considered.

26. From the pleadings and submissions filed, I find the issues for the court's determination to be as follows:-

(i) Whether the plaintiff has *locus standi* to bring and prosecute this suit?

(ii) Was the suit property registered in the name of the deceased to hold in trust for the plaintiff's father, if yes, for what reason was the registration effected?

(iii) Whether the plaintiff has made up a case for being granted the orders sought?

(iv) What orders should the court make?

27. With regard to the first issue, on behalf of the defendant, it is submitted that the plaintiff requires grant of letters of administration in respect of his deceased father before he can urge his claim that the plaintiff holds a portion of the suit property in trust of his mother, his brother and himself.

28. This being a claim not based on the estate of the plaintiff's father but based on trust which is said to have outlived the plaintiff's father by the beneficiaries of the pleaded trust, I am of the considered view that the plaintiff, as a beneficiary of the pleaded trust, does not need any grant of letters of administration before he can urge his claim based on the pleaded trust.

29. On whether a portion of the suit property was registered in the name of the defendant's father to hold in trust for the plaintiff's father, whilst the plaintiff maintains that from the history of the suit property given to him by his mother and the conduct of the defendant's family (they are not the ones who have been in use and occupation of the suit property) he has made up a case for the pleaded trust; it is important to point out that the plaintiff in his evidence departed from his own pleadings concerning the reason as to why a portion of the suit property was registered in the name of the defendant's father. In that regard, whilst in his plaint (paragraph 6) the plaintiff gave the reason for registration of his uncle as the proprietor of the portion that allegedly belonged to his father as the death of his father, in his testimony before court, he gave the reason as the fear that his uncle had that his father's other parcel of land to wit 387, could be taken by the government because his father was a Mau Mau warrior. That testimony offends the provisions of **Order 2 Rule 6** of the Civil Procedure Rules Cap. 21 Laws of Kenya, which prohibits parties to suits from departing from their pleadings unless by way of amendment.

30. Having carefully reviewed the evidence adduced by the plaintiff in support of the pleaded trust, I find it to be incapable of proving any trust in his favour in the suit property. I say so firstly, because the evidence adduced in this suit shows that the suit property was not ancestral land before it was registered in the name of the defendant's father. Secondly, it is common ground that the suit property was bought by the defendant's father. Thirdly, there is no evidence of any contribution by the plaintiff's father in the acquisition of the suit property and fourthly, I find the plaintiff to be an unreliable witness as he changed his story concerning ownership of the suit property. In that regard, whilst in the case before the Tribunal he claimed the suit property was ancestral land, in these proceedings he admitted that the suit property was bought by the defendant's father and that his grandfather had no land which his father and the defendant's father could have inherited. He also departed from his pleadings by giving the reason as to why the portion he claims was registered in the name of the defendant's father as the apprehension that the land would be taken over by the government owing to the fact that his father was a Mau Mau freedom fighter yet in his pleadings he gave the reason as death of his father before demarcation.

31. As to whether the plaintiff has made up a case for being granted the orders sought, whilst there is evidence that at some point the plaintiff lived on a portion of the suit property and that he benefits from the tea bushes grown there, I find that evidence to be incapable of proving the pleaded trust.

32. The upshot of the foregoing is that the plaintiff's suit is found to be lacking in merit and is dismissed with costs to the defendant.

33. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 31st day of May, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. King'ori h/b for Mr. Nderi for the plaintiff

Mr. Kebuka Wachira for the defendants

Court assistant - Esther