



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 78 OF 2014

WANIOHI MWAI 1ST PLAINTIFF

TERESIA WARUGURU GITHAE 2ND PLAINTIFF

LUCY WAMBUI GITHAE 3RD PLAINTIFF

VESUS

ISAAC RURIGA GITHAE DEFENDANT

JUDGMENT

Land parcels No. MUTITHI/STRIP/688, 690 and 691 (hereinafter the suit land) are registered in the names of **ISAAC RURIGA GITHAE** (the defendant). Those three parcels of land, together with another parcel MUTITHI/STRIP/689 which has now been sold to one **JUSTUS KARUNGA MWANIKI** are all resultant sub-divisions of the original land parcel No. MUTITHI/STRIP/60 which was registered in the names of the defendant since 12th February 1973 before that title was closed on sub-division on 28th April 1999.

By a further amended Originating Summons filed herein on 21st April 2016, **WANJOHI MWAI, TERESIA WARUGURU GITHAE** and **LUCY WAMBUI GITHAE** (the 1st, 2nd and 3rd plaintiffs respectively) sought orders against the defendant in the following terms:

- 1. WANJOHI MWAI, TERESIA WARUGURU and LUCY WAMBUI GITHAE be registered 0.80 Ha each out of parcels MUTITHI/STRIP/688, 690 and 691 by way of adverse possession.***
- 2. In the alternative to prayer 1 above, the Court do declare that the defendant holds 2.40 Ha out of land parcel No. MUTITHI/STRIP/691, 690 and 688 under an implied trust on behalf of the plaintiffs jointly and severally.***
- 3. The Deputy Registrar of this Court do execute all relevant documents to facilitate the transfer of the said parcel of land to the Applicants.***
- 4. That costs be provided for.***

The claim is premised on the further affidavit of the 1st plaintiff sworn on behalf of the 2nd and 3rd plaintiffs in which it is deponed, inter alia, that land parcels No. MUTITHI/STRIP/691, 690 and 688 are a resultant sub-divisions of land parcel No. MUTITHI/STRIP/60 which was family land and on which they have lived since 1979 together with their families which include the defendant who is a brother to the 1st and 3rd plaintiffs and son to the 2nd plaintiff. The plaintiffs were therefore surprised to discover that the suit land is registered in the names of the defendant who has since 1990 been threatening them with eviction and has even sold part of the original land to a stranger. The plaintiffs therefore moved to this Court seeking the above orders.

In resisting that claim, the defendant filed a further affidavit dated 27th June 2016 in addition to a previous one dated 15th April 2014. In those affidavits, he deponed that whereas the 2nd plaintiff is his mother, the 1st and 3rd plaintiffs are his brother and sister respectively but born of a different father and that in 1971, he was given the land parcel No. MUTITHI/STRIP/60 by the **KERUGOYA COUNTY COUNCIL** through a secret ballot and was thereafter issued with the title deed on 24th November 1992. That land measured approximately ten (10) acres and he sub-divided it to give rise to the suit land and sold another portion MUTITHI/STRIP/689 to **JUSTUS KARUNGA MWANIKI** in 1998 but retained the suit land. He denied that he holds the suit land in trust for the plaintiffs or that the original land was ancestral land given to him by his late father who he said died before the land adjudication process. He added that the 2nd plaintiff was infact living at the home of the father to the 1st and 3rd plaintiffs but he only invited her in 1998 and built a house for her before the 1st and 3rd plaintiffs joined her and are living on a portion of the parcel No. MUTITHI/STRIP/691 against his will.

The 1st and 3rd plaintiffs testified and called their other witnesses **JACKSON NJUKI MWAI** (PW3) and their step brother **JOSEPH MAINA GITHAE** (PW4) in support of their case. The defendant called as his witness **NDAMBIRI NYAGA** (DW2) and **JUSTUS KARUGA MWANIKI** (DW3).

The evidence of the 1st and 3rd plaintiffs is that the defendant is their elder brother and the 2nd plaintiff their mother and that they have all lived on the suit land which was given to the defendant by their Wambui Clan and was registered in the defendant's names because their father had died while they were in school. The defendant has however refused to share the suit land with them and has instead registered it in his name and sold one portion to a stranger after sub-dividing the original land parcel No. MUTITHI/STRIP/60 into four (4) portions. They produced the certificates of search in respect to the suit land. Exhibits 1A, 1B and 1C. In 1996, the plaintiffs asked the defendant to share the suit land together with their other brother **JAMES MWANGI** but he refused.

JACKSON NJUKI MWAI (PW3) is the Chairman of the Wambui Clan. He asked the Court to adopt his written statement as his evidence and added that he knows the 1st and 3rd plaintiffs as siblings to the defendant and that the 2nd plaintiff is their mother. He said that he is familiar with the history of the suit land which originally belonged to **GITHAE** the father to the 1st and 3rd plaintiff as well as the defendant and that he had two wives one of whom is the 2nd plaintiff and that since the 2nd plaintiff had no Identity Card, the original land was registered in the names of the defendant as the eldest son to hold for the family. He added that the original land belonged to the clan although when it was registered in the names of the defendant, the plaintiffs were living on the land of **GITHAE**'s first wife **KABUTA** before moving to the suit land in 1973.

JOSEPH MAINA GITHAE (PW4) is a step brother to the 1st and 3rd plaintiffs and also confirmed that their late father had two wives **KABUTHA** and the 2nd plaintiff. He told the Court that the plaintiffs all live on the suit land which was given to the defendant by the clan and was registered in his names to hold in trust for the house of his mother the 2nd plaintiff around 1970 or 1971. He told the Court that the share of his mother's house was registered in the names of his elder brother **KARIUKI**. He added that the plaintiffs all live on the suit land.

In his defence, the defendant asked the Court to adopt as his evidence his two replying affidavits dated 15th April 2014 and 27th June 2016. In those affidavits which I have already referred to earlier in this judgment, he denies holding the suit land in trust for the plaintiffs adding that the original land parcel No. MUTITHI/STRIP/60 was given to him in 1971 by the **KERUGOYA COUNTY COUNCIL** through secret ballot and was never ancestral land. That he only invited his mother the 2nd plaintiff and built a house for her before she was joined by the 1st and 3rd plaintiffs who he says were born of a different father.

NDAMBIRI NYAGA (DW2) also asked the Court to adopt his written statement as his evidence. He told the Court that both he and the defendant were given ten (10) acres of land each by the **KERUGOYA COUNCIL** through secret ballot in 1971 and that only the 2nd plaintiff was living on the suit land but was joined later by the 1st and 3rd plaintiffs and the defendant gave them a portion to cultivate.

JUSTUS KARUGA MWANIKI (DW3) also asked the Court to adopt his written statement as his evidence which is that he bought parcel No. MUTITHI/STRIP/489 from the defendant in 1998 and by then, the plaintiffs were utilizing another portion of the original land parcel No. MUTITHI/STRIP/60.

At the end of the trial, submissions were filed both by **Mr. L. MAINA** advocate for the plaintiffs and **Mr. MAGEE WA MAGEE** advocate for the defendant.

I have considered the evidence by both sides and the submissions by counsel.

The plaintiffs claim is based both on adverse possession and trust. I shall consider each separately.

ADVERSE POSSESSION

In **KASUVE VS MWAANI INVESTMENT LIMITED & FOUR OTHERS 2004 1 K.L.R 184**, the Court of Appeal re-stated what a party has to establish in order to prove a claim for land by adverse possession and said:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

It is common ground that the original land parcel No. MUTITHI/STRIP/60 and the resultant sub-divisions thereof which are the suit land are registered in the names of the defendant. The certificates of search were produced as part of the evidence. The occupation and possession of part of the suit land by the plaintiffs is conceded by the defendant. In paragraphs 11 and 15 of his replying affidavit dated 15th April 2014, he has deponed as follows:

11:“That the 2nd plaintiff who is my mother came and started living with me around the year 1998. She was by then living at the ancestral home to the father of the 1st plaintiff and the 3rd plaintiff in Kiburu Village”.

15:“The land parcel No. MUTITHI/STRIP/691 measures approximately 2 acres and the 1st and 3rd plaintiffs only occupy portion of the same which has always been against my wish”

In cross-examination however, he said that his mother the 2nd plaintiff was on the suit land on his invitation and she in turn invited the 1st

and 3rd plaintiffs. This is what he said when cross-examined by **Mr. L. MAINA**:

“I only allowed my mother the 2nd plaintiff to live on the land but she invited the other plaintiffs. I have never chased them away”

Earlier on, the defendant stated as follows when cross-examined by **Mr. L. MAINA**:

“The 2nd plaintiff started living on that land in 1984. The 1st plaintiff started living on the land in 1981. The 3rd plaintiff started living there in 1982”

The evidence of the 1st and 3rd plaintiffs is that they started living on the suit land in 1979 and that it was not until 1990 that the defendant started threatening them with eviction. Whether the 1st and 3rd plaintiffs started living on the suit land between 1981 and 1984 (as stated by the defendant) or in 1979 (as stated by the 1st and 3rd plaintiffs), the twelve (12) years statutory period that enables one in occupation of land to claim it through adverse possession had expired by the time this suit was filed through the first Originating Summons dated 13th March 2014 and filed on 18th March 2014 before the subsequent amendments resting with the one filed on 21st April 2016. Indeed the plaintiffs have been living on the suit land well in excess of thirty (30) years. There is no evidence that the defendant has at any time during that period asserted his right to the suit land by taking legal proceedings or by an effective entry or that the plaintiffs have admitted his right thereto which would have been the only way by which the plaintiffs possession and occupation of the suit land would have been interrupted – **GITHU VS NDEETE 1984 K.L.R 776.**

With regard to the 2nd plaintiff, it is the defendant’s case that he allowed her to live on the suit land and in fact built a house for her. This is what he said in paragraph 14 of his replying affidavit dated 15th April 2014:

“That I build for my mother a house and when the 1st and 3rd plaintiffs came, they started living with my mother”

The defendant is therefore claiming that the 2nd plaintiff lives on the suit land with his consent. That evidence could only have been rebutted by the 2nd plaintiff herself. However, although she recorded a statement on 13th March 2014, she did not testify. The 1st plaintiff told the court that the 2nd plaintiff is ***“bed ridden and cannot even talk”***. Given those circumstances, it is not surprising that the 2nd plaintiff did not attend this trial and that means that the defendant’s evidence that he invited her to the suit land is uncontroverted. It is trite law that a person in possession of another’s land with the owner’s consent cannot claim to be in adverse possession thereof – **WANJE VS SAIKWA 1984 K.L.R 284.** In the circumstances, it is clear to this Court that the 2nd plaintiff cannot mount a valid claim to the suit land or any portion thereof by way of adverse possession having been invited by the defendant. However, by his own admission, the 1st and 3rd plaintiffs are in occupation and possession of a portion of the suit land against the defendant’s wish – see paragraph 15 of his replying affidavit dated 15th April 2014. They have therefore taken hostile possession of a portion of the land parcel No. MUTITHI/STRIP/691 depriving the defendant the use thereof for over thirty years as per paragraph 15 of the defendant’s own replying affidavit dated 15th April 2014. That averment in fact corroborates the pleading in paragraph 3 of the supporting affidavit of the 1st plaintiff amended on 11th April 2016 wherein he has deposed as follows:

“That the land parcel No. MUTITHI/STRIP/691, MUTITHI/STRIP/690, MUTITHI/STRIP/688 were from parcel of land No. MUTITHI/STRIP/60 and was belong (sic) to the entire family members and we have lived on the aforesaid land since 1979 with our extended and large families not knowing any other land and we have never been interrupted by anybody either by way of threats for eviction or otherwise and hence have been occupying the land peacefully”

In my view, the 1st and 3rd plaintiffs’ claim to a portion of the suit land by way of adverse possession is well founded and I would allow it. I would however dismiss the 2nd plaintiff’s claim because her entry on the suit land was with the consent of the defendant.

TRUST

The plaintiffs have made an alternative claim to the suit land by what they refer to as an ***“implied trust”***. Trust is a matter of fact that has to be proved by evidence and in **GICHUKI VS GICHUKI C.A CIVIL APPEAL No. 21 of 1981.** the Court of Appeal held that a party relying on the existence of a trust must prove through evidence the creation and existence of such trust. In **MBOTHU & OTHERS VS WAITIMU & OTHERS 1986 K.L.R 173,** the Court of Appeal expressed itself as follows:

“The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”

As I have already found above, the plaintiffs’ occupation and possession of a portion of the suit land is not in doubt. It is admitted by the defendant who however claims that he only allowed the 2nd plaintiff to live thereon but that the 1st and 3rd plaintiffs followed her there against his will. He has denied that he holds the suit land in trust for the plaintiffs or that it is ancestral land. His case is that he acquired the original land parcel No. MUTITHI/STRIP/60 through secret ballot in 1971 a claim that has been supported by his witness **NDAMBIRI NYAGA (DW2)**. If indeed the defendant acquired the original land parcel No. MUTITHI/STRIP/60 from the then **KIRINAYGA COUNTY COUNCIL** through secret ballot, I would have expected at least some documents to show for it. I am not aware that balloting for land is done verbally. Surely there must be some records. While the defendant’s registration as the proprietor of the suit land is not in dispute, such registration alone cannot defeat a claim based on trust. Both **Section 28 of the repealed Registered Land Act** under which the title to the suit land is registered and **Section 25 of the new Land Registration Act** are clear on that. There are also sufficient judicial precedents on this such

as *GATHIBA VS GATHIBA 2002 2 E.A.L.R 342* and *KANYI VS MUTHIORA 1984 K.L.R 712* among others. The plaintiffs' claim to the suit land is clearly based on customary trust by persons in occupation and possession thereof which are some of the overriding interests protected by **Section 30 of the repealed Registered Land Act** and **Section 28 of the new Land Registration Act**. Much of the trial however revolved around the issue on whether the 1st and 3rd plaintiffs are in fact brother and sister respectively of the defendant. While the defendant was adamant that the 1st and 3rd plaintiffs are children of his mother the 2nd plaintiff, he added that they were however born of a different father and specifically one **MWAI**. On the other hand, the 1st and 3rd plaintiffs testified that their father **GITHAE** had two wives **KABUTA GITHAE** and **WARUGURU GITHAE** the 2nd plaintiff and that the defendant is their eldest brother and when their father **GITHAE** died, all of them were taken care of by their uncle **MWAI**. The 1st plaintiff denied the suggestion that **MWAI** was his father. This is what he said in re-examination by his counsel:

“JACKSON MWAI is a brother to my late father. He took care of my mother after my father died. He also took care of the defendant. JACKSON MWAI is therefore not my father. He is my uncle”

On his part, when he was re-examined by his counsel, the defendant had this to say on that issue:

“I confirm that the 1st and 3rd plaintiffs and I share the same mother but not the same father”

This same mother referred to by the defendant is of course the 2nd plaintiff who, unfortunately, could not testify because, as the Court was informed by the 1st plaintiff, was bed-ridden at the time of the trial. The Court was therefore deprived of a key witness's evidence because, other than medical evidence, there is no better person to prove the paternity of a child better than the mother. This Court was therefore left with the two contrasting versions of the plaintiffs and the defendant as to whether or not the 1st and 3rd plaintiffs are born of the same father. To me however, that was really inconsequential given the fact that the defendant admitted that the 1st and 3rd plaintiffs were born of the 2nd plaintiff who is also his mother and really therefore the defendant (by his own assertion) is still a half brother to the 1st and 3rd plaintiffs and they are not strangers as suggested by the defendant's counsel when he submitted that the 1st and 3rd plaintiffs have **“no connection”** to the defendant. They certainly do. The defendant's witness could not assist this Court in that regard. The defendant himself was not of much help either. This is what he said when cross-examined by **Mr. MAINA**:

“I am not a member of the Umbui Clan. I am from the Unjiru Clan. I never saw my father and I don't know which clan he belonged to”

Given that admission, this Court can only treat his evidence that the 1st and 3rd plaintiffs were not born of the same parents with a pinch of salt. The bottom line really is that whether or not they were born of the same father, the 1st and 3rd plaintiffs and the defendant are children of the 2nd plaintiff and are therefore a family. Therefore, apart from the evidence that the plaintiffs and defendant all live on the suit land and which evidence can support a claim based on trust, it is clear that they are not strangers to each other. It is also not lost to this Court that **JACKSON NJUKI MWAI** (PW3), the Chairman of the Wambui Clan to which the parties belong was categorical in his evidence in chief that the defendant was registered as the proprietor of the original land because he was the eldest in the family. This is what he said:

“I know the history of the suit land. It was clan land. It was originally given to their father GITHAE who had two wives. The two wives were called KABUTA and the other was WARUGURU who is the 2nd plaintiff. Since WARUGURU had no Identity Card, her portion was registered in the names of the defendant since he was the eldest of the children. I was present when that was being done. So the land was given to the defendant to hold for the family and upto now, the plaintiffs and defendant all live on the suit land which was registered in the names of the defendant in the 1970's”

This same witness later confirmed that when the original land was registered in the names of the defendant, the plaintiffs had gone to live with their uncle **MWAI** who brought them up and took them to school following the death of their father **GITHAE**. He added that the plaintiffs only went to live with **MWAI** because the 2nd plaintiff was un-able to educate the 1st and 3rd plaintiffs and that explains why the 1st plaintiff took the name **MWAI**. Indeed the witness stated that he also took care of the defendant. He said:

“MWAI only took care of the defendant, 1st and 3rd plaintiffs and they lived on his land with their mother 2nd plaintiff but were children of GITHAE. The 1st plaintiff only took the name MWAI because it was MWAI who educated him and was living with him but was not his father”

It is now well established that under **Kikuyu Customary Law**, to which the parties herein are subject, land is usually held by the eldest son in trust for the family – see *KIHARI VS KIHARI C.A CIVIL APPEAL No 170 of 1993 (1994 e K.L.R)*. Evidence has been led in this case to show that the defendant is the eldest in the house of his mother the 2nd plaintiff and that is why the original land parcel No. MUTITHI/STRIP/60 was registered in his names to hold in trust for the plaintiffs. This evidence, taken together with the fact that the original land parcel No. MUTITHI/STRIP/60 was originally clan land and not private property, on which the plaintiffs have lived for close to thirty (30) years, is evidence upon which this Court can conclude, which I hereby do, that the defendant holds the suit land in trust for both himself and the plaintiffs. I must therefore determine the trust in the terms sought by the plaintiffs.

The original land parcel No. MUTITHI/STRIP/60 measured 4.0 Ha as per the Green Card produced herein. After sub-dividing it into four portions to give rise to the suit land, the defendant sold one portion MUTITHI/STRIP/689 to one **JUSTUS KARUNGA MWANIKI**. It was then that the plaintiffs moved to this Court. The defendant was clearly in breach of his obligation as a trustee. That left only three portions as follows:

1. MUTITHI/STRIP/688 - 2.02 Ha

2. MUTITHI/STRIP/690 - 0.81 Ha

3. MUTITHI/STIP/691 - 0.81 Ha

Total - 3.64 Ha

The plaintiffs seek an order that the defendant holds 2.40 Ha out of the suit land in trust for them and that the Land Registrar do transfer that portion to them upon execution of the necessary documents by the Deputy Registrar of this Court. That would still leave the defendant with 1.24 Ha.

The up-shot of the above is that this Court finds that the plaintiffs have proved their case as required in law on the claim that the defendant holds the land parcels No. MUTITHI/STRIP/688, 690 and 691 in trust both for himself and the plaintiffs. There shall be judgment for the plaintiffs against the defendant in the following terms:

1. A declaration that the defendant holds 2.40 Ha out of the land parcels No. MUTITHI/STRIP/688, 690 and 691 in trust for the plaintiffs.

2. The Deputy Registrar do execute all relevant documents to facilitate the transfer of 2.40 Ha out of land parcels No. MUTITHI/STRIP/688, 690 and 691 to the plaintiffs.

3. As the parties are family, each to meet their own costs.

B.N. OLAO

JUDGE

7TH MAY, 2018

Dated and signed at Bungoma this 7th day of May 2018.

Read and Delivered on 26th Day of June 2018

S.N MUKUNYA

JUDGE

26TH JUNE, 2018