



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 138 OF 2013

JULIUS WACHIRA MAINA.....1ST PLAINTIFF

SAMUEL MUCHOKI MAINA.....2ND PLAINTIFF

JOSEPH GATHUA MAINA.....3RD PLAINTIFF

- VERSUS-

CHRISTOPHER MURATHE MURAGURI.....DEFENDANT

JUDGMENT

Introduction

1. The subject matter of this suit is ownership of the parcel of land known as **Githi/Igana/11** (hereinafter referred to as “the suit property”) currently registered in the name of **Christopher Murathe Muraguri**, the defendant herein.
2. The suit property was initially registered in the name of the defendant’s father, **Francis Muraguri Wachira**, deceased. Registration of the defendant as the proprietor of the suit property was effected pursuant to orders issued in Nakuru High Court Succession Cause No. 34 of 1990.
3. The plaintiffs’ contend that the suit property was registered in the name of the defendant’s father to hold on behalf of their father, Peter Gituria (deceased) and on his own behalf. For that reason, the plaintiffs claim that the defendant holds the suit property subject to a trust in their favour.
4. Vide his statement of defence, the defendant has denied the plaintiffs’ claim and contended that neither he nor his father was registered as a trustee of the plaintiffs’ father.

EVIDENCE

The plaintiff’s case

5. When the matter came up for hearing, the plaintiffs reiterated their contention that the defendant holds a portion of the suit property, measuring 2 acres in trust for them.
6. According to the plaintiffs, the suit property is one of the two parcels of land which belonged to their grandfather (deceased), the other parcel being plot No.12 Mukurweini.

7. The plaintiffs told the court that the two parcels were to be shared amongst the five sons of their grandfather, who included their father, Peter Giture; the suit property was to be shared between the defendant's father and their father. The other three sons were to share plot No. 12 Mukurweini.

8. It was the testimony of the the plaintiffs' that the parcels of land were shared as indicated above.

9. The plaintiffs' informed the court that because at the time of registration their father had passed on, his portion was gathered by the defendant's father.

10. It was the plaintiffs' testimony, that despite the suit property having been registered in the name of the defendant's father and subsequently the defendant's name, they have all along being living in the suit property.

11. The court heard that the dispute concerning their occupation and use of the suit property only arose after the defendant decided to share the suit property in a manner prejudicial to them by taking away half an acre belonging to them.

12. The conduct of the defendant is said to be premised on the desire to dispossess one of the plaintiffs' brother who is said to be of unsound mind.

The defence case

13. In his testimony, the defendant admitted that the two parcels of land herein belonged to their grandfather but denied the contention that his father held the suit property in trust for the plaintiffs' father and on his own behalf.

14. The defendant also admitted that the plaintiffs' father was a brother to his father and stated for reasons unknown to him, the plaintiffs' father had no land.

Submissions

15. In their submissions, the plaintiffs urge the court to take into account the following facts:

i) That their grandfather, Wachira Mbirui, had five sons and two parcels of land namely Githi/Igana/11 and Githi/Igana 12;

ii) That Githi/Igana/11 was registered in the name of Francis Muraguri (the defendant's father) in trust for Peter Giture and Githi/Igana/12 was registered in the name of John Kiragu in trust for Laban Maina and Kingangi;

iii) That the defendant's father had only one son; the defendant herein; while their father had three sons; themselves;

iv) That they have been in use and occupation of the suit property for over 50 years;

v) That their mother is buried in the suit property;

vi) That the defendant did not raise any objection to the division of the property, in equal shares, by the area chief and their uncle, Laban Maina.

16. Claiming that they were not aware of the succession proceedings where the defendant was confirmed as the sole owner of the suit property, the plaintiffs blame the defendant for having instituted the succession proceedings in Nakuru law courts instead of Nyeri law courts.

17. The plaintiffs also blame the defendant for attempting to take advantage of their brother, Julius Wachira Maina, whom they claim is of unsound mind, by taking half an acre from him.

18. Maintaining that as sons of Peter Gikuria, they were entitled to inherit their father, the plaintiffs explained that they could not inherit Laban Maina who merely inherited their mother following the death of their father.

19. On behalf of the defendant, it is pointed out that the defendant was registered as proprietor of the suit property pursuant to orders obtained in Nakuru High Court Succession Cause No. 34 of 1990; that the orders issued in that cause have never been challenged and submitted that the orders having been issued by a judge of concurrent jurisdiction, this court cannot grant the orders sought because doing so would be tantamount to setting aside the said orders.

20. Based on the decision in the case of **George Wambugu Ngunjiri v. Eunice Nyaitaha-Nyeri HCCC No. 120 of 1996** (unreported) and the provisions of **Section 20 (2)** of the Limitation of Actions Act, Cap 22 Laws of Kenya, it is submitted that the plaintiffs' claim is statute barred. Besides, it is submitted that a trust relationship was not established. In this regard, it is submitted that the evidence adduced showed that the plaintiffs were born after the property had been registered in the name of the defendant's father way before the plaintiffs were born and that the plaintiffs were named after Laban Maina who had his own land.

Issues for determination

21. From the pleadings filed in this suit and the submissions, I find the issues for determination to be:-

- a. **Whether this court has jurisdiction to hear and determine the issues raised in this suit?**
- b. **Whether the plaintiffs' claim is time barred?**
- c. **Whether the plaintiff have made up a case for being granted the orders sought?**
- d. **What orders should the court make?**

22. On whether this court has jurisdiction to hear and determine the dispute herein, this court is urged to be persuaded by the decision in the case of **George Wambugu Guchiri v. Eunice Nyaitaha, Nyeri HCCC No. 120 of 1996** where **Okwengu J.**, (as she then was) observed:

'It is apparent that the defendant is in effect challenging the distribution done in the succession cause number 165 of 1983 and the right of the plaintiff to inherit the portion having her matrimonial home. The defendant however has so far sat on her rights as she has taken no action since she came to learn of distribution and registration of the suit land in the name of the plaintiff. The defendant has failed to use the elaborate machinery provided for challenging the distribution or confirmation of the grant relating to the estate of her deceased husband. This means that as matters stand now the plaintiff is the registered owner of the suit land and is therefore entitled to the orders sought.'

23. In the above case, the plaintiff had moved to court seeking eviction orders against the defendant whom she claimed to be occupying the property that had been transmitted to her unlawfully.

24. Unlike in that suit, where the plaintiff did not base her claim on alleged trust relationship, in the current suit the plaintiffs' claim is based on alleged trust relationship. That being the case, I find the circumstances obtaining in that suit to be different from those obtaining in the current case.

25. Given the fact that the succession court was not asked to determine whether the interest being succeeded was subject of any trust in favour of the plaintiffs or any other person, I am unable to agree with the defendant's counsel that by asking this court to determine whether the registration of the defendant as the absolute proprietor of the suit property is subject to their interest in the suit properties as beneficiaries pursuant to the alleged trust relationship amounts to challenging the orders obtained in the succession proceedings.

26. In their testimony, the plaintiffs categorically stated that they are not challenging the orders obtained by the defendant in the said succession proceedings.

27. In my view, this court would lack jurisdiction, only and only if, the question of the plaintiffs' interest had been made subject of consideration in the succession proceedings and found to be none existent.

28. There being no evidence that the question of trust or the question of the plaintiffs interest in the suit property was subject of consideration in the succession cause, I find and hold that this court has jurisdiction to hear and determine whether the registration of the defendant is subject of the alleged trust in favour of the plaintiffs.

29. On whether the plaintiffs' claim is statute barred, I adopt the decision of this court in **Peter Muriithi Gichohi v. Richard Wambugu Gichohi (2016)e KLR** where I observed:-

“In answering this question, I am persuaded by the decision in the case of Michael Gachoki Gicheru v. Joseph Karobia Gicheru (2014) eKLR where Olao J., stated:-

“The plaintiff goes further in paragraph 6 to plead that the defendant has always been unwilling to sub-divide the land and give him two (2) acres out of the five (5) acres. From those pleadings, the plaintiff is clearly seeking to recover from the defendant trust property and is alleging that there is a breach of trust by the defendant who is converting the land subject matter of this suit for his own use. ... In my view, having looked at Section 20 (1) and (2) of the Limitation of Actions Act as well as the pleadings herein, this suit falls under Section 20 (1) of the Limitation of Actions Act for which there is no period of limitation. See also the case of

STEPHENS AND SIX OTHERS VS STEPHENS AND ANOTHER 1987 K.L.R 125 where the Court of Appeal held that the period of limitation prescribed in the Limitation of Actions Act Section 20 (1) (b) does not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust property or proceeds thereof converted by the trustee for his own use. Whether in fact the plaintiff herein will be able to establish that he is the beneficiary of any trust or that the defendant has converted trust property into his own use is of course a matter for trial to be proved by the evidence that will be adduced by the parties. As for now, the Court can only go by the pleadings and it is clear to me that being a claim for breach of trust, this claim is not therefore time barred.”

30. On whether the plaintiffs have made up a case for being granted the orders sought, from the undisputed or uncontroverted facts of this case; namely that the grandfather of the parties herein had two parcels of land to wit Githi/Igana/11 and Githi/Igana/12 and five sons, among them the parents of the parties to this suit; that the plaintiffs have been in use and occupation of the suit property for over 50 years and the conduct of the parties (parties appear to be in agreement that the plaintiffs are entitled to a portion of the suit property, their difference being the size only), I entertain no doubt that the defendant holds a portion of the suit property in trust for the plaintiffs. Consequently, I find the plaintiffs claim to be merited and allow it in terms of prayer (a), (b) and (c) of the plaint hereto, dated 15th July, 2013.

31. This being a family dispute I make no order as to costs.

Orders accordingly.

Dated, signed and delivered at Nyeri this 31st day of January, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Muturi h/b for Mr. Wahome Gikonyo for the defendant

Defendant present in person

Julius Wachira mina

Samuel Muchoki Maina

Joseph Gathua Maina

Court clerk - Esther