



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 63 OF 2013 (O.S)**

**IN THE MATTER OF ORDER 37 RULES 1, 2 AND 7 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF A DECLARATION OF TRUST AND/OR ADVERSE POSSESSION**

**AND**

**IN THE MATTER OF ADMINISTRATION OF THE ESTATE OF JOHN MUCHIRI WAIRAGU  
(DECEASED)**

**AND**

**IN THE MATTER OF L.R NO. OTHAYA/IHURIRIO/645, 646 AND 647**

**BETWEEN**

**JOHNSON KANYINGI GITHINJI.....PLAINTIFF**

**- VERSUS -**

**MARGARET WANJIRU MUCHIRI.....DEFENDANT**

**JUDGMENT**

**Pleadings**

1. The plaintiff herein, John Kanyingi Githinji, took up the summons dated **18th April, 2013** for determination of the following questions:-

1. Whether the parcels of land known as L.R No.Othaya/Ihuririo/645, 646 and 647 (the suit properties) were initially registered in the name of John Muchiri Wairagu (deceased) and currently in the name of the defendant, Margaret Wanjiku Muchiri, are subject to a customary trust in his favour.

2. Whether the said customary trust, if found to exist, should be determined through rectification of the register by cancellation of the defendant's name as proprietor of the suit properties and in place thereof the other identifiable beneficiaries and himself be registered as proprietors of the suit properties.

4. **Subject to the outcome of prayer (2) above whether a determination should be made of the extent of his entitlement to the suit properties as well as the entitlement of the other beneficiaries to the suit property.**

4. **In alternative to prayers (1), (2) and (3) above whether he has become entitled to be registered as the proprietor of the suit property by adverse possession?**

5. **Who should bear the costs of the suit?**

2. In support of the application, the plaintiff has deposed that the suit properties which are currently registered in the name of the defendant are resultant subdivisions of L.R No.Othaya/Ihuririo/379 which was registered in the name of the deceased husband's name, John Muchiri Wairagu; that before the suit properties were registered in the defendant's name, they were registered in the name of her husband despite it being family land.

3. The plaintiff contends that the registration of the defendant's husband as the proprietor of the suit property was meant to be for the benefit of the whole family.

4. Explaining that his family, the family of Francis Waigiri and himself settled in the suit property in 1958 and have since then had exclusive possession and use of the suit property and effected massive development thereon, the plaintiff explains that neither the defendant nor her husband settled on the land.

It is further deposed that attempts to get the defendant's husband to have the land registered in the name of identifiable beneficiaries were in vain.

5. The plaintiff accuses the defendant of having transferred the suit properties to herself in disregard of their interest thereto.

6. In reply and opposition to the application, the respondent has deposed that the dispute concerning the suit property was subject of determination in Nyeri South Land Disputes Tribunal where, an award which has not been appealed from was made in her favour. The applicant contends that the plaintiff, if dissatisfied, ought to have appealed against the award. In effect, the plaintiff denies the plaintiff claim.

## **EVIDENCE**

### **The plaintiff's case**

7. The plaintiff who testified as **P.W-1**, informed the court that he has lived in the suit property since 1958; that the suit property belonged to his grandfather Muchiri Muchemi and that before the suit property was registered in the name of the defendant, it was registered in the name of the defendant's husband, Muchiri Wairagu, as a trustee for his fathers. He informed the court that the dispute concerning the suit property has been severally discussed at family level and that the family had agreed on the mode of distribution of the suit properties.

8. He denied the allegation that the suit properties were bought by the defendant's husband.

9. He told the court that he was present when the suit property was being demarcated and explained that he could not be registered as proprietor because his father was the chairman of the demarcation committee.

10. He further informed the court that the suit property was a consolidation of 6 acres from his grandfather and 7 ½ acres from his father (that was according to the history of the land which he got from his father). P.W.1 told the court that since 1958 he has not agreed with the way things were done.

11. With regard to the proposed distribution of the suit property, he told the court that it was in

accordance with the contribution of the parties involved.

12. He further informed the court that he is aware that in 2013, the defendant lodged a complaint before the District Commissioner (D.C) but stated that he is not aware of the succession proceedings pursuant to which the defendant obtained title to the suit property. It was his testimony that although the defendant is entitled to a share of the suit property, she is not entitled to the crops thereon.

13. He also contended that he is the one who cleared his grandfather's debt in respect of the suit property. According to him, the defendant's husband paid for his portion. The court further heard that the proposal for distribution of the suit property accords with what is happening on the ground.

14. **P.W - 2 Festus Karanja Githinji**, a brother to the plaintiff, told the court that he has lived on the suit property all his life. Like P.W.1, he informed the court that the defendant has neither lived on the suit property nor developed it. He stated that the suit property belonged to his grandfather's family, Muchiri, acquired through payment of goats. His grandfather paid 2 goats and his father 34 goats. Wairagu Muchiri and another brother paid but is not aware how much having got the information from family records kept by his father showing the history of the land. He proposed that plaintiff be given 9.2 acres with the balance of the land going to the defendant's husband and his brothers.

15. He stated that he got the records from Peter Maina. However, he could not identify the author of the records contained in the book.

16. He told the court that the defendant's husband had been given land which he sold.

17. He explained that they are laying claim to the suit property because it was held in trust although not the entire portion was held in trust. He stated that the defendant's husband has a portion set aside for him and explained that the tea on the suit property was planted by his father in 1958.

18. He testified that he only became aware of the succession proceedings filed by the defendant when he was served with an eviction order, which he challenged by filing a caution.

19. He maintained that the defendant changed title secretly, because he did not inform them. According to him, the defendant's husband should have informed them through the chief.

20. He further informed the court that the tea in the suit property is taken care of and picked by his family.

21. **P.W - 3 Peter Maina Muchiri**, told the court that he was given the book which he produced by his grandmother, Lucy Wangari Githinji, to keep in safe custody. The book contains important information regarding the family of Muchiri. It captures important issues relating to the family like land transactions and dowry payment. He stated that he has always availed the book when needed as a reference point.

22. He further informed the court that the book belongs to the family of Karanga Muchiri including the extended family. He admitted that he has never witnessed any entry being made in the book.

### **The Defence case**

23. **D.W - 1 Margaret Wanjiku Muchiri**, told the court that the suit property was bought by her husband through his father and that the plaintiff's father was the one taking care of it.

24. She explained that she obtained the suit property through succession proceedings, vide Nyahururu No. 40 of 2011, and maintained that the plaintiff is not entitled to any portion of the suit property.

25. She termed the book relied on by the plaintiffs as their own creation and the contents therein false.

26. She told the court that the land that belonged to their grandfather was sub-divided among the

plaintiffs. She further told the court that she is not utilising the land because any time she goes there, she is chased away by the plaintiff's brother, Karanja.

27. She told the court that she had reported the matter to the area chief who had referred her to the village elders.

28. She further told the court that she was not aware that the suit property was first registered in the name of her husband in 1958 when he was 13 years old.

29. She maintained that the land was bought for his husband and that when she was married, the land was being used by her father-in-law. According to her, the developments on the suit properties were partly effected by her father – in-law.

30. She admitted that the land was sub-divided by her husband and that her husband and the family of the plaintiff have had a long protracted dispute over the suit property.

31. She also told the court that by the time she got married, their grandfather, Muchiri, had passed on.

32. With regard to the contention that her husband filed the succession proceedings secretly, she stated that the proceedings were gazetted.

33. She further told the court that her husband had unsuccessfully tried to evict the plaintiff and his family from the suit properties.

34. **D.W - 2 Richard Muchemi Wairagu**, a brother to the defendant's husband, informed the court that the suit property was bought by his late father in early 1950's.

35. Peter Githinji Muchiri who was receiving instructions on how to deal with ancestral land, was instructed to register the suit property in the name of Muchiri Wairagu (who was his father's first born).

36. He explained to the court that the plaintiff's father was allowed to live and effect some developments on the suit property by the defendant's father-in-law after he lost his job. He was to take care of the land on his behalf.

37. He stated that he is aware of the succession proceedings filed by the defendant and the meeting held at the D.C's office where the plaintiffs were ordered to vacate the land.

38. He accused the plaintiffs of using the court process to prolong their stay in the suit property.

39. He further stated that is not aware of the book produced by P.W.3. and that the Plaintiff's father had filed another case, 109 of 1985 which was never concluded.

40. He explained that he was not born when the land was being bought. He only knew that his father had bought the land but he did not know from whom. He stated that the suit property is occupied by the family of Peter Githinji Muchemi and Waigiri Muchiri. They have lived there for many years and the tea bushes thereon were planted by his father but are used by the families living thereon.

41. He admitted that there have been many family meetings concerning the suit property. He maintained that he did not know about the book produced by P.W.3. and therefore could not comment about its contents.

42. He admitted that neither the defendant nor her husband have even lived in the suit property.

43. He testified that the dispute arose in 1980 when the defendant wanted to sell the land and confirmed that the defendant's husband never filed a case in court concerning the property. According to him, not more than 10 people lived on the suit properties. He stated that he was aware that his grandfather had

land in Kiandeni but he did not know how he had acquired it.

44. Finally he stated that Festus Githinji, a son to his uncle Peter, resides in the suit property and was aware that his grandfather owned plot number 972 which was subdivided amongst his sons, his father and his brothers. He confirmed that he has land given to him by his father in Nyandarua.

### **Submissions**

45. On behalf of the plaintiff, a brief overview of the cases of the parties is given and submitted that there is cogent evidence in the history of the suit property disclosing existence of a customary trust over the suit properties. In this regard, it is pointed out that the defendant's husband did not acquire the suit property; that the suit property was registered in the defendant husband's name when he was still a minor. The evidence of the plaintiff concerning the acquisition of the property is said to be corroborated by the entries recorded in the book produced by P.W.3, as **Pexbt 9**.

46. The fact that the defendant's husband did not enjoy rights to the suit property as the absolute proprietor thereof, the explanation offered by the plaintiff as to why the defendant's husband was registered and the fact that there is no reliable evidence to show that the persons in possession of the suit property took possession of the suit property, are said to be evidence of the pleaded trust.

47. It is also contended that there is evidence of observance of trust by possession and occupation. In this regard, it is pointed out that since registration, possession and use of the suit property has been with two of the three pleaded beneficiaries of the suit property. It is pointed out that the persons in possession and use of the land extensively developed it. Conversely, neither the defendant nor her husband has been in possession of the suit property. It is contended that save for the belated attempts by the defendant to disrupt the communal and inter-generational holding of the land, the plaintiffs enjoyment of the land has been peaceful.

48. On the law, it is submitted that the law imputes a customary trust over registered land in recognition of possession and occupation of such land in apparent observance of such customary rights which gives rise to a trust which is protected by law. In this regard, reference is made to the proviso to **Section 28** of the Registered Land Act, (RLA) (repealed), **Section 25(2)** of the Land Registration Act (LRA), 2012, **Section 30(g)** of the RLA (repealed) and **Section 28** of the LRA, 2012.

Further reference is made to the cases of **Mbui v. Mbui (2005)1 E.A 256; Kanyi v. Muthiora (1984) KLR 712; Gathimba v. Gathiba (2001)1 KLR 1048; Mutsonga v. Nyati (2001) 1 KLR 1048; Mwangi & Another v. Mwangi (2008) 1 KLR 1070; Mumo v. Makau (2002) 2 (E.A) 251; Philicery Nduko Mumu v. Nzuki Makau (2002) 2 E.A 251; Njenga Chogera v. Maria Manjira Kimani (2005) e KLR; Lunkuli v. Marko Sabayi (1979) KLR 251; Gatimu Kinguru v. Muya Gathanji (1976) KLR 253.**

49. In the above cited cases, courts recognised customary trusts in registered land.

50. Arguing that the circumstances that obtained in those cases are in all fours with the circumstances of the instant case, the plaintiff counsel urges the court to make a similar finding.

51. With regard to the defendant's contention that the plaintiff ought to have challenged her entitlement to the suit property, it is submitted that, that argument should fail because of the following reasons-

1. The death of a trustee and administration of his estate does not nullify a trust attached to the estate;
2. The court that handled the administration of the estate had no jurisdiction to and was not seized of the issue of trust;
3. The plaintiff was not a party to the succession proceedings;

4. The plaintiff and the other beneficiaries of the pleaded trust have a right to put to an end the trust;

52. With regard to the claim for adverse possession, it is submitted that the defendant admitted that the plaintiff and the other beneficiaries have been in actual possession of the land since its registration to date, a period of over 50 years. Evidence of possession is said to be captured in the valuation report tendered by the plaintiff as **Pexbt 8**. There were attempts to evict the plaintiffs from the suit property through the Provincial Administration which were resisted by the plaintiffs.

53. The possession is said to have been notorious and open, without interruption for all those years; That there has been hostile assertion of title by the persons in possession adverse to the legal title of the defendant and her predecessor in entitlement.

In view of the foregoing, the defendant's title to the land is said to have been extinguished by the plaintiff's adverse possession thereof.

54. Based on the decision of **Gatimu v. Muya** (*supra*), the court is urged to enter judgment in favour of the plaintiff on both limbs of his claim, customary trust and adverse possession.

55. Despite being granted enough time, at the time of writing this judgment the defendant had not filed any submissions.

### **Analysis and consideration**

56. I have read and considered the pleadings, evidence and the submissions made in respect of the cases of the parties in this case.

57. With regard to the claim that the defendant holds the suit properties in trust for the plaintiffs, that claim should be gauged on the basis of the test enunciated by the Court of Appeal in the case of **Salesio M'itonga v. M'ithara & 3 Others (2015)eKLR** thus:-

**“It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki - vs- Gichuki – Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust.....We concur with the following findings by the High Court:-**

**“Trust must be proved by credible evidence adduced by the person claiming that a trust exists. See Wambugu vs. Kimani supra....”**

58. The uncontroverted facts about this case are:-

1. That the suit properties were registered in the name of the defendant's husband before they were registered in the defendant's name;
2. That the suit properties are sub-divisions of L.R No. Othaya/Ihuririo/379
3. That the plaintiffs are and have been in possession of the suit property for a long period of time;
4. That the plaintiffs have effected massive developments in the suit properties;
5. That the plaintiffs are the ones taking care and making use of the tea bushes growing in the suit property;
6. That neither the defendant nor her deceased husband have ever lived in the suit properties;
7. That there have been protracted disputes between the family of the defendant and the plaintiffs over entitlement to the suit properties.

8. That the defendant is entitled to a share of the suit properties.

59. Whilst the plaintiffs' claim that the defendant's husband was registered as the proprietor of the original parcel of land, Othaya/Ihuririo/379 to hold on their behalf and on his own behalf, the defendant, on the other hand maintained that her husband held the land absolutely, the same having been bought for him by his father.

60. Does the evidence adduced by the plaintiff meet the threshold for proof of existence of a trust relationship between the plaintiff or put another way the persons in possession of the suit properties and the defendant?

To determine this question, I have carefully reviewed and analyzed the evidence adduced in this case and made the following observations:

i. That the original parcel of land was registered in the name of the defendant's husband in 1958, when he was barely 13 years of age;

ii. That other than his registration, there is nothing to show that the defendant ever took possession of the suit properties or effected any developments thereon. With regard to the defendant's contention that the tea bushes on the suit properties belong or were planted by her father-in-law, upon review of the evidence on record to wit the fact that the tea is picked by the plaintiffs and their family and in the absence of any dispute concerning the plaintiffs' action of picking the tea, I am unable to agree with the defendant that the tea bushes in the suit property were planted by the defendant's father-in-law.

iii. The defendant's evidence to the effect that the suit property was bought by her husband was contrary to that of her witness D.W.2 whose testimony was to the effect that the original parcel of land was bought by his late fathers. D.W.2's testimony accorded with that of the plaintiff's that the suit property was family land.

D.W.2's testimony to the effect that the plaintiffs' father was a mere caretaker of the suit property is neither supported by the pleadings filed in the case nor the evidence on record. In my view, if the plaintiffs' father came into the suit property as a mere caretaker there is no way he and his family would have effected such massive development on the suit property without interference by the alleged owners. This is so because there is no evidence or suggestion that the persons in possession obtained consent or permission of the owners to effect the developments on the suit property. Moreover, the evidence on record shows that it is not the family of the plaintiff's father only that is in use and occupation of the suit property.

iv. There is evidence that the dispute between the parties herein has been subject of arbitration before various forums including the defunct Land Disputes Tribunal, which found in favour of the respondent. Concerning that determination by the Land Disputes Tribunal and the fact that the plaintiffs did not appeal the decision of the Land Disputes Tribunal, I can do no better than reiterate the observation by **Ombwayo J.**, in the plaintiffs' application for interlocutory reliefs that the Tribunal lacked jurisdiction to hear and determine the dispute preferred before it. Besides, the issue of trust which is the subject matter of these proceedings has never been raised and determined in any court of competent jurisdiction. That being the case, the plaintiffs cannot be faulted for failure to appeal against the decision of the Land Disputes Tribunal and/or for having preferred this suit for determination of the issue of trust, which the Tribunal had no power to hear and determine.

v. The totality of the evidence in this case, namely exclusive possession and use of the suit properties, observance of a customary trust, at least by the plaintiffs on the suit properties, and the conduct of the parties to the dispute leaves no doubt that the defendant's husband held the suit property in trust for himself and the plaintiffs.

vi. The plaintiffs suggested the mode of distribution of the suit property based on what they called

the parties contribution to the acquisition of the suit property. In a bid to show how the property was acquired and the contribution of the parties in its acquisition, the plaintiff produced a book which allegedly was used to record the family's important transactions like dowry payments and land transaction. The book which was produced as **Pexbt 9** was unfortunately not in the language of the court. The plaintiff or his advocate did not endeavour to translate the contents therein, thus making the contents therein inadmissible in evidence.

vii. In the absence of any reliable evidence, concerning the contribution of the parties to the acquisition of the suit properties, I order and direct that the suit properties be shared equally between the three families of Muchiri.

viii. This been a family dispute, I order that parties bear their own costs of the suit.

Orders accordingly.

**Dated, signed and delivered at Nyeri on this 17<sup>th</sup> day of January, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr.Ombongi for the defendant

Mr. Ndegwa h/b for C.N. Kingori for the plaintiff

Court clerk - Esther