REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 239 OF 2015

PAUL NJERU MWATHE……..……...…….APPLICANT

VERSUS

VIDYA THIRA MWATHE…….....1ST RESPONDENT

CATHERINE MUTHONI…….....2ND RESPONDENT

MARY WARUE JOHN…….....3RD RESPONDENT

ALOIS NYAGA MBOGO…….....4TH RESPONDENT

JUDGMENT

By an amended Originating Summons filed herein on 1st August 2014 the plaintiff sought the following orders against the defendants:-

> ***1. That a declaration do issue that the defendants hold land parcels No. KYENI/MUFU/7142 to 7148 in trust for the plaintiff PAUL NJERU MWATHE and that the plaintiff has obtained an adverse title of the piece of land No. KYENI/MUFU/7142 to 7148.***
>
> ***2. That the defendants be condemned to pay the costs of this suit.***

The Originating Summons is accompanied by the plaintiff's supporting affidavit in which he has deponed, inter alia, that the land parcels No. KYENI/MUFU/7142 to 7148 (the suit land herein) is registered in the names of the 1st, 2nd, 3rd and 4th defendants although for over fourty (40) years, he has lived and cultivated on five (5) acres thereof which is his only source of livelihood and which he has developed by planting 400 coffee stems and 100 banana stems. That the suit land previously belonged to his late grandfather **MWATHE KURIKA** who gave him the same as a gift but it was registered in the names of his mother the 1st defendant to hold in trust for him being the only son in the family. That on 13th October 2010, the 1st defendant sub-divided the suit land with the intention of selling the sub-divisions to the 2nd to 4th defendants.

The 1st, 2nd and 3rd defendants swore a joint affidavit in response to the Originating Summons in which they deponed, inter alia, that the original land parcel No. KYENI/MUFU/1189 belonged to the 1st defendant's father **MWATHE KURIKA** who in 1980 transferred it to his un-married daughter the 1st defendant to hold it in trust for herself and her only sister **PENINAH WARUE**. That sometime in 2009, the 1st defendant sub-divided the said land so that she could share it between her sister and children including the plaintiff. However, the plaintiff could hear none of this and lodged a caution thereon. However, that caution was removed following a ruling in **RUNYENJES PMCC No. 17 of 2009.** The 1st

defendant thereafter sub-divided the land parcel No. KYENI/MUFU/1189 to give rise to the suit land and transferred parcel No. KYENI/MUFU/7146 to the 2nd defendant, KYENI/MUFU/7147 to the 3rd defendant and KYENI/MUFU/7145 to the 4th defendant. And although the 1st defendant intended to transfer the remaining portions to the plaintiff and his sister, the plaintiff lodged a caution on those parcels. The 1st, 2nd, and 3rd defendants denied that the 1st defendant's father gave the suit land to her to hold in trust for the plaintiff adding that infact the plaintiff was then aged over 25 years with an Identity Card and nothing would have stopped him from having it registered in his name. Further, the plaintiff was only a grandchild and cannot claim adverse possession over his parent's properties.

The 4th defendant in his replying affidavit informed the Court that he is the registered proprietor of the land parcel No. KYENI/MUFU/7145 measuring 0.40 Ha which he purchased from the 1st defendant as the registered owner and to which the plaintiff has no claim.

When counsel for the parties appeared before me on 7th March 2016, it was agreed that the dispute be determined by way of the parties respective affidavits and written submissions. Those submissions were subsequently filed in May and June 2016 and this file was transmitted to me at Kerugoya ELC to write a judgment.

I have considered the Originating Summons, the replying affidavits and the submissions by counsel.

Although both counsel have confined their submissions on the claim for adverse possession, it is clear from the Originating Summons that the plaintiff's suit is premised on two distinct claims. These are:-

1. Adverse possession

2. Trust.

ADVERSE POSSESSION

In the case of ***TITUS KASUVE VS MWAANI INVESTMENT LTD C.A CIVIL APPEAL No. 35 of 2002 (2004 1 K.L.R 184***), the Court of Appeal laid down what a party claiming land by adverse possession has to prove. It said:-

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

It is now well established that the combined effect of the provisions of ***Sections 7, 13 and 17 of the Limitation of Actions Act*** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession of that land – ***BENJAMIN KAMAU VS GLADYS NJERI C.A CIVIL APPEAL No. 2136 of 1996***. Similarly, the new land laws promulgated after 2010 recognize the doctrine of adverse passion. ***Section 28 (h) of the new Land Registration Act 2012*** recognizes some of the overriding interests on land as:

> "***rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription"***

Section 7 of the new Land Act 2012 on the other hand provides that:-

> ***"Title to land may be acquired through:***
>
> **a.**
>
> **b.**

c.

d. Prescription".

Finally, ***Section 38 (1) of the Limitation of Actions Act*** provides as follows:-

> "***Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of land comprised in a lease registered under any of these Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land".***

The plaintiff has pleaded in paragraphs 5 and 6 of his supporting affidavit that for over 40 years, he and his family have occupied 5 acres out of the suit land where he grows coffee and bananas and they have no other source of livelihood. That has not been rebutted by the defendants. However, the plaintiff also needs to prove that he has dispossessed the defendants of the suit land before he can successfully mount a claim based on adverse possession. What amounts to dispossessing of land are acts which are inconsistent with the owner's enjoyment of the land in dispute. In ***NGATI FARMERS CO-OPERATIVE SOCIETY LTD VS COUNCILOR JOHN LEDIDI & OTHERS C.A CIVIL APPEAL No. 64 of 2004***, the Court cited with approval ***LITTLEDALE VS LIVERPOOL COLLEGE (1900) 1 CH 19*** in which **LINDHOY M.R** said:-

> ***"In order to acquire by the statute of limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it ……"***

In ***WAMBUGU VS NJUGUNA (1983) K.L.R 172,*** the Court of Appeal stated as follows:-

> ***"First, in order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being disposed of it or by having discontinued his possession of it – Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The limitation of Action Act (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years".***

In the circumstances of this case, the plaintiff has not proved that he has dispossessed the defendants of the suit land. While this Court is satisfied from the affidavit evidence that the plaintiff has lived and cultivated on 5 acres of the suit land for over 40 years (that was not rebutted by the defendants replying affidavits), there is no evidence that the defendants have ever discontinued their possession of the same for the statutory period in order to justify orders for adverse possession.

It is also a well settled principle that a party claiming land through adverse possession must prove that his possession is ***"nec vi nec clam nec precario***" that is that it is peaceful, open and continuous. It is clear from the defendants replying affidavits however that although the 1st defendant has been desirous of sub-dividing the suit land, the plaintiff did not want that to happen and therefore lodged a caution thereon. The plaintiff's occupation of the suit land has therefore not been peaceful and he cannot therefore be entitled to orders of adverse possession with respect to the suit land.

Given those circumstances, the plaintiff's claim to the suit land through adverse possession must fail and in therefore dismissed.

TRUST

The plaintiff also claims that the suit land is held in trust for him by the defendants since it was originally

registered in the names of his late grandfather **MWATHE KURIKA** who had given it to him as a gift before he died. In paragraph 3 of his supporting affidavit, he has deponed as follows:-

> 3: "***That since I had not attained the age of majority, the respondents herein, my mother, 2nd, 3rd and 4th respondents got registered with land No. KYENI/MUFU/1189, 7142 to 7148 in trust for me"***

This had been rebutted by the defendants. In paragraph 13 of the replying affidavit of the 1st, 2nd and 3rd defendants, it is deponed as follows:-

> 13: ***"That it is not true that the 1st respondent's father intended to give the land to the 1st respondent to hold in trust for the applicant because:***
>
> ***a. At the time the land was transferred to the 1st respondent, the applicant was aged over 25 years, had an Identity Card and nothing could have stopped him from having the land registered in his name"***
>
> ***b. the applicant was not the only grandchild, or the only beneficially (sic) to the Estate"***

While it is conceded that the plaintiff is a son to the 1st defendant and also a grandchild of the late **MWATHE KURIKA** the original proprietor of the land parcel No. KYENI/MUFU/1189, there is really no evidence that his late grandfather gifted him the said land or indeed the suit land during his life time as envisaged under ***Sections 108 and 109 of the repealed Registered Land Act*** under which the land was registered which are similar to ***Sections 43 and 44 of the new Land Registration Act.*** The law sets out clear guidelines as to how a gift of land is transmitted.

What about the plaintiff's claim to the suit land by way of trust? In my view, the plaintiff's claim to a portion of the suit land measuring 5 acres by way of a trust is well founded. The registration of the suit land in the names of the defendants is not in dispute. That is clear from the copies of the Green Cards to the suit land. It is trite law, however, that the registration of land in the name of a party does not relieve him of any obligation to which he is subject as a trustee nor extinguish a claimant's rights

including those that arise out of a customary trust – see ***KINGURU VS GATHANGI (1976) K.L.R 253*** and also ***KANYI VS MUTHIORA (1984) K.L.R 712*** among others. It is the duty of the person claiming ownership of land through trust to lead evidence in support of such a claim. As was held in ***MBOTHO & OTHERS VS WAITIMU & OTHERS 1986 K.L.R 171:***

> ***"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 intentions of the parties to create a trust must be clearly determined before a trust will be implied".***

As indicated above, the plaintiff's claim that he has occupied part of the suit land for over 40 years is not really in dispute. He is a son of the 1st defendant and a grandchild of the original owner of the land before its sub-division to give rise to the suit land. As a descendant of the original owner of land parcel No. KYENI/MUFU/1189, the plaintiff can justifiably lay a claim to the suit land. One of the guiding principles that guide this Court under ***Section 18 of the Land and Environment Court Act*** is that of

intergenerational and intragenerational equity which recognize that land is held by one generation for the benefit of succeeding generations. The fact that the plaintiff has lived on the suit land for over 40 years only serves to confirm that it was the intention of his late grandfather that he should have a share of the suit land and therefore the registration of the same in the names of the defendants did not extinguish the plaintiff's right to a portion thereof. The plaintiff's occupation of a portion of the suit land for the past 40 years is evidence upon which this Court can conclude, which I hereby do, that the original owner of land parcel No. KYENI/MUFU/1189 who is the plaintiff's late grandfather desired that he should own a share of the same. Therefore, the registration of the suit land in the names of the 1st defendant did not

extinguish the plaintiff's right to a portion thereof.

More significantly, the 1st defendant has infact admitted that he recognized the plaintiff's right to a portion of the suit land. In paragraphs 5, 6 and 7 of their replying affidavit, the 1st, 2nd and 3rd defendants have deponed as follows:-

> 5: "***That the original land KYENI/MUFU/1189 was originally registered in the name of the 1st respondent's father who is our grandfather MWATHE KURIKA"***
>
> ***6: "That way back in 1980, he transferred the said land to his un-married daughter the 1st respondent herein, who was to hold the same in trust of herself and her sister PENINA WARUE, as he had only two children"***
>
> ***7: "That sometime in the year 2009, the 1st respondent sought to sub-divide the land so that she could transfer her sister's entitlement to her, and further, so that she could <u>divide her portion between her children, the applicant inclusive</u>***" Emphasis added.

The fact that the 1st defendant proposed to share the suit land between her sibling and children is evidence upon which this Court can conclude that she was aware that she holds it in trust for herself and the plaintiff among others. I am therefore satisfied from the evidence on record that the 1st defendant held land parcel No. KYENI/MUFU/1189 and the subsequent sub-divisions being the suit land herein in trust for the plaintiff.

Having found that the plaintiff has proved that he is entitled to the suit land in trust, what orders can this Court make with respect to his claim? The suit land parcels are KYENI/MUFU/7142 to 7148 but out of these seven (7) parcels, the 1st defendant has sold the following portions:

1. **KYENI/MUFU/7145 to 4th defendant**

2. **KYENI/MUFU/7146 to 2nd defendant**

3. **KYENI/MUFU/7147 to 3rd defendant.**

The 1st defendant retains the following parcels KYENI/MUFU/7142, 7143, 7144 and 7148 registered under her names. Those portions measure 0.8 Ha, 0.2 Ha, 0.4 Ha and 0.5 Ha respectively. The plaintiff has pleaded, and it is not rebutted, that for the past 40 years, he has lived on 5 acres of the suit land with his family and has 400 coffee stems and over 100 bananas. In total therefore, the 1st defendant still has some 1.9 Ha of the suit land registered in her names. The plaintiff is claiming 5 acres thereof. 1 Ha is equivalent to 2.47 acres and if the Court grants the plaintiff 5 acres, it would mean that he must be awarded the whole of parcels No. KYENI/MUFU/7142, 7143, 7144 and 7148 which add upto 1.9 Ha translating to 4.9 acres slightly less than the 5 acres that he claims. That would leave the 1st defendant, her siblings and other children with nothing since the other parcels have already been sold to the 2nd, 3rd and 4th defendants. But the 1st defendant is the author of this situation.The whole of the original land KYENI/MUFU/1189 measured 3.24 Ha as per the Green Card. That translates to 8.00 acres. If I award the plaintiff 5.0 acres, which he claims, he will have taken more than half of the suit land for himself leaving only 3.0 acres for the others. That would not be equity. The 1st defendant deponed that she intended to share the suit land between herself, her sister **PENINA WARUE** and her children. However, she did not indicate how many other children she had apart from the plaintiff. This Court will therefore share the suit land equally between the plaintiff, 1st defendant and **PENINA WARUE** as they are the only beneficiaries named. I will therefore direct that the plaintiff be granted 2.6 acres out of the suit land.

Ultimately therefore and upon considering all the affidavit evidence herein, I enter judgment for the plaintiff against the defendants in the following terms:-

1. ***A declaration that the defendants hold land parcel No. L.R KYENI/MUFU/7142 to 7148 in***

trust for the plaintiff.

2. That trust is determined and the plaintiff is entitled to 2.6 acres of the suit land parcel.

3. Each party to meet their own costs of the suit.

B.N. OLAO

JUDGE

3RD MARCH, 2017

Judgment dated, delivered and signed in open Court this 3rd day of March 2017

Mr. Macharia holding brief for both Mr. Njiru for the Plaintiff and Ms Rugaita for the Defendants.

B.N. OLAO

JUDGE

3RD MARCH, 2017