



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO.120 OF 2013 (O.S)

IN THE MATTER OF LAND PARCEL NUMBER KIRIMUKUYU/MUTATHIINI/513

BETWEEN

RUTH NYAWIRA WAMAI.....PLAINTIFF/APPLICANT

-VERSUS-

WANGUI WAMAIDEFENDANT/RESPONDENT

JUDGMENT

Introduction

1. The plaintiff herein took up the originating summons dated 22nd June, 2013 for determination of the following questions:-

- a) Whether or not the defendant was registered as absolute proprietor of L.R Kirimukuyu/ Mutathiini/ 513 or as trustee for and on behalf of herself pursuant to succession proceedings before Karatina District Magistrate's court under the provisions of Section 120, of the Registered Land Act on or about 6th November, 1978;**
- b) Whether or not the said trust, should be terminated and the defendant ordered to effect transfer of half share of L.R Kirimukuyu/ Mutathiini/513 in favour of herself;**
- c) Who is entitled to costs of the suit?**

2. The application is supported by the affidavit (supporting) of the plaintiff/applicant, Ruth Nyawira, sworn on 24th June, 2013. In that affidavit the plaintiff has deponed:

- (i) That at all times material to this suit, the suit property, to wit, Kirimukuyu/Mutathiini/513, was registered in the name of Wamai Muraya as a first registration, on 12th May, 1959;
- (ii) That the said Wamai Muraya was her husband as well as the husband of the respondent herein;
- (iii) That the said Wamai Muraya died intestate on 28th April, 1972 leaving the respondent and herself as his widows;
- (iv) That in 1978 the respondent secretly initiated succession proceedings for the suit property

before Karatina District Magistrate's court without involving her and was registered as proprietor of the suit property under Section 120 of the Registered Land Act Cap 300 Laws of Kenya on 6th November, 1978;

(v) That when she learnt about the registration of the respondent as the proprietor of the suit property, in 1983 she commenced succession proceedings before the magistrate's court at Nyeri vide Succession Cause No. 111 of 1983;

(vi) That the respondent was an objector in the Nyeri proceedings where the dispute was referred to arbitration and decreed that the suit property be shared equally between herself and the respondent;

(vii) That the award was later on set aside following an appeal by the respondent and an order made to the effect that the matter be heard *de novo*;

(viii) That the award was subsequently set aside reverting the parties to their original position; and

(ix) That her case is that the respondent's registration as the proprietor of the suit property is subject of a trust in her favour to the extent of half share of the suit property.

3. In reply and opposition to the plaintiff's claim, the defendant vide the replying affidavit filed on 10th July, 2013 deponed as follows:

(i) That her registration as the proprietor of the suit property is not subject of any trust in favour of the respondent or anyone else;

(ii) That the suit property was left to her by her deceased husband and has since been sub-divided into seven equal portions in readiness for distribution amongst the children of the deceased;

(iii) That the children of the deceased have extensively developed their respective portions;

(iv) That she is the only wife entitled to inherit the suit property;

(v) That she was registered as the proprietor of the suit property pursuant to orders issued in Karatina court under the provisions of Section 120 of the Registered Land Act, Cap 300 Laws of Kenya;

(vi) That there are other children of the deceased who are not claiming any trust on the suit property;

(vii) That the deceased had another wife (divorced) who is not laying any claim to the suit property;

(viii) That the plaintiff was a wife of the deceased who was divorced for over 40 years and

(ix) That the plaintiff's claim for half share of the suit property is preposterous as the deceased had many children.

4. The respondent denies the allegation that she initiated the succession proceedings secretly and contends that the declarations sought in this suit can't issue because the succession cause filed by the plaintiff still exists.

5. The respondent faults the plaintiff for instituting the current suit during the pendency of the succession cause she filed at the Nyeri Succession Court.

6. The respondent further contends that the plaintiff's suit is unmaintainable for the following reasons:

(i) That the plaintiff has never lived in the suit property since she was officially divorced;

- (ii) That the plaintiff never returned to the deceased's home even after the deceased passed on;
- (iii) That the plaintiff eloped with the deceased's servant, one Edward Nguuri and vowed that she will never return to the deceased;
- (iv) That the plaintiff emerged long after the deceased had been buried and started claiming his estate which was none existent and
- (v) That the clan elders and local administrators know about the divorce.

7. According to the respondent, her husband sent elders to the plaintiff's parents who confirmed that the plaintiff was living with Edward Nguuri at Mweiga and that the plaintiff had no intention of returning to their deceased husband.

8. The respondent further contends that the deceased having died in 1972, the plaintiff is estopped from claiming his land, forty years down the line.

The applicant's case

9. When the matter came up for hearing, parties reiterated the contents of their affidavits. Notably the plaintiff informed the court that she got married to the deceased in 1954 and got blessed with one issue in 1956. She informed the court that at the time her husband passed on, in 1972, they were living separately. The court heard that the plaintiff and the deceased separated in 1968 owing to the violence on the part of the deceased after he married the defendant.

10. The plaintiff further informed the court that despite the separation the deceased continued supporting and educating their daughter.

11. Explaining that their husband had already shared out the suit property between the defendant and herself, the plaintiff urged the court to adopt her supporting affidavit as her evidence.

12. On cross examination the plaintiff resiled from her testimony to the effect that the deceased was a violent person and explained that he only beat her on the day she left him.

13. She denied the respondent's contention that her husband sent elders to ask her to return and refused but admitted that she never returned to the suit land after she left. Nevertheless, she attended her husband's burial.

14. The plaintiff further informed the court that after she left her husband, she got employed at Nairobi Polytechnic in Nairobi.

15. Concerning the allegations that she eloped with their servant, Edward Nguuri, the plaintiff denied having done so and explained that she was merely doing business with him.

16. The Plaintiff further informed the court that after she learnt that the respondent had filed a succession cause in respect of the deceased's estate and failed to include her as a beneficiary of the estate, she filed another Succession Cause at Nyeri law courts which cause is yet to be concluded.

17. The plaintiff told the court that she has a claim over her husband's estate now vested in the respondent because she was married under kikuyu customary law.

18. Contrary to the respondent's claim that she was divorced, she contended that her husband never divorced her traditionally as no sheep was slaughtered for her parents to eat.

19. She denied having been married by Edward or having refused to return to her husband's home. She further denied having land at Kiamahuri or at their parent's place, Kianjogu.

20. In re-exam, she reiterated that her deceased husband neither divorced her nor sent elders to bring her back home. She maintained that Edward Nguuri was neither her husband nor lover but merely a business partner.

21. In support of her case, the plaintiff availed her daughter, Grace Wanjiru Kariuki (P.W.2), who informed the court that she is aware that the succession cause filed by her mother was dismissed and that she does not know what transpired between her parents after they separated.

The respondent's case

22. On her part, the respondent, Margaret Wangui Wamai (D.W.1) informed the court that she lives on the suit property.

23. She admitted that the plaintiff was married to her husband, James Muraya and acknowledged that her husband was the registered proprietor of the suit property before he passed on.

24. D.W.1 further informed the court that following the death of her husband, clan elders and the area chief met and decided that because she was the only wife left in that home, the suit property should be transferred to her. Consequently, she filed a succession cause and the land was transferred to her.

25. The respondent informed the court that her husband had other wives like Gacheke and reiterated her contention that the plaintiff eloped with their servant, Edward Nguuri, and went to Mweiga. She also reiterated her contention that her husband went to the plaintiff's home to bring the plaintiff back but failed to find her.

26. According to the respondent, her husband later sent elders who found the plaintiff at a certain shopping centre but she vowed she will never go back to him. When the elders brought back the report to her husband, he vowed that he would never allow her back.

27. D.W.1 further informed the court that by the time her husband passed on, the plaintiff had not returned to the matrimonial home.

28. D.W.1 reiterated her testimony to the effect that after her husband passed on, a decision was made by elders that the suit land should be given to her.

29. Contrary to the plaintiff's claim that the deceased had shared the suit land between the plaintiff and herself, the respondent stated that her husband had never given his land to anybody.

30. On cross examination, the respondent stated that she got married in 1963 under Kikuyu Customary law and acknowledged that under kikuyu customary law a man can marry other wives. She also acknowledged that her husband had other wives before her.

31. She informed the court that the dispute between the plaintiff and herself started around 1983-84 and that it relates to the plaintiff's demand for ½ share of the suit property which was initially registered in the name of her husband.

32. She admitted that in the succession proceedings in which she was given the suit property, she did not inform the court about the earlier wives.

33. She informed the court that her husband did not accompany elders to the plaintiff's home, in a bid to bring her back and that all the elders who were sent by her husband to the plaintiff's home are all deceased.

34. According to the respondent, though there are no witnesses to confirm the report, the elders gave their report in her presence.

35. On how divorce was conducted under Kikuyu customary law, she stated that she does not know how the same was conducted.

36. She acknowledged that she neither informed nor involved the plaintiff in the succession proceedings she filed.

37. She availed no witness to confirm that the plaintiff and her husband were divorced. She stated that all those who were parties or had knowledge of the separation are deceased.

38. In re examination, she stated that when her husband died she was the only wife left at home. There was therefore no need to inform the court about the previous wives.

39. She stated that she did not know why the plaintiff's daughter whom she knew as Mwarania was now called Grace Wanjiru.

40. She reiterated that when the 4 elders brought the report of the visit to plaintiff's home with a bid to bring her back she was present. She maintained that she does not know the procedure of divorce under kikuyu customary law.

Submissions

41. On behalf of the plaintiff, a brief background to the suit herein is given and submitted that the import of the ruling of Hon. **Juma CM** on 8th April, 2013 concerning the plaintiff's entitlement to the suit property was to render that issue unresolved.

42. Reference is made to the cases urged by the parties to this suit and submitted that it is not indispute that the plaintiff was a wife of the deceased, with whom they had one daughter, P.W.2; that the issue in dispute is whether or not the plaintiff had either deserted the deceased or been divorced by the deceased.

43. Based on **Sections 107(1)** of the Evidence Act which places the burden of proof on the person who asserts existence or none existence of facts and **Section 108** which places the burden of proof in a suit or proceedings on the person who would fail if no evidence at all is given on either side, the plaintiff submits that the respondent has not proved that she (plaintiff) was divorced by the deceased.

44. According to the plaintiff, had the Karatina Court been informed about her interest in the suit property, it would have declared her as a co-heir and beneficiary of the estate of the deceased in equal share with the respondent.

45. Based on the provisions of **Section 126(3)** of the Registered Land Act, (RLA) (now repealed) which subjects registered land to trusts and **Section 120** of the same Act which applied customary law on inheritance, the plaintiff submits that the respondent's registration as the registered proprietor of the suit property is subject to a customary trust in her favour.

46. Further reliance is made on the case of **Gathiba v. Gathiba (1983) KLR 356 and Karanja Kariuki vs. Kariuki (1983) KLR 209** where it was held that Kikuyu Customary Law recognizes the concept of trust.

47. On behalf of the respondent, a brief overview of the cases urged by the parties is given and submitted that from the evidence adduced by the respondent to the effect that the plaintiff had deserted his husband and gone to live with another man, by the time the deceased passed on, she had ceased to be a wife of the deceased.

48. Because the plaintiff had not returned at the time the deceased passed on, owing to the conduct of the plaintiff and long separation between the deceased and the plaintiff, the court is urged to find that there was both constructive and actual divorce between the plaintiff and the deceased.

49. Owing to the fact that the plaintiff has not been in actual physical possession of the suit property, it is submitted that she cannot urge a claim for constructive, resulting or even customary trust against the respondent.

50. Based on a passage In the book **“Restatement of African Law 2 by Eugene Cotran”**, page 11(7), on distribution of the estate of a deceased husband and given the fact that the plaintiff was not cultivating any land belonging to the deceased at the time he passed on, it is submitted that there was no land due to her. The passage provides as follows:

““The widow retains the same piece of land she has been cultivating during her husband’s life time”,

51. Reliance is also made on **Section 30** of the RLA, Cap 300 Laws of Kenya (now repealed) which does not recognize customary law rights as overriding interests in registered land and the case of **Esiroyo vs. Esiroyo & Another (1973) E.A 388** and reiterated that registration of the respondent as the proprietor of the suit property was not subject to any trust in favour of the plaintiff.

52. It is further contended that the procedure for determination of a claim to registered land is that contemplated in **Sections 120 and 121** of the RLA (repealed) that is to say, the Land Registrar should refer the matter to court for determination as to who is the rightful heirs in accordance with the customary law applicable.

Analysis and determination

53. From the pleadings, submissions and the evidence adduced in this matter the following facts are either common ground and/or uncontroverted:

- (i) That the suit property was registered in the name of Wamai Muraya (deceased) before it was transferred to the respondent;
- (ii) That the deceased was the husband of the parties to this suit;
- (iii) That the deceased and the applicant had one issue, P.W.2.
- (iv) That by the time the deceased passed on, the applicant and the deceased were not living together (were separated);
- (v) That the respondent succeeded the estate of the deceased without informing the court whether the deceased had other wives and children.
- (vi) That the plaintiff and her child have never lived in the suit property since she parted ways with the deceased.

54. Although its not indispute that the applicant was a wife of the deceased, the respondent claims that she is not entitled to inherit the estate of the deceased because at the time the deceased passed on, she was no longer his wife (she had been divorced).

55. As pointed out above, the respondent relied on what she called a report of the elders, who were allegedly sent by her husband to go and bring the applicant back and her assertion that the applicant vowed that she will never return to the deceased which made the deceased to, similarly, vow not to accept the applicant back.

56. The conduct of the plaintiff of allegedly eloping with her servant and deserting the deceased for a long period of time is also said to have amounted to constructive divorce.

57. The foregoing contentions bring into fore the issue of whether the respondent proved that the plaintiff

was divorced by the deceased?

58. With regard to this issue, having carefully considered the evidence adduced in this matter, I find it incapable to prove that the applicant had been divorced by the deceased. All that the evidence proves is that by the time the deceased passed on, he was not living together with the applicant (that is to say the applicant and the deceased were separated). No evidence whatsoever was adduced capable of showing that the applicant was ever divorced by the respondent and/or that the applicant had no intention of returning to the deceased.

59. The evidence adduced in this matter further shows that when the respondent lodged succession proceeding in respect of the estate of the deceased, she did not inform the court about the applicant's interest in the suit property and as a result, the court allowed the respondent to solely succeed the estate of the deceased.

60. As pointed out herein above, the grant issued in favour of the respondent was issued under **Section 120** of the RLA, Cap 300 Laws of Kenya, (now repealed).

61. In the case of **re-Estate of Mwangi s/o Ngamba alias Mwangi Ngamba (Deceased) (2015)e KLR** the court stated as follows concerning Kikuyu customary law of intestate succession and application of **Section 120** of the Registered Act to it:

“The Kikuyu customary law of intestate succession is well documented in such treatises as Eugene Cotran’s *Restatement of African Law: Kenya II the Law of Succession* [8] and *Jomo Kenyatta’s Facing Mount Kenya: The Tribal Life of the Gikuyu*, among others. It has also been restated in several judicial pronouncements, such as in *Kanyi vs. Muthiora*. [9] I am though conscious of the dynamism of African Customary Law and alive to the caution sounded by the Court of Appeal in *Atemo vs. Imujaro* [10] that the position as stated in the treatises may not be true today.

Under the Kikuyu Customary Law of intestacy, succession is patrilineal. Devolution is in favour of the male relatives of the deceased. Where a male deceased person is survived by a widow and male and female children, the land devolves upon the sons with the widow being entitled to life interest. Daughters are not entitled to inherit, they play their part in the family or clan in which they get married, but it is permissible for daughters who attain the age of marriage but never marry to inherit from their parents. Where the deceased person has daughters only and the said daughters are all married, the property will pass to his brothers or their sons, with the widow having life interest.

The position stated above is no doubt discriminatory in favour of men and against women. This was however sanctioned by Section 82(4) of the repealed Constitution. Section 82(1) of the said Constitution stated that “... no law shall make any provision that is discriminatory either of itself or in its effect.” Section 82(4) of the said Constitution made a number of exceptions to Section 82(1); it states that:

“... Subsection (1) shall not apply to any law so far as that law makes provision ... (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.”

.....

The law regulating succession by an African to such property was stated in Section 120(2) of the Registered Land Act [15] (Repealed) to the effect that the Land Registrar, after satisfying himself of the death of the proprietor of the land, was obliged to apply to the court for the determination of the heirs, and the court was to determine the persons entitled.

There are several judicial determinations on Section 120(2) of the Registered Land Act. The

Court of Appeal in *Karanja Kariuki vs. Kariuki*[16] for example, stated that customary succession to land in areas where land was registered under the Registered Land Act were subject to the process set out in Sections 120 and 121 of the said Act. The process being that the land registrar upon being informed of the death of the proprietor of the land and that he had died intestate, applied to the relevant court to determine the matter on who was entitled to the law according to the Customary Law applicable to the deceased proprietor. The High Court had stated similarly previously in *Mbuthi vs. Mbuthi*[17] adding that the provision in Section 120 of the Registered Land Act did not preclude the taking out of letters of administration. Other pronouncements on Section 120 of the said Act are to be found in *Simiyu vs. Watambamala*,[18] *Njoroge vs. Mbiti*[19] and *Gathiba vs. Gathiba* [20].”

62. In the case of Erastus Gichingiri Muhoro v Gerishon Gichingiri Muhoro & 2 others [2014] eKLR the Court of Appeal observed:

“...The deceased died in 1974 and the Kikuyu Customary Law is what was applicable under Section 2(2) of the Law of Succession Act. ...

63. It is clear from the above cited authorities, that the estate of the deceased ought to have been succeeded to in accordance with **Sections 120 and 121** of the RLA (now repealed) as read with **Section 2(2)** of the Law of Succession Act, Cap 160 Laws of Kenya.

64. Although the estate of the deceased was subjected to the process contemplated in **Section 120** of Cap 300, it appears that some material facts were withheld from the court.

65. The evidence adduced in this case shows that the court was not informed that the deceased had other wives and for that reason, it cannot reasonably be said that the decision to make the respondent the sole administrator of the estate of the deceased settled the question of entitlement to the estate of the deceased. The foregoing notwithstanding, as inheritance under Kikuyu customary law is patrilineal with the widow being entitled to the portion of land she cultivated to the extent of a life interest, it behooved the applicant to prove that she cultivated a certain portion of the land held by the applicant in respect of which she is entitled to possession and/or occupation. In this regard see the case of Joyce Wambugu Kagwara v. George Mburu & Another, Nairobi HCC No. 648 of 2004 where it was held;

“... In his **RESTATEMENT OF AFRICAN LAW**, Vol. 2, at Page 8, E. Cotran states:

“Inheritance under Kikuyu Law is patrilineal. The pattern of inheritance is based on the equal distribution of a man’s property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried. In the absence of sons the heirs are the nearest patrilineal relatives of the deceased, namely father, full brother, half-brothers and paternal Uncles.”

66. Also see the case of Moses Karanja Kariuki v. Naomi Njeri Kariuki & 4 others (1983)e KLR, where **Madan JA.**, as he then was, observed:

“There is a well-entrenched principle of customary law which decisively resolves the dispute between these parties. Among the Kikuyu the eldest son normally inherits land upon the death of his father under customary law. This rule of succession under customary law is indefeasible except in a case of disability arising from infirmity of body or mind or from any other cause or relinquishment by the eldest son himself.”

67. As the applicant has not proved that she was cultivating any portion of the estate of the deceased held by the respondent, I find and hold that she has not made a case for being issued the orders sought or any one of them. Consequently, I dismiss the suit.

68. This being a family dispute I order that each party meets its own costs of the suit.

Dated, signed and delivered in open court at Nyeri this 16th day of August, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Gathega Mwangi for the defendant

No appearance for the plaintiff

Court clerk - Esther