



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MERU

CIVIL SUIT NO. 201 OF 2012

ROSE GACHERI M'ARIMI.....PLAINTIFF

VERSUS

GEDION M'IKUNYUA ARIMI.....DEFENDANT

J U D G M E N T

BACKGROUND:-

The parties herein are siblings of same father M'Arimi M'Mukiki (Deceased) but of different mothers. Plaintiff is born of Jeniffer Makutho while Gideon is son of mama Gitonga. The land in dispute is NTHAMBIRI/IGOKI/209 which was registered in defendant's name. It has since been subdivided into several parcels namely 668,669,670,671 and 672. Plaintiff desires to have a portion of the land on the basis of Customary Trust.

Plaintiff's Case

Plaintiff has pleaded that in her mother's house (Jennifer Makutho's) there are two girls. Herself and her sister Charity Gachoria. Charity is happily married, and is therefore not claiming for the land. Plaintiff further pleads that during demarcation, adjudication and registration of land in Nthimbiri location, her father caused the family land to be registered in the name of his only son Gedion M'Ikunyua M'Arimi, (born of mama Gitonga) the first wife. The parents of both litigants have passed on. Plaintiff prays for:-

- 1) *A declaration that the Defendant held title to land reference NTHIMBIRI/IGOKI/209 in Trust for his own benefit and the benefit of the Plaintiff in equal shares.*
- 2) *A declaration that the Subdivision of Land Reference Number NTHIMBIRI/IGOKI/209 and alienation of the resultant titles to other individuals leaving out the Plaintiff is a breach of Customary Trust and illegal.*
- 3) *An order of revocation and/or cancellation of the subdivisions made on L.R. NTHIMBIRI/IGOKI/209 and restoration of the Original Title Deed.*
- 4) *An order directing the Defendant to subdivide the Original Title Deed to wit L.R. NTHIMBIRI/IGOKI/209 into two (2) equal parts and to Transfer one portion to the Plaintiff and, if the Plaintiff declines, the Court's Executive Officer be empowered to sign the transfer documents in place of the Defendant.*
- 5) *Costs and interest of the suit.*

6) *Any or better relief that this Honourable Court may deem fit and just to grant.*

While testifying, Plaintiff adopted her statement filed on 21.11.12 as her evidence. Her evidence is that the original Suitland No.209 was 1.66 acres. She avers that defendant has since divided the land into 4 parcels and particulars thereof captured in the green cards (produced as exhibits) are as follows:-

NTHIMBIRI/IGOKI/ 668 0.4 ha. in name of John Gachau Ikunyua.

NTHIMBIRI/IGOKI/669 0.2 ha. in name of Ikunyua Arithi.

NTHIMBIRI/IGOKI/670 0.4. ha in name of Ikunyua Arimi

NTHIMBIRI/IGOKI/671. 0.20. ha in the name of Ikunyua Arimi.

For parcel No. 671, Plaintiff did lodge a caution on 30.08.12.

NTHIMBIRI IGOKI 672 0.33 ha. in name of Ikunyua Arimi

Plaintiff avers that she is entitled to half of the Suitland before it was subdivided, the same being 0.83 ha. She apparently stays on part of the Suitland with 3 of her four children namely Daniel Kirimi, Beatrice Kananu, Mercy Kathambi and Doris Kagwiria. Beatrice is married and does not stay on the suitland.

Defence case.

Defendant in his testimony adopted his statement of 25.05.16 as his evidence. He admits the family relationship between himself and Plaintiff. He however avers that he became the registered owner of the suit land (209) after he bought the same from one M'Munyua M'Munna in 1940's. He states that their ancestors land was sold by his father. His father and Jennifer Mukutho were then banished from the land by the purchaser so he took them in and gave them a small portion to farm. When his father died, Jennifer tried to take possession of a portion of the land and this necessitated the dispute to be resolved by the clan. He (defendant) therefore gave Plaintiff's mother ½ acre of the Suitland and that this is the portion plaintiff's family have been utilizing todate.

He avers that when the Suitland was subdivided, he did give Plaintiff her portion of 0.5 acres as per the Clans Customary Law.

Defendant averred that he has divided the Land into 5 portions where by the parcel he has given to Plaintiff is parcel No.668.

Issues for Determination

- i. Whether the original Parcel No. NTHIMBIRI/IGOKI/209 was ancestral land?
- ii. Whether Defendant holds the land Title No. NTHIMBIRI/IGOK/209 in trust for himself and Plaintiff.

Was parcel No. 209 Ancestral land?

Plaintiff's claim is that the original parcel No. 209 was ancestral land, the same having been her father's land (M'Arimi M'Mukiki). She however has not given any evidence as to why her father caused the family land to be registered in defendant's name. However, it was not unusual for a male child to be registered in respect of ancestral land, during the colonial era.

On the other hand defendant claims he bought the land from the grandfather of DW 3 (Jeremiano Muriira Ringera). The said grandfather was called Kamurani Ikiugu. During his testimony, DW 3 stated that he is 50 years old. The land was apparently bought in 1940. Any information that DW3 came to acquire

regarding defendants acquisition of the said land is but hearsay as he was surely not born by then.

DW2, Francis Kithinji M'Rithara avers that he is aware of how defendant bought the land from his (defendants) step father Kamurani. However, DW 2 stated that he was not staying at Thimbiri at the time of demarcation. He was staying at Ruirii. He has not explained the circumstances under which he came to know how defendant bought the land yet he was not residing at Thimbiri.

As rightly submitted by Plaintiff in Peter Moturi V Elimelds Basweti Matonda & 3 Others (2013) E KLR," **Customary law trust is proved by reading evidence on the history of the suit property**". Neither Plaintiff nor defendant has been able to give a clear history regarding the acquisition of the original parcel No. 209. Whereas there is no such express evidence from either side to prove or disapprove that parcel 209 was ancestral land, there is implied evidence that such a trust did exist.

The first is point to note is defendants own admission that his father had land. In his testimony, defendant stated that:-

"My father had 2 wives. He had one parcel of land. The land is registered in my name. The land that belonged to the Plaintiff's mother was sold by Jennifer and my father".

Further, DW2 Francis Kithinji M'Ritara states that:-

"I knew M'Mukiki very well. He had 2 wives. ,,,, on the land of M'Mukiki stays his children namely Gideon and his sister, Gacheri".

DW 2 therefore identifies the Suitland as having belonged to M'Mukiki who is the father of the two litigants.

In absence of any prove of how defendant purchased the land, and in absence of any evidence that plaintiff's mother and her husband sold the land that Plaintiff could have inherited, I conclude that land No. 209 was ancestral land.

Does defendant hold the land in trust for the Plaintiff?

It is quite apparent that Plaintiff was born and raised on the Suitland. She now has children of her own. She knows no other home. This case can be distinguished from **Paul Gathera Kihara Vs Stephen Muchai H.C.C.108 /2000** cited by defendant in that in the cited case the Court was dealing with a situation where Plaintiff had documentary evidence of how he had purchased the land through STF loan.

To a certain extent, Defendant has admitted Plaintiff's claim on basis of Customary Law, whereby he stated that:-

"The subdivision was clearly done to the best of my knowledge and awarded her a portion of 0.5 acres as stated by the clan Customary Law".

Defendant was alluding to a case that was done before a clan of elders. Defendant further states that when he subdivided the land, he gave to Plaintiff one parcel, No. 668. This is however not true.

What is quite apparent is that after defendant's realization that Plaintiff was staking a claim on the land via customary route, he took deliberate steps to subvert plaintiff's interest in the land. He caused the parcel No.209 registered in his name to be subdivided into 5 five portions namely parcel 668, 669, 670,671 672. All the resultant parcels are in his name save No. 668 which is in the name of John Gachau IKunyua.

In the case of **Mbui Mukangu Vs. Gerald Mutwiri Mbui Court of Appeal 281/00 (Nyeri)**, the Court made reference to its own decision in **Alan Kiama vs Ndio Muthunya & Others, Civil Appeal No. 42/1978 where the Court doubted that customary law rights were excluded from Section 30 of the**

Registered land Act (now repealed) as overriding interest”.

The Court went further to quote Madan J A’S reference to section 30 (g) in the aforementioned case:

“What meaning is to be given to Section 30(g) the rights under customary law may be argued to be extinguished by section 28-kneller J.A Esiroyo v. Esiroyo (1973 E.A 388 at Pg 390. It must refer to equitable rights. It cannot be otherwise, it has to be sensibly interpretable. Overriding interests which arise in right only of possession or actual occupation without legal title are equitable rights which are binging on the land, therefore on the registered owner of it. Under S. 30 (g) they possess legal sanctity without being noted on the register,,,,,, ,overriding interests which so exist or are so created are entitled to protection because they are equitable rights even if they have a customary law flavor or the Concomitant aspect of cultivation. At the end of it all, the Court of appeal holding was that A TRUST CAN ARISE FROM POSSESSION AND OCCUPATION OF THE LAND”.

The undisputed fact is that Plaintiff was born on the Suitland, was raised on this land and she is raising her own children on this land. The only logical conclusion to make is that defendant holds part of the land in Trust for the Plaintiff.

Conclusion:

Plaintiff desires that the titles be cancelled to give rise to the original title (209) so that she can get half a share of that land. As noted earlier on, Plaintiff had not been able to give a strong case that the land was ancestral. The strength of her case lies more on the aspect of **occupation, cultivation** and **possession**. I will therefore not order that all the titles be cancelled to revert to original 209.

Defendant avers that the parcel she gave Plaintiffs is 668 and that is where her house is situated. She (Plaintiff) also lodged a caution on parcel No. 671. I conclude that Plaintiff’s equitable rights are anchored on these two parcels of land numbers 668 and 677. The parcel Number 668 is in the name of John Gachau Ikunyua but it is defendant who caused the transfer of land to him obviously to circumvent Plaintiff’s claim on this land. It is up to defendant to decide which parcel he will give the said John Gachau Ikunyua.

I proceed to give orders as follows:-

- 1) In total Plaintiff is to get 0.60 ha (0.4 ha. in parcel No. 668 and 0.2 ha. in parcel No. 671), with defendant getting 0.93 ha (0.2ha. in parcel No. 669, 0.4 ha. in parcel No. 670 and 0.33 ha in parcel No. 672).
- 2) A declaration is hereby issued that plaintiff is entitled to the entire parcel of land No. 668 measuring 0.40 ha.
- 3) It is hereby ordered that the title for parcel No. 668 be cancelled from the name of John Gachau Ikunyua and the land to be registered in the name of Rose Gacheri M’Arimi.
- 4) A declaration is hereby issued that Plaintiff is entitled to parcel No. 671 measuring 0.20ha.
- 5) It is hereby ordered that the title for Parcel No. 671 be cancelled from the name of Gedion M’Ikunyua Arimi to that of the Rose Gacheri M’Arimi.
- 6) The caution lodged on 30.08.12 in respect of parcel No. 671, is to be lifted forthwith to facilitate the transfer.
- 7) John Ikunyua and Gedion M’Ikunyua M’Arimi are given two months to harvest any crops and to remove any structures that may be on the aforementioned parcels of land (No 668 and 671).

8) This being a family dispute between two siblings, I direct that each party bears their own cost, of the suit.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MERU THIS 21ST SEPTEMBER, 2017 IN THE PRESENCE OF:-

CA: Janet

Mutungu h/b for Riungu for Plaintiff

Mwirigi h/b for Otieno for Defendant

HON. L.N. MBUGUA

JUDGE