



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 814 OF 2000

1. VERONICA NGATHA GICHURI

2. JOHN NGANGA GICHURI.....PLAINTIFF

VERSUS

1. JOSEPH KURIA KIHANYA

2. DOMINIC MBURU KIHANYA

3. BENSON KIHANYA NDUNGU

4. PAUL NGANGA KIHANYA

5. JAMES KAMAU KIHANYA

6. AGNES MUGURE KIHANYA.....DEFENDANT

JUDGMENT

The plaintiffs' claim:

This family dispute has been pending in court for the last 17 years. The dispute revolves around the ownership of a parcel of land known as Gatamaiyu/Nyanduma/244(hereinafter referred to as “the suit property”). The plaintiffs’ claim against the defendants is set out in their amended amended plaint filed in court on 26th March, 2001. The plaintiffs averred that they are the children of one, Gichuri Mwaniki (deceased)(hereinafter referred to as “Mwaniki” where the context so admits) while the defendants are the children of one, John Kihanya Gichuri also known as Kihanya Gichuri(deceased)(hereinafter referred to as “Kihanya” where the context so admits). The plaintiffs averred that the defendants’ father was the son of Mwaniki and a step brother to the plaintiffs.

The plaintiffs averred that during the land adjudication process at Nyanduma Gatamaiyu area in 1958, Mwaniki divided his hitherto larger parcel of land amongst his three (3) surviving wives (houses) and retained one parcel of land in his name in trust for the plaintiffs who were the children of his fourth wife who was deceased at the material time. The plaintiffs averred that, Land parcel No. Nyanduma/Gatamaiyu/241 was allocated to the house of Mwaniki’s first wife, Ngendo Gichuri, Land Parcel No. Nyanduma/Gatamaiyu/242 to the house of his second wife, Keru Gichuri and Land Parcel No. Nyanduma/Gatamaiyu/243 to the house of his third wife, Mugure Gichuri. The plaintiffs averred that Mwaniki held Land Parcel No. Nyanduma/Gatamaiyu/244 (suit property) in his name in trust for himself and the children of his fourth wife, Njeri Gichuri.

The plaintiffs averred that Kihanya was supposed to benefit from Land Parcel No. Nyanduma/Gatamaiyu/243 which was allocated to his mother, Mugure Gichuri by Mwaniki. The plaintiffs on the other hand were supposed to benefit from Land Parcel No. Nyanduma/Gatamaiyu/244(the suit property) which was held by Mwaniki in trust for them. The plaintiffs averred that Mwaniki died on 1st June, 1966 while the suit property was still registered in his name as a trustee for the plaintiffs and their siblings. The plaintiffs averred that on or about 4th July, 1972 Kihanya fraudulently with intent to deceive and deprive the plaintiffs of the suit property misrepresented to the Land Registrar, Kiambu that Kihanya and Mwaniki were one and the same person and caused the register for the suit property to be rectified. Through that rectification of the register, the name of the registered owner of the suit property was changed from Mwaniki Gichuri (Mwaniki) to Kihanya Gichuri (Kihanya).

The plaintiffs averred that on 11th February, 1997, Kihanya unlawfully and fraudulently subdivided the suit property into six (6) portions namely, Land Parcel No. Nyanduma/ Gatamaiyu/1769, 1770, 1771, 1772, 1773 and 1774 which he thereafter transferred to the 1st to 6th defendants. The plaintiffs averred that Kihanya and the defendants knew that the suit property was held by Mwaniki in trust for the plaintiffs. The plaintiffs averred that they were not aware that the suit property had been transferred into the name of Kihanya until 1997 when the suit property was subdivided and registered in the names of the defendants who thereafter threatened them with eviction from the suit property.

The plaintiffs sought judgment against the defendants for, an order that the transfer and registration of the parcels of land known as Land Parcel No. Nyanduma/ Gatamaiyu/1769, 1770, 1771, 1772, 1773 and 1774 in the names of the defendants were fraudulent and should be cancelled so that the land comprised in the said titles reverts to the original Land Parcel No. Nyanduma/ Gatamaiyu/244(suit property), an order that the registration of Kihanya as the owner of the suit property on 4th July, 1972 was fraudulent and should be cancelled so that the suit property reverts to the name of Mwaniki as it was prior to 4th July, 1972 and, an order that a succession cause be instituted in respect of the estate of Mwaniki to determine the beneficiaries of his estate who are entitled to the suit property.

The defence:

The defendants filed a joint statement of defence to the amended amended plaint on 31st October, 2000. The defendants admitted that the plaintiffs and their father, Kihanya were the children of Mwaniki by different mothers. The plaintiffs admitted further that Mwaniki died in the year 1966. The defendants denied that they acquired the suit property through their father fraudulently. The defendants averred that as grandchildren of Mwaniki they were entitled to inherit the suit property. The defendants averred that the plaintiffs were not the legitimate beneficiaries of the estate of Mwaniki and as such were not entitled to inherit the suit property. The defendants averred that this suit discloses no cause of action against them and that the suit is time barred.

The evidence adduced on behalf of the plaintiffs:

At the trial, PW1 Simon Gichuri stated as follows. The plaintiffs and the defendants were known to him. He was one of the sons of Gichuri Mwaniki(Mwaniki). The plaintiffs' mother was his step mother. His mother who was Mwaniki's second wife was known as Wanjiru alias Kero Gichuri. The plaintiffs' mother was known as Njeri. She was the fourth wife of his father. His father divided his land amongst his four wives. When his father was dividing the land, he was an adult with family. The land was divided between the houses of the first wife Mugure, the second wife Wanjiru Mweru, and the third wife, Ngendo. The land allocated to the wives of Mwaniki was registered in the names of their sons to hold in trust for their siblings. When Mwaniki was sharing land amongst his wives, the plaintiffs were very young. The portion of land that was supposed to be allocated to the plaintiffs' mother, Njeri was registered in the name of Mwaniki as Land Parcel No. Gitamaiyu/Nyanduma/244(suit property). Mwaniki was to hold the suit property in trust for Njeri and her children. The plaintiffs' father who was from the house of Mwaniki's first wife later on took the suit property while the plaintiffs were young. The dispute between the plaintiffs and the defendants over the suit property was first taken before the Land Disputes Tribunal at Lari for determination. The tribunal ordered that the suit property be returned to the plaintiffs.

PW1 stated that the plaintiffs were left with no land after the suit property was taken by Kihanya. He stated that application for grant of letters of administration in respect of the estate of Mwaniki was not made because the plaintiffs were young.

The next to give evidence for the plaintiffs was the 1st Plaintiff (PW2). PW2 stated in her evidence that the defendants are the children of her step brother, Kihanya. She stated that her father Gichuri Mwaniki (Mwaniki) had four(4) wives; Mugure Gichuri, Wanjiru Gichuri, Ngendo Gichuri and Njeri Gichuri in that order. She stated that the 2nd plaintiff and she were the children of the fourth wife, Njeri Gichuri while the defendants' father Kihanya was the son of the first wife, Mugure Gichuri. PW2 corroborated the evidence of PW1 that in 1958, her father shared out his land amongst his wives and retained one parcel of land, Nyanduma/Gatamaiyu/244(the suit property) in his name for the children of his last wife, Njeri Gichuri who was deceased and whose children were young. PW2 stated that Mwaniki died on 1st June, 1966 and that the 2nd plaintiff and she are beneficiaries of his estate. PW2 stated that after the death of Mwaniki and without applying for grant of letters of administration in respect of his estate, Kihanya fraudulently caused the suit property to be transferred to his name by way of change of name on 4th July, 1972. She stated that in 1990, Kihanya issued her with a notice to vacate the suit property. She stated that Kihanya subsequently colluded with the defendants and subdivided the suit property into six(6) portions which he transferred to the defendants. PW2 corroborated the evidence of PW1 that the dispute between the plaintiffs and the defendants over the suit property was taken before the Land Disputes Tribunal which made a finding that the suit property should revert to the name of Mwaniki.

PW2 stated that the 2nd plaintiff and she were still occupying the suit property but had nowhere to cultivate. PW2 stated that one of the defendants is living on the suit property while the rest are cultivating their respective portions thereof. She stated that the defendants' father who died in 1997 received his share of Mwaniki's land from the land that was allocated to his mother's house, namely, Nyanduma/Gatamaiyu/243.

The evidence adduced on behalf of the defendants:

The first to give evidence on behalf of the defendants was the 3rd defendant, Benson Kihanya Ndungu(DW1). DW1 stated that he interacted with the plaintiffs for the first time in 1998 when the plaintiffs lodged a claim against the defendants at the Land Disputes Tribunal claiming that they were related. DW1 stated that his father was Kihanya while his mother was Janet Wambui Kihanya. He stated that he was born in 1953 on the suit property. He stated that in 1997, his father subdivided the suit property into six portions namely, Land Parcel No. Nyanduma/Gatamaiyu/1769-1775 which he transferred to each of them (defendants). He stated that his father died in April, 1997 after which the plaintiffs lodged a claim against them at the Land Disputes Tribunal at Lari claiming that the suit property did not belong to their father. He stated that the plaintiffs' claim at the tribunal was heard and determined. He stated that when the tribunal's decision was lodged at the Resident Magistrate Court at Kiambu for adoption as a judgment of the court, the magistrate ruled that the tribunal had sat on a dispute which was outside its jurisdiction and directed the parties to refer the dispute to the High Court. It was after that direction that this suit was instituted. DW1 stated that he did not know the plaintiffs before they brought a claim against him and the other defendants at the tribunal. He stated that his family has been living on the suit property and that his father and mother were buried on the suit property. DW1 stated that he was not aware how their father acquired the suit property.

In cross-examination, DW1 stated that he only knew one of Mwaniki's wives by the name Mugure Gichuri who was his grandmother. He stated that he did not meet Mwaniki's other wives and their children. He stated that he was not aware that his father had received his inheritance of Mwaniki's land from Land Parcel No. Nyanduma/Gatamaiyu/243. DW1 stated that he was not aware that his father had acquired the suit property fraudulently. He admitted however that his father was registered as the owner of the suit property on 4th July, 1972 through change of name. He stated that he was not aware if his father had applied for a grant of letters of administration in respect of the estate of Mwaniki. He stated that he did not have any information relating to the suit property prior to the death of his father. He admitted that the plaintiffs are residing on the suit property.

DW2 and DW3, Joseph Kuria Kihanya and Dominic Mburu Kihanya respectively adopted their witness statements dated 27th August, 2016 as their evidence in chief. In the said statements, DW2 and DW3 corroborated the evidence of DW1 which I have highlighted above in detail. In cross-examination, DW2 stated that the 1st plaintiff was her aunt and that they were staying together. DW2 stated further that he was not aware how the suit property moved from the name of Mwaniki to the name of his father.

The issues arising for determination:

On 22nd February, 2010, the parties filed a statement of agreed issues signed by the advocates for both parties. The following issues were framed by the parties for determination by the court:

1. Whether or not the plaintiffs are daughter and son respectively of Gichuri Mwaniki(deceased) and consequently beneficiaries of the deceased's estate?
2. Whether the plaintiffs are the sole and rightful beneficiaries of Land Parcel No. Gitamaiyu/Nyanduma/244 which is part of the estate of Gichuri Mwaniki(deceased)?
3. Whether or not Kihanya Gichuri and Gichuri Mwaniki is one and the same person?
4. Whether or not Kihanya Mwaniki alias Gichuri Mwaniki had the capacity to solely take over and/or deal with Land Parcel No. Gitamaiyu/Nyanduma/244 without taking out letters of administration in respect of the estate of Gichuri Mwaniki?
5. Whether the properties comprised in the estate of Gichuri Mwaniki could have legally changed hands without a succession cause having been instituted?
6. Whether the subdivision of Land Parcel No. Gitamaiyu/ Nyanduma/ 244 was illegal and should be cancelled?
7. Who are the rightful beneficiaries of Land Parcel No. Gitamaiyu/ Nyanduma/ 244?

Determination:

The first issue:

In paragraph 3 of the amended plaint and amended amended plaint, the plaintiffs averred that they are the children of Gichuri Mwaniki who died in the year 1966. In their statement of defence filed on 31st October, 2000, the defendants admitted that fact. There is no dispute therefore that the plaintiffs are the children of Gichuri Mwaniki(Mwaniki). In cross-examination, the 3rd defendant(DW1) admitted that the plaintiffs are his relatives. The 1st defendant (DW2) on his part admitted that the 1st plaintiff is his aunt being a sister to his father. I am satisfied from the pleadings and the evidence on record that the plaintiffs are the children of Gichuri Mwaniki(Mwaniki). Whether they are beneficiaries of the estate of Mwaniki, is a question that can only be answered by a Succession Court in a petition for grant of letters of administration in respect of the estate of Mwaniki. Without deciding the matter with finality so as not to prejudice subsequent proceedings that may be instituted in the Family Division of the High Court for the distribution of the estate of Mwaniki, the much I can say is that no reason has been put forward that would preclude the plaintiffs who are the children of Mwaniki from being beneficiaries of his estate.

The second issue:

As I have stated above, this court has no jurisdiction to determine beneficiaries and distribution of estates of deceased persons. The jurisdiction is reserved for the High Court. For that reason, this court cannot determine this issue.

The third issue:

My answer to this issue is in the negative. Gichuri Mwaniki and Kihanya Gichuri is not one and the same person. The evidence on record shows that the defendants are the children of Kihanya Gichuri(Kihanya) who was the son of Guchuri Mwaniki(Mwaniki). In his witness statement dated 27th August, 2016 which he adopted as his evidence in chief, the 1st defendant (DW2) stated that he is the third born in the family of Kihanya Gichuri and that Gichuri Mwaniki and Mugure Mwaniki were his grandparents. In his evidence in chief, DW1 told the court that his father was Kihanya Gichuri and that the suit property belonged to his grandfather, Gichuri Mwaniki. As I have stated earlier when determining issue number one, the defendants admitted in their defence that they are grandchildren of Gichuri Mwaniki. From the pleadings and the evidence on record, it is my finding that Kihanya Gichuri was the son of Gichuri Mwaniki and that the two names do not refer to one and the same person.

The fourth and fifth issues:

It is not in dispute that the suit property was at all material times registered in the name of Gichuri Mwaniki until 4th July, 1972 when the register of the suit property was rectified by the cancellation of the name of Gichuri Mwaniki and the registration of the property in the name of Kihanya Gichuri through change of name. As I have stated above, Gichuri Mwaniki and Kihanya Gichuri are not one and the same person. It was common ground that Gichuri Mwaniki died on 1st June, 1966. Gichuri Mwaniki could not therefore have changed his name in the register of the suit property on 4th July, 1972 to Kihanya Gichuri.

I am in agreement with the plaintiffs that the manner in which Kihanya Gichuri acquired the suit property was illegal and fraudulent. Kihanya Gichuri represented falsely to the Land Registrar at Kiambu that he was also known as Gichuri Mwaniki and persuaded the Land Registrar to change the name of the proprietor of the suit property in the register from Gichuri Mwaniki to Kihanya Gichuri. The representation was willfully made, was false and was intended to mislead. What other evidence of fraud can one look for? Since the suit property was registered in the name of a deceased person, Kihanya Gichuri could only acquire the same through transmission under section 119 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed).

Section 4 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) provides that:

“Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act.”

Section 38(1) of the Registered Land Act provides that:

“(1) No land, lease or charge shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of the land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or effect any estate, right or interest in the land, lease or charge.”

The effect of the foregoing provisions of the law is that the procedure through which Kihanya Gichuri acquired the suit property was not provided for in law and as such did not confer upon him any right or interest in the suit property. My findings on the fourth and fifth issues are in the negative.

The sixth issue:

As I have held above, Kihanya Gichuri did not acquire any estate, right or interest in the suit property in view of the manner in which the suit property was registered in his name. Since he had no right or valid interest in the suit property, his title was a nullity. Consequently, all his dealings with the suit property were similarly null and void. His purported sub-division of the suit property and transfer of the portions thereof to the defendants were tainted with illegality and were null and void. The defendants must be taken to have been aware of the defect in their father’s title. The Land Registrar had registered a restriction on the title of the suit property on 31st August, 1990 on the ground that the transfer of the suit

property to Kihanya Gichuri was suspected to have been carried out fraudulently. The said restriction was removed on 11th November, 1996 after Kihanya Gichuri and the defendants prevailed upon the Land Registrar to do so. It was following the removal of the said restriction that the suit property was subdivided and portions thereof transferred to the defendants. This court has the power to cancel the purported subdivision of the suit property and the transfer of portions of thereof to the defendants.

The seventh issue:

I have already dealt with this issue above. After the death of Gichuri Mwaniki, the suit property became part of his estate. Only the succession court can determine the beneficiaries of the estate of Gichuri Mwaniki who are entitled to inherit the suit property.

Conclusion:

In conclusion, I am satisfied that the plaintiffs have established that the suit property was acquired by Kihanya Gichuri illegally and fraudulently and that Kihanya Gichuri had no title in the suit property on the basis of which he could sub-divide the same and transfer portions thereof to the defendants. It is my finding that the only lawful way Kihanya Gichuri could have acquired the suit property was through a petition for grant of letters of administration in respect of the estate of Gichuri Mwaniki. The plaintiffs have proved their case on a balance of probabilities. I therefore enter judgment for the plaintiffs against the defendants on the following terms;

1. I declare that the transfer and registration of Land Parcel Numbers: Gitamaiyu/ Nyanduma/ 1769, 1770, 1771, 1772, 1773 and 1774 in the names of the 1st, 2nd, 3rd, 4th, 5th and 6th defendants respectively was illegal and tainted with fraud.
2. The titles for Land Parcel Numbers: Gitamaiyu/Nyanduma/ 1769, 1770, 1771, 1772, 1773 and 1774 in the names of the 1st, 2nd, 3rd, 4th, 5th and 6th defendants respectively are cancelled and the land comprised in the said titles shall revert to the original Land Parcel Number Gitamaiyu/ Nyanduma/ 244.
3. I declare that the registration of Land Parcel Numbers: Gitamaiyu/ Nyanduma/244 in the name of Kihanya Gichuri was illegal and fraudulent.
4. The registration of Land Parcel Number Gitamaiyu/ Nyanduma/244 in the name of Kihanya Gichuri is cancelled and the property shall revert to the name of Gichuri Mwaniki.
5. The status quo prevailing as of the date hereof as relates to possession, occupation and use of Land Parcel Number Gitamaiyu/ Nyanduma/244 by all the parties to this suit shall be maintained, pending the filing, hearing and determination of a petition for full grant of letters of administration in respect of the estate Gichuri Mwaniki or for a period of two (2) years from the date hereof whichever comes earlier.
6. In view of the relationship between the parties and the nature of the dispute that was before the court each party shall bear its own costs of the suit.

Delivered and Signed at Nairobi this 17th day of November 2017

S. OKONG'O

JUDGE

Judgment delivered in open court in the presence of:

Mr. Ogwe

for the Plaintiffs

No appearance for the Defendants

Catherine Court Assistant