



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 217 OF 2015 (O.S)

IN THE MATTER OF L.R NO. TETU/MUTHUAINI/1676

AND

IN THE MATTER OF DECLARATION AND TERMINATION OF TRUST

BETWEEN

TABITHA WAMBUI MUCHEMI.....APPLICANT

-VERSUS-

ZIPORA NJOKI MUCHEMI.....RESPONDENT

JUDGMENT

1. The applicant herein took up the originating summons dated **22nd July, 2015** for determination of the questions raised therein, and in particular, the determination of whether or not the respondent holds half share of the parcel of land known as **L.R No. Tetu/Muthuaini/1676** (hereinafter referred to as the suit property) in trust for her.
2. The applicant's claim is opposed through the replying affidavit of the respondent sworn on **2nd September, 2015**.
3. Pursuant to directions given on 11th May, 2016 to the effect that the originating summons be treated as a plaint; the replying affidavit as defence and that the matter be heard orally, parties to this suit tendered oral evidence in support of their respective cases.
4. The applicant informed the court that the respondent is her co-wife, both of them having been married by Muchemi Waigwa (deceased) under Kikuyu customary law.
5. The applicant informed the court that she was the first to be married by the deceased. Because she delayed in giving the deceased children, she agreed with the deceased that he marries the respondent. Later, she got her own children leading to disagreements with the respondent.
6. As a result of the disagreements she had with the respondent, she separated with the deceased and went to live in Kieni where she bought a piece of land.
7. Explaining that before she separated with the deceased, they were living in the colonial village and that

she never lived in the suit property which was formerly registered in the name of her mother-in-law to hold on behalf of the deceased and his brother Joseph Wandimi Waigwa, she informed the court that after her mother-in-law passed on, her estate was succeeded by the deceased brother and the respondent in equal share.

8. Arguing that her separation with the deceased did not take away her right to inherit her deceased husband, the applicant explains that she was not made aware of the succession proceedings instituted by her brother-in-law.

9. When she learnt that the deceased's share of the estate of their mother-in-law was wholly inherited by the respondent, she filed a case at Nyeri Municipality Land Disputes Tribunal.

10. After considering her case, the Tribunal awarded her half share of the suit property.

11. Aggrieved by the decision of the Land Disputes Tribunal, the respondent appealed to the Provincial Land Disputes Tribunal.

12. Before the respondent's appeal could be heard and determined, the Tribunals got disbanded following the repeal of the Land Disputes Tribunal Act by the Environment and Land Court Act, 2011.

13. To enforce her rights to the suit property, the applicant brought this suit, claiming that as a co-wife, the respondent holds half share of the suit property in trust for her.

14. According to the respondent, her separation with the deceased did not affect her right to inherit her husband's share of the family land which was held by their mother-in-law in trust for her children.

15. On her part, the respondent admitted that the applicant was her co-wife but contended that the applicant should not partake in sharing of the suit property for the following reasons:

(i) She was not present during the burial of their husband;

(ii) She has never lived on the suit property;

(iii) The applicant was married by other men after she separated with their husband;

(iv) The applicant had vowed that she would not return to their husband;

(v) That the property was given to her by her mother-in-law as opposed to their husband;

(vi) That their mother-in-law had not given any land to her.

16. The respondent also admitted that when the applicant left, she had children with her husband. She also confirmed that one of the sons of the applicant attempted to construct a house in the suit property but was chased away by her brother-in-law.

17. Contrary to the applicant's contention that she was chased away by the deceased, she stated that the applicant left the matrimonial home of her own volition.

Submissions

18. On behalf of the applicant, an overview of the facts of the case is given and submitted that it is not in dispute that the suit property comprised the beneficial interest of the parties' deceased husband in the original land and that the defendant benefited from the suit property on account of her being a widow of the parties' deceased husband.

19. It is the plaintiff's case that her claim has been proved by evidence, admission by the respondent and

previous proceedings over the matter.

20. On whether separation between the applicant and her husband deprived the applicant of her right to inherit her husband, reference is made to **Section 2** of the Law of Succession Act and the case of **Kimani Gituanja v. Jane Njoki Gituanja (1983) e KLR** and reiterated that the applicant has made up a case for being granted the orders sought.

21. On whether the applicant should have pursued her claim through her husband or within the succession proceedings in respect of the estate of their mother-in-law, it is submitted that administration of an estate does not nullify the trust which the property is subject to. In that regard, reference is made to **Section 51** of the Land Act, 2012.

22. According to the applicant, her interest in the suit property constitutes an overriding interest to the title held by the respondent.

23. On behalf of the respondent, a brief background of the circumstances leading to registration of the suit property in the name of the respondent is given and submitted that the applicant should have claimed land from her husband when he was alive or tried her luck in the succession cause.

24. Terming the applicant's case an afterthought, counsel for the respondent urges the court to dismiss the suit with costs to the respondent.

Analysis and determination

25. From the pleadings, evidence and submissions tendered in this matter, the following facts are either common ground or undisputed;

(i) That the applicant and the respondent were married by the deceased in accordance with Kikuyu customary law;

(ii) That the applicant and the deceased separated;

(iii) That at the time the applicant and the deceased separated they had children;

(iv) That by the time the applicant separated with the deceased they lived in the colonial village;

(v) That the applicant has never lived in the suit property, which was originally registered in the name of the parties' mother-in-law;

(vi) That the applicant did not attend her husband's burial after he passed on;

(vii) That after the parties mother-in-law died, the parties brother-in-law commenced succession proceedings that led to the estate of the parties' mother-in-law being succeeded by the parties brother-in-law and the respondent in equal shares.

(viii) That the applicant was not party to the succession proceedings (claims was not aware);

(ix) That pursuant to the orders obtained in the succession proceedings commenced by the parties' brother-in-law, the suit property which by then was registered in the name of the parties' mother-in-law was sub-divided into two equal parcels and the sub-divisions registered in the names of the parties' brother in law and the respondent;

(x) That after the respondent learnt about the succession, she filed a case at the Nyeri Municipality Land Disputes Tribunal which upon listening to the case awarded her half share of the suit property.

(xi) That the respondent appealed against the award;

(xii) That the appeal by the respondent was never determined because the appeal Tribunals were disbanded following repeal of the Land Disputes Tribunal Act No.18 of 1990 which established them.

26. From the pleadings and the submissions by the respective parties to this dispute I find the sole issue for determination to be whether the applicant has proved that the respondent holds half share of the suit property on her behalf.

27. As pointed out herein above the applicant claim is opposed on the grounds that:

(i) she was not present during the burial of their husband;

(ii) she has never lived on the suit property;

(iii) she got married to other men after she separated with their husband;

(iv) she vowed that she would not return to their husband;

(v) the property was given to the respondent by her mother-in-law as opposed to by their husband;
and

(vi) their mother-in-law had not given any land to her.

28. Concerning the first ground that is, the applicant's failure to attend her husband's burial, I hold the view that the said ground cannot vitiate the applicant's right to inherit her husband, if such right is found to exist. This is so, because the law does not say or contemplate a situation where a party's right to inherit another is dependent on the conduct of the person seeking to inherit the other. Once the right to inherit is established, in the absence of anything preventing the court from upholding that right, the court will enforce the right as by law ordained. In the circumstances of this case, it has not been demonstrated that failure by the applicant to attend her husband's burial could lawfully vitiate her right to inherit him, if the right to inherit him is found to exist.

29. Concerning the grounds that the applicant got remarried to several other men and that she vowed that she would never return to the deceased, I find the evidence adduced concerning those allegations to be insufficient to prove that the applicant indeed got married by other men or vowed that she will never return to the deceased.

30. Similarly, I find that there is no evidence capable of proving that the suit property was given to the respondent by her mother-in-law as opposed to her husband and that the parties' mother-in-law did not give any land to the applicant. To the contrary, the evidence on record shows that the respondent got the suit property pursuant to succession proceedings of the estate of the parties' mother-in-law.

31. It is common ground that the property that was succeeded to by the respondent and her brother-in-law was family land, meaning that the parties' mother-in-law held it in trust for herself, her children and their heirs. In this regard see the case of **Kimani Gituanja** (*supra*) in which it was stated:

“Land inheritance among the Kikuyu is as stated by Jomo Kenyatta in his book Facing Mt. Kenya page 32 (1965 Edition). The position has been as follows:

‘After the death of the father the land passed on to his sons, the eldest son took his father’s place. At this juncture the system of land tenure changed a little, there was no one who could regard the land as “mine”, all would call it “our land”. The eldest son who had assumed the title of Muramati (titular or trustee) had no more rights than his brothers, except the title, he could not sell the land without the agreement of his brothers who had the same full

cultivation

rights on the piece of land which they cultivated as well as those which were cultivated by their respective mothers.'

32. There being no dispute that the land succeeded by the respondent was held by the parties' mother-in-law in trust for her children, the respondent cannot be heard to say that the applicant, who was her co-wife needed to be given land by their mother-in-law in order to succeed in her claim against her based on the alleged trust. In my view, all what the applicant needs to prove in order to be granted the orders sought is that the respondent holds the suit property or a portion thereof in trust for her.

33. In resolving this dispute, given the history of the land to the effect that it is family land which delvolved from the parties mother-in-law to her children or administrators of her estate, I have no difficulty in finding that the respondent holds the suit property subject to the interests of the persons her mother-in-law held the property in trust for. I agree with counsel for the respondent that the trust to which the land was subjected to was not extinguished by the mere administration of the estate by among others the respondent.

34. In view of the foregoing, the issue for determination is whether the applicant has proved that the land held by the respondent is subject to a trust in her favour.

35. With regard to that question, because the evidence on record is to the effect that the applicant has never lived or been in use and occupation of the suit property, I hold the view that, if the land held by the respondent is subject to any trust in favour of the applicant, then that trust can only be by implication of law to wit, the applicable customary law. In this regard see the case of **Jason Gitimu Wangara v Martin Munene Wangara & others [2013] eKLR** where it was observed:

"There is nothing in the Registered Land Act (now repealed) and under which the suit land was registered, which precludes the declaration of a trust in respect of registered land even if it is a first registration. Secondly, Section 28 of the same Act contemplates the holding of land in trust – see MUMO VS MAKAU 2004 1 K.L.R 13(CA). The parties herein are Kikuyu and in KANYI VS MUTHIORA 1984 K.L.R 712 (C.A), the Court held that the registration of land in the name of one party under the Registered Land Act does not extinguish the right of other parties who may be entitled to it under Kikuyu Customary Law.

See also MUKANGU VS MBUI 2004 2 K.L.R 256. The new Land Registration Act 2012 makes it very clear in Section 28 that unless the contrary is expressed in the register, all registered land shall be subject to various overriding interest without their being noted on the register and one such interest is a trust including customary trust. In view of the above, Ms Wangari's submissions cannot be up-held. A customary trust need not be registered."

36. In the case of **Peter Moturi Ogutu v. Elmelda Basweti Matonda & 3 others (2013) e KLR** it was stated:

"In the court of appeal cases of, Muthuita .vs. Muthuita (1982-88) 1 KAR 42 at 44 and Njenga Chogera .vs. Maria Wanjira Kimani & Others [2005] e KLR, it was held that customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded. Interests in land arising from customary law trusts are now expressly recognized under the provisions of section 28 (b) of the Land Registration Act, No.3 of 2012. The suit property was registered under the Registered Land Act, Cap. 300 Laws of Kenya (now repealed). Previously, it was debatable whether or not customary law rights which were not indicated in the register should be given recognition as overriding interests over land registered under the Registered Land Act, Cap. 300 (now repealed). The courts however recognized the existence of customary law trusts. In the case of Gathiba –vs- Gathiba [2001] 2 E.A 342, Khamoni, J. stated as follows (at page 348) with

regard to section 30 and section 28 of the Registered Land Act, Cap. 300(now repealed);-

“The position as I see it is therefore as follows: - correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under Section 30 of the Registered land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and Section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to Section 28 of the Registered Land Act such registration does not relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

7. This statement by Khamoni,J. was approved by the court of Appeal in the case of Mukangu –vs- Mbui, KLR (E&L)1,622 where the court stated as follows at page 633;-

“We have also examined other authorities and we think it cannot be argued too strongly that the proper view of the qualification or proviso to Section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from the possession and occupation of part of the Registered land which although strictly it may not be an overriding interest under Section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act”.

In this case the court held that a trust arose in favour of a son from the son’s possession and occupation of his father’s land which trust was protected under Sections 28 and 30(g) of the Registered Land Act, Cap. 300 (now repealed).

8. It will be noted that in the cases that I have highlighted above, it was maintained and held by the courts that rights under customary law were not overriding interests under Section 30 of the Registered Land Act, Cap. 300 (now repealed). The courts however recognized the existence of customary law trusts and tried through statutory interpretation to secure their protection under the Registered Land Act, Cap.300 (now repealed). This position prevailed prior to the enactment of the Land Registration Act, 2012 which now gives express statutory recognition to customary law trusts as overriding interests over registered land. The Plaintiff herein could therefore establish a valid claim to the suit property based on customary trust. The Plaintiff did not however place sufficient evidence before the court on which the court could find such a trust. The fact that the suit property was ancestral land was not enough to establish the existence of a trust relationship between the Plaintiff and the 1st defendant in relation to the suit property. Due to the foregoing, I am not satisfied that the Plaintiff has proved a case based on trust.”

37. Turning to the instant case, having found that the suit property was family land which was registered in the names of the respondent and her brother in law following succession proceedings for the estate of their mother in law and there being admission that the applicant was a wife of the deceased with whom they have children, I find the respondent holds the suit property or a portion thereof in trust for the applicant. However taking into consideration that the applicant has never lived or been in use and occupation of the suit property, I hold the view that although entitled to a portion of the suit property, she is not entitled to equal portion as the respondent. Under the circumstances, I find the applicant’s entitlement to be ¼ share of the suit property.

38. Because the applicant has partially succeeded in her claim, I also allow prayers 2 and 3 to the extent stated in this judgment.

39. This been a family dispute each party to bear their own costs of the suit.

Dated, signed and delivered at Nyeri this 13th day of November, 2017.

L N WAITHAKA

JUDGE

Coram:

N/A for the applicant

N/A for the respondent

Antony Waigwa Muchemi s/o the respondent

Court assistant - Esther