



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
IN THE ENVIRONMENT & LAND COURT AT NYERI
CIVIL MISC NO. 27 OF 2012
WAIRIMU MWATHA GACHIHI & ANOTHER.....PLAINTIFF
VS
MILKA WANGU NGURE.....DEFENDANTS

JUDGMENT

The plaintiff claims that at all material times land parcel number KIIN/E/KIANGAI/157 was registered in the names of one Ngure Kimotho who was the husband of the defendant. It is further contended that the said Ngure Kimotho died intestate on or about 12th May 2007 leaving the defendant surviving him amongst other dependants and beneficiaries of his estate.

The Plaintiffs further contends that the said Ngure Kimotho was registered proprietor of L.R. KIINE/KIANGAI/157 as trustee for himself and the plaintiffs by virtue of the 1st plaintiff's husband and 2nd plaintiff's father, one Gachihi Kimotho (Deceased) having been a brother of the said Ngure Kimotho.

That by virtue of the said trust the plaintiffs settled and occupied the suit property and have been in such occupation and use for approximately half of the said parcel of land since the 1970s.

Upon the demise of the said Ngure Kimotho the Plaintiffs petitioned the High Court at Nyeri to be appointed as Legal representatives of the estate of the said Ngure Kimotho and were so appointed on 11th September 2009 vide Nyeri Succession Cause No. 509 of 2007 In The Matter Of The Estate Of Ngure Kimotho (DECEASED)

That upon filing the application for confirmation of grant in the aforesaid Succession proceedings the Defendant lodged an affidavit of protest against confirmation of grant and distribution of the estate of the deceased comprising of the suit property into two equal portions.

That by ruling of the High Court (Sergon J) delivered on 19/11/2010 the Hon. Judge ruled that further proceedings in the Succession cause be stayed pending institution and determination of the issue of trust claimed by the plaintiffs.

That by an order of the High Court made in the aforesaid Succession Cause No. 519 of 2007 made on 21/10/2011, the Defendant was enjoined as a co-Administrator of the estate of the said Ngure Kimotho (deceased) to facilitate the hearing and determination of the instant suit.

The plaintiffs' prayer against the defendant is for a declaration that the said Ngure Kimotho was registered proprietor of the suit land in Trust for and on behalf of the Plaintiffs and order that the said trust be determined as well as appropriate court orders directing the Defendant to effect transfer of the aforesaid half portion of the suit land in favour of the plaintiffs.

For the above reasons the plaintiff prays for a declaration that Ngure Kimotho (deceased) was registered proprietor of L.R. KIINE/KIANGAI/157 in trust for the Plaintiffs and other dependants of Gachihi Kimotho and an order requiring the Defendant to execute all relevant documents pertaining to half portion of the suitland in favour of the Plaintiffs and in default such documents be executed by the deputy Registrar of this honourable court.

The defendant in response to the plaintiff's claim filed a defence whose admitting that the defendant's husband is the registered proprietor of parcel No KIINE/KIANGAI/157 but the said registration was free from encumbrances.

He prays that the suit be dismissed with costs.

The matter came up for hearing on 10/10/2013. Muthigani for plaintiffs was present while Mr. Macharia for defendant was absent. The hearing date had been taken in court by consent.

The plaintiff testified that David Muriuki Gachihi was her son while Milka Wangu Ngure was the wife to her brother in law. Her husband who died in the year 2007 was known as Gachihi Kimotho and had a parcel of land known as KIINE/KIANGAI/157 registered in the names of Ngure Kimotho. Her husband had 4 brothers who were all staying in KIINE/KIANGAI/157 and IRIAINI/KAGUYU/243 thus Wanjohi Kimotho and Kagwe Kimotho were residing on IRIAINI/KAGUYU/243 whereas Gachihi Kimotho and Ngure Kimotho were residing on KIINE/KIANGAI/157

The plaintiff called **Gibson Rubuchwa Karobia** who testified that his residence was Kiangai village within Kiringaya County. He belonged to Agathigia a Mbari ya Kingathi clan to which the two parties in the proceedings also belonged. He knew both parents of Ngure Kimotho who were known as Kimotho Rukanga and Tabitha Wanja Kimotho and they had four sons namely Wanjohi Kimotho, Kagwe Kimotho, Ngure Kimotho and Gachihi Kimotho. He also stated that he was aware of the said Kimotho Rukanga had two parcels of land which he caused to be registered in the names of two of his sons Wanjohi Kimotho and Ngure Kimotho. Wanjohi was registered proprietor of L.R. KIINE/KIANGAI/157. According to Kimotho Rukanga wish, L.R. IRIANINI/KAGUYU/243 was to be shared between Wanjohi Kimotho and Kagwe Kimotho and the said two settled on parcel of land and their respective families reside to date. On the other other hand, Ngure Kimotho and Gachihi Kimotho settled on L.R. KIINE/KIANGAI/157 in accordance with the direction given by their father in his lifetime. He therefore urged the Honourable court to declare that L.R. KIINE/KIANGAI/157 be registered in the name of Ngure Kimotho in trust for Gachihi Kimotho in equal shares and confirmed that the family of Gachihi Kimotho resided on L.R. KIINE/KIANGAI/157 where they had tea bushes and grew subsistence crops.

Erastus Kanyora Machau also testified and stated that he resided at Kiangai village whithin Kirinyaga County and also belonged to Agathigia a Mbari ya Kingathi clan. He confirmed that the parties in this suit also belonged to the same clan. He claimed to know both parents of Ngure Kimotho and Gachihi Kimotho by their names as Kimotho Rukanga and Tabitha Wanja Kimotho and they had four sons namely Wanjohi Kimotho, Kagwe Kimotho, Ngure Kimotho and Gachihi Kimotho.

He further stated that he was aware that the said Kimotho Rukanga had two parcels of land which he registered in the names of two of his sons Wanjohi Kimotho and Ngure Kimotho. Wanjohi was registered proprietor of L.R. KIINE/KIANGAI/157. According to Kimotho Rukanga directions, L.R. IRIANINI/KAGUYU/243 was to be shared between Wanjohi Kimotho and Kagwe Kimotho and the said two settled on parcel of land and their respective families reside to date. On the other other hand, Ngure Kimotho and Gachihi Kimotho settled on L.R. KIINE/KIANGAI/157 in accordance with the direction given by their father in his lifetime. He therefore urged the Honourable court to declare that L.R.

KIINE/KIANGAI/157 be registered in the name of Ngure Kimotho in trust for Gachihi Kimotho in equal shares and confirmed that the family of Gachihi Kimotho resided on L.R. KIINE/KIANGAI/157 where they had tea bushes and grew subsistence crops.

I have considered the evidence on record and do find that the plaintiff Wairimu Mwatha Gachihi was married to one Gachihi Kimotho and had four children. During their marriage, the plaintiff resided on L.R. KIINE/KIANGAI/157 registered in the names of Ngure Kimotho, the plaintiff's husband's brother where she brought up her children. The plaintiff utilizes half the portion while the defendants utilizes the other half of the same and both have planted tea bushes and subsistence food crops. The dispute was heard briefly by the High Court Probate and Administration division when the court ordered that the issue of trusteeship be determined first hence this suit.

I do find that the plaintiff has established that the late Ngure Kimotho was registered as trustee of the property L.R. KIINI/KIANGAI/157 on his behalf and on behalf of this brother Gachihi Kimotho. She has proved that she has been in occupation of this land since her marriage in 1982 and has known the land as her matrimonial home since the said marriage.

Gibson Rubuchwa Karobia's evidence also proves that the plaintiff's husband belonged to Agathigia a Mbari ya Kingathi clan. He states that Ngure Kimotho was registered proprietor of L.R. KIINE/KIANGAI/157 in accordance with the direction of his father Kimotho Rukanga in his life time in trust for Gachihi Kimotho in equal shares. The family of Gachihi Kimotho, plaintiff's husband, has been residing on this land since then which evidence is corroborated with the evidence of Erastus Kanyora Machau.

This court finds that the plaintiff has proved his case on a balance of probabilities and declares that Ngure Kimotho (deceased) was registered proprietor of L.R. KIINE/KIANGAI/157 in trust for Gachihi Kimotho husband of the plaintiff and provider of the other Dependants and orders that the said trust be determined by half share of the suit property that is being occupied by the plaintiffs to be registered jointly in the ir names and the remainder to be registered in the defendant's name. No order as to costs this being a family dispute.

SIGNED AND DATED AT ELDORET THISDAY OF..... 2015

ANTONY OMBWAYO

JUDGE

DELIVERED AND SIGNED AT NYERI THIS 5TH DAY OF FEBRUARY ,2015

LUCY WAITHAKA

JUDGE