



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 85 OF 2013

JOHN MATHENGE GAITA (SUING AS THE ADMINISTRATOR OF

THE ESTATE OF JOYCE NJERI GAITA AND

LUCY NJERI GAITA – DECEASED)..... PLAINTIFF

VERSUS

BETH WAHITO WAMBUGU.....DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 2nd May, 2013 the plaintiff filed this claim against the defendant seeking the following orders:-

a) A declaration that the defendant has no right to bury the remains of her daughter in law Veronica Gathoni on L.R Muhito/Ruthanji/157;

b) An order that the defendant do vacate L.R No.Muhito/Ruthanji/157 and in default be forcefully evicted therefrom.

c) Costs and interests.

2. Upon being served with the suit papers in this case, the defendant filed a statement of defence and counter-claim denying squatting or being a trespasser on L.R NO. Muhito/Ruthanji/157 (hereinafter referred to as the suit property).It is the defendant's case that the suit property was registered in the name of Mukundu Gaita as a trustee for his family and the family of his brother Wambugu Gaita.

3. Further, that despite the suit property (Muhito/Ruthanji/157) and Muhito/Munyu/263 being registered in the names of Mukundi Gaita and Wambugu Gaita respectively, they belonged to their father (that is to say they belonged to the father of Mukundi Gaita and Wambugu Gaita). That being the case, the defendant contends that the beneficiaries of the properties cited above are the descendants of Mukundi Gaita and Wambugu Gaita.

4. The defendant prayed for a declaration that the registration of Muthoni Mukundi and Lucy Njeri Gaita as proprietors of the suit property was subject to the trust created on registration. She also

seeks an order to the effect that she is entitled to half share of the suit property.

EVIDENCE

The plaintiff's case

5. When the matter came up for hearing, the plaintiff informed the court that the case herein is in respect of the estate of his mother and grandmother. He stated that the suit property was bought by his grandfather (Mukundi Gaita). He explained that his grandfather had a brother (Wambugu Gaita). He stated that the two brothers settled on the suit property using it but in unequal proportions.

6. He conceded that the defendant came to the suit property when it was newly acquired. The court heard that there was no dispute over use of the suit property during the life time of the two brothers. When the defendant's husband died in 1980, the defendant brought a case against his mother and grandmother but the case was dismissed for want of prosecution. Following the death of his mother and grandmother, he filed succession proceedings without involving the defendant.

7. The court was informed that the two brothers herein had another parcel of land to wit, Muhito/Munyu/263 which is undeveloped. The court further heard that on 13th September, 1988 elders met and agreed that the defendant receives 0.2 acres from the suit property on condition that she forfeits 0.6 acres from Muhito/Munyu/263. The plaintiff states that he is not agreeable to the defendant's contention that she is entitled to half share of each of the two properties herein.

8. **P.W.2 Eliud Kinyua Wagonda**, a neighbor to the parties herein, stated that he knew that the plaintiff's grandfather had bought the suit property from one Ndegwa but did not know for how much or how big. He acknowledged that at the time of registration of the suit property, the defendant was living thereon and has lived there on ever since. The court heard that their dispute began in 1998; that the plaintiff's grandfather was to give the defendant 0.2 acres out of the suit property and that Muhito/Munyu 263 was also to be shared but the defendant refused that arrangement.

9. The court further heard that there was no dispute between the two original owners of the properties herein. The dispute arose after the death of the defendant's husband. The court heard that before he passed on, the plaintiff's grandfather who was registered as the sole proprietor of the suit property because he was the one who bought the land, had asked the defendant to move to Muhito/Munyu/263 but she refused. He informed the court that the defendant's husband and one of her children are buried on the suit property.

10. In the meeting held by the elders in 1988 to resolve the dispute herein, the elders resolved that Mukundi Gaita gives the defendant 0.2 acres of the suit property in exchange of 0.6 acres from Muhito/Munyu/ 263. The defendant who insisted on half share of the two parcels of land, disagreed with the resolution of the elders. The elders advised her to go to court over the matter.

11. **Davis Kigunga** who testified as **P.W.3**, informed the court that the plaintiff's grandfather had told them that the suit property belonged to him and that he wished that his brother goes to Muhito/Munyu/263.

The defendant's case

12. On her part, the defendant (**D.W.1**) informed the court that the suit property was to be registered in the name of the two brothers herein (Mukundi Gaita and Wambugu Gaita). She explained that she has lived on the suit property since after emergency (way before independence) and that there was no dispute between the two brothers. She admitted that the family has another parcel of land registered in her husband's name, that is to say Muhito/Munyu/263 and that elders have severally tried to resolve the land dispute in vain.

13. The court heard that in 1993, elders decided that the suit property be divided between the two brothers

so that her husband gets 1.5 acres and her husband's brother gets 2.2 acres. The elders also decided that plot No. 263 be shared equally.

14. Concerning the succession proceedings that led to the plaintiff being made an administrator of the suit property, she stated that she was not aware of it; that she was not served with any documents in respect thereof. In view of the foregoing, she urged the court to dismiss the suit and order that each party to occupy their respective portions.

15. Upon being cross-examined on the reason why her husband was not registered as the proprietor of the suit property, she stated that the two brothers were too close at the time-there was no dispute amongst them. On why the elders proposed that the plaintiff's grandfather takes a bigger share, she explained that that was so because her husband's brother was older.

16. She admitted that she filed a case in 1993 concerning ownership of the suit property and explained that the suit was dismissed because of want of prosecution.

17. The court heard that the plaintiff's grandfather's first wife did not have children and that the dispute concerning the properties herein began in 1998 after the plaintiff's grandfather married another wife. The court further heard that in her dismissed suit, the defendant had sought that the two parcels of land herein to be shared equally.

18. **D.W.2, Charles Muhoho Ndegwa**, informed the court that he was one of the clan elders involved in resolution of the dispute herein. The court heard that he was the secretary to the meeting held in 1993. In that meeting, the elders proposed that the plaintiff's grandfather should get 2.2 acres and the defendant's husband 1.5 acres because he was older and the one who had brought his brother up.

19. **Naftali Kabugi Ndegwa**, who testified as **D.W.3**, informed the court that the suit property was registered in the name of the plaintiff's grandfather because he was the elder brother. He stated that he participated in the clan elders meeting held in 1993 over the properties herein. Like D.W.2, he stated that clan elders decided that the suit property be shared between the two brothers so that the plaintiff's grandfather gets 2.2 acres and the defendant's husband gets 1.5 acres. The court heard that during their lifetime the two brothers cultivated the suit property together as brothers.

20. Concerning registration of the plaintiff's grandfather as proprietor of the suit property, D.W.3 explained that during demarcation, only one person per family would be registered. The court heard that such person would usually be the eldest son.

21. D.W.3 pointed out that the defendant's husband (Wambugu) was disabled and explained that the defendant was in accordance with Kikuyu customary practices brought by the plaintiff's grandfather as Wambugu's wife.

22. The court further heard that in the 1993 during clan elder's deliberations, only grownups were invited. The two families were represented in the meeting.

23. D.W.3 opined that the suit property should be shared between the families of the two brothers.

24. After close of hearing, counsels for the respective parties filed submissions, which I have read and considered.

Submissions on behalf of the plaintiff

25. In the submissions filed on behalf of the plaintiff, it is submitted that the evidence on record shows that the suit property was acquired by the plaintiff's grandfather.

26. On the alleged trust, it is submitted that according to **Order 37 Rules 1, 2 and 8** of the Civil Procedure Rules, it is clear on who may take out originating summons and in respect of what

matters.

27. It is pointed out that the issue of the respondent's entitlement to the suit property had been raised in an earlier suit to wit HCCC NO. 519 of 1993 which was dismissed for want of prosecution. Despite the acknowledgement that the defendant's suit was dismissed for want of prosecution, counsel for the plaintiff submits that the defendant's counter-claim herein is *res judicata* the suit that was dismissed for want of prosecution.

28. The defendant is also blamed for having failed to apply for revocation of the grant of letters of administration issued to the plaintiff in respect of the estate of the plaintiff's deceased parents, including the suit property.

29. Asserting that the defendant has not made up a case for continued possession of the portion of the suit property she occupies, counsel for the plaintiff's submits that she should be evicted.

Submissions on behalf of the defendant

30. On behalf of the defendant, an over view of the pleadings filed in this suit and the testimonies/evidence produced in respect thereof is given. From the pleadings and evidence adduced in support thereof, two issues are framed for the court's determination. These are:-

- a. Whether the plaintiff has proved that the defendant is a squatter on the suit property, who ought to be evicted? and
- b. Whether the defendant has proved that she is not a squatter on the suit property and that a trust was created in her favour on the registration of the suit land?

31. With regard to the first question, it is submitted that the testimony adduced by the plaintiff does not in any way suggest that the defendant is a squatter on the suit property. The plaintiff and his witnesses are said to have admitted that the defendant has been in occupation of the suit property since the time of land consolidation and demarcation. Both sides are said to be in agreement that the defendant and her family have been living on the suit property and that the defendant's husband and her son are buried thereon. It is contended that had the defendant been a squatter, the plaintiff or his predecessors in claim would have taken steps to evict her. The current suit is said to have been brought because of the death of a relative of the defendant whom the plaintiff did not want to be buried on the suit property.

32. Concerning Muhito/Munyu 263, it is submitted that there is no dispute that no one has settled thereon.

33. On the second issue, it is submitted that the testimony of the defendant with regard to the defendant's occupation and possession of the suit property was not controverted; that she has lived therein since she was married pointing out that the law imputes a customary trust over registered land in recognition of evidence of possession and occupation of land in accordance with customary rights.

34. In this regard, reference is made to the proviso that **Section 28** of the Registered Land Act, Cap 300 laws of Kenya (now repealed) and **Section 25(2)** of the Land Registration Act, 2012 which is said to be in *pari materia* to the proviso in **Section 28** of Cap 300 aforementioned and submitted that customary right gives rise to a trust which is protected by law. The proviso provides as follows:-

“Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

35. Reference is also made to **Section 30(g)** of Cap 300 Laws of Kenya and **Section 28(b)** of the Land Registration Act, 2012 which subjects registered land to trusts including customary trusts. It was submitted that a customary trust was created in favour of the defendant, who all along has been in occupation and possession of a portion of the suit property, upon registration of the plaintiff's grandfather

(Mukundi Gaita).

36. It is further submitted that the death of the plaintiff's grandfather did not invalidate the trust created in favour of the defendant and that the trust attached to the estate of the plaintiff's grandfather and any other party subsequently registered as a proprietor of the suit property. In this regard reference is made to a passage in Halbury's Laws of England Vol. 48, 4th Edition at paragraph 626 and the case of **Kanyi vs. Muthiora (1984) KLR 713** where the court of Appeal held:-

“... a proprietor of first registration or any subsequent registration is not relieved by anything in section 28 from any duty or obligation to which he is subject as a trustee.”

37. It was also submitted that, whereas the plaintiff has failed on a balance of probabilities to prove that the defendant is a squatter on the suit property, the defendant has proved that she is entitled to half share of the suit property.

Analysis and determination

38. It is not in dispute that the suit property was registered in the name of the plaintiff's grandfather before it was transferred to his mother and grandmother in 1992. It is also not in dispute that since demarcation, the defendant and her family peacefully lived on a portion of the suit property until after the death of her husband and the plaintiff's grandfather.

39. It is further not in dispute that there were attempts by elders to resolve disputes concerning ownership of the suit property. In both meetings, the defendant's right to occupy the suit property was acknowledged. In the first instance, the elders acknowledged her right to occupy 0.2 acres of the suit property in exchange for 0.6 acres in Muhito/Munyu 263. It is noteworthy, that no reasons were given by the elders for that mode of distribution. In the subsequent meeting, the elders proposed that the defendant's family gets 1.5 acres and the plaintiff's side 2.2 acres out of the suit property. The other property was to be shared equally. The reason provided for the proposed mode of distribution of the suit property was the recognition of the active role played by the plaintiff's grandfather in acquisition of the suit properties. In the second meeting the elders also took into account the developments parties had made in the areas they occupied.

40. Upon considering the totality of the evidence adduced in this case, I find as a fact that the plaintiff's family and that of the defendant have been in occupation of the suit property for a long period of time. From the plaintiff's own testimony, it is clear that their predecessors in claim, settled on the suit property using it but in unequal proportions. He also conceded that the defendant came to the suit property when it was newly acquired. All along, the two families lived in harmony until the death of their predecessors in claim.

41. From the conduct of the predecessors of the plaintiff in claim, I infer that the parties considered the suit property as family land. Although there is evidence that the plaintiff's grandfather played a bigger role in acquisition of the suit property, there is no evidence that the defendant's husband did not play any role in its acquisition or that the plaintiff's grandfather had the intention of excluding his brother from entitlement to the suit property.

42. That being the case, I am not persuaded that the defendant is a trespasser to the suit property. Although the suit property is registered in the plaintiff's grandfather's name, I find that registration to have been subject to the defendant's unregistered interest therein as a person in possession. In this regard see **Section 30(g)** of the Registered Land Act, Cap 300 Laws of Kenya, which provides as follows :-

“ 30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register

(g) the rights of a person in possession or actual occupation of land to which he is

entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”

43. In the circumstances, the defendant's possession of the suit property is protected by that section of the law. From the conduct of the predecessors in title, I also find that the defendant's occupation of the suit property to be covered by the proviso to **Section 28** of the Registered Land Act, Cap 300 Laws of Kenya which by virtue of **Section 107** of the Land Registration Act, 2012 applies to the title to the suit property. The proviso to **Section 28** aforementioned provides:-

“Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

44. Turning to the issues raised in the plaintiff's submissions, beginning with the contention that the defendant's counter-claim is res judicata HCCC NO. 519 OF 1993, there being no evidence that the issues raised in the dismissed suit were heard and determined on their merits, I am unable to determine that question. The burden to prove that the counter-claim herein is res judicata lay on the plaintiff, which burden has not been discharged.

45. With regard to the contention that the grant issued to the plaintiff was not revoked, I wish to state that the grant did not make the plaintiff the owner of the suit property. It only conferred on him a right to administer the estate on behalf of its beneficiaries, the defendant included.

46. The upshot of the foregoing, is that the plaintiff has failed to prove his case on a balance of probabilities. On the contrary, I find the defendant's counter-claim for a declaration of a trust in a favour to be proved on a balance of probabilities. However, from the evidence adduced in this suit, I am not persuaded that the defendant is entitled to half share of the suit property.

How should the suit property be shared?

47. Having considered the totality of the evidence adduced in this suit, I am persuaded that the best way to sub-divide the suit property is in accordance with the decision of elders made on 25th September, 1993. Consequently, I declare that the defendant's family is entitled to be registered as the absolute proprietor of 1.5 acres out of the suit property. The division shall, as much as is possible, take into account the portions occupied by the families and the developments they have effected thereon.

48. Since parties have not asked this court to make any orders in respect of Muhito/Munyu 263, this court will only advise the parties to consider sharing it in the manner proposed by the elders on 25th September, 1993.

49. This court has been persuaded by the decision of the elders made on 25th September, 1993 because the reasons given by the elders for the proposed mode of sub-division are reasonable and has also been persuaded by the evidence on record.

50. This being a family dispute, parties shall bear their own costs of the suit.

Dated, Signed and Delivered at Nyeri this 27th day of May, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kingeri h/b for Ms Mwai for the defendant

Mr. Nderi h/b for Ms Muhoro for the plaintiff

Court assistant - Lydia