



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
CIVIL APPEAL NO.19 OF 2010

PURITY WAHITO)

KARURI KABU)

NDEGWA WAHITO).....APPELLANTS

VERSUS

MUNENE KARIUKI.....RESPONDENT

J U D G M E N T

The 1st appellant is the mother of the 2nd and 3rd appellants and the respondent is the registered owner of half share in L.R. No.Kirimukuyu/Kiria/85 while the other half share is registered in the name of Wanjiru Kariuki (deceased). The shares were determined by Karatina Resident Magistrate's Court Succession Cause No.60 of 1979.

The respondents claim in the lower court was that the appellants who were entitled to occupy half share registered in the name of Wanjiru Kariuki (deceased) have unilaterally and without any color of right occupied the whole land parcel and thereby prevented the respondent from occupying and utilizing his half share of the said land.

The appellants through the District Officer Mathira registered a restriction against the said title vide the District Officer's letter Ref.LND/15/2 VOL.III/56 dated 8/6/2005 thereby preventing partition of the land into two equal portions as per the determination in succession cause No.60 of 1979.

The respondent had averred in the lower court that the appellants had continued to commit acts of waste on his half share of the land by cutting the trees on the land parcel No.Kirimukuyu/Kiria/85 that measures 0.48 ha and that the appellants had failed to give vacant possession despite demand and had prayed for judgment and orders against the appellants jointly and severally for a *permanent injunction restraining them from entering, occupying or utilizing half portion measuring 0.24 Ha in Kirimukuyu/Kiria/85 and Removal of the restriction placed on L.R. No.Kirimukuyu/Kiria/85 and an order for the partition of the land parcel into two equal portions.*

In their defence dated 1st March 2006 the appellants denied the respondents claim and pleaded a preliminary objection that the suit was bad in law and ought to have been struck out.

Mr Wilson Kariuki Munene testified that the respondent is his father and that he was appointed as his guardian ad litem as per court order dated 22/4/2009. He said he knew the land Kirimukuyu/Kiria/85

which is 0.48 hectares half of which is in the name of respondent and the other half in the name of Wanjiru Kariuki who was a wife to the respondent's father and mother to the 1st appellant. He stated that he saw a certificate of official search for the suit land which indicates that the land is registered jointly in the names of Munene Kariuki and Wanjiru Kariuki.

The green card shows Munene Kariuki has half share and Wanjiru Kariuki has the other half share. He knew that there was a Succession Cause No.60 of 1979 in Karatina Court that gave the two parties equal shares in the suit land. The confirmation of grant shows that Munene Kariuki got half of the land and Wanjiru Kariuki the other half share and was issued on 31/3/1980 and is signed by the magistrate. He stated the land was to be partitioned as per the certificate of succession. The partition was not done as Purity and her children blocked it when they were assisted with the department of survey and Administration Police. The sub-chief informed the department of survey that there was a dispute hence they declined to do the survey. They went to a District Officer who caused a restriction to be lodged on 9/6/05 by force of his letter addressed to lands office Nyeri. The respondents wrote to the Land Registrar as per the letter dated 22/6/05 to remove the restriction but he has not done it to date. From 2005, it is the 1st appellant and her children who utilize the land after chasing him away and destroying his property.

The 1st appellant on his part stated that his father Harun Kariuki had 3 wives and each wife was given a portion of land. His mother Wanjiru Kariuki was the last wife and the 1st appellant was the only child. When her mother brought the succession cause, the succession case was objected to by the respondent and who is her step brother. When clan people were called they said Munene Kariuki was to hold that land as a trust as it was alleged her mother could sell the land as she used to drink beer. He was not given the land, he was only to hold it in trust. Later, Munene Kariuki her step brother went on to do the succession cause and that she was not involved. When the 1st appellant learnt about it, she went to the District Officer and they were called so that they could discuss the issues.

The 2nd appellant testified that the suit land belonged to his grandfather Harun Kariuki and his grandmother Wanjiru Kariuki. When he was born the land was registered in the names of Harun Kariuki and Wanjiru Kariuki. From 2005 Munene Kariuki the child of his grandfather went and changed the land register to read his name and the name of Wanjiru Kariuki. The 2nd appellants grandfather had 3 wives and every woman was given land separately. The first wife is the mother of Munene Kariuki and 2nd wife is the mother of Mbogo but there was also a Mwangi who died. They stay on the small parcel of land which was given to them by their grandmother with whom they stayed.

The 3rd appellant testified that they stay on the suit land and that he believed that the land was theirs as their grandfather Harun Kariuki had 3 wives and each wife was given her land and the lands are not even bordering each other. Munene Kariuki left his land which his grandmother had given him and he encroached their land.

DW4 was an independent witness who testified on behalf of the appellants that he knew Harun Munene as their grand father and he was also called Kariuki Wamae who had 3 wives hence 3 houses. The first house was for Ngima, the 2nd was for Jelioth Gachambi and the 3rd was for Murigi wanjiru. Munene Kariuki was in the first house and the DW4 was in the 2nd house and Wanjiru 1st appellant is from the 3rd house. Harun Kariuki Wamae had 3 pieces of land that were consolidated into land No.Kirimukuyu/Kiria/85 however, because of the 3rd wife's drunkenness, he divided the land into two portions and he was registered in one half and Wanjiru Kariuki on the other.

Their grandmother called Jelioth Gachabi had said that Munene Kariuki be registered instead of that woman, mother of Wahito as the latter was a drunkard and she could have sold the land. Munene Kariuki was to be registered only as a trustee. This was to prevent Wanjiru Kariuki from selling the land. He stated that there was no succession Cause No.60 of 1979 as when they started the scuffle he went to Nyeri in 2005 and found the land was still in the name of Wanjiru Kariuki and Munene Kariuki.

The other independent witness was DW5 who testified that he knew the 1st appellant as a step sister to the respondent. When 1st appellant's father died her elder sister from another house called all her brothers and appellant's mother in the presence of DW5 and asked her brothers if anyone was claiming

anything from their younger step mother and they all said no one was claiming anything. The appellant's mother stated that their father had said that if anyone missed a place to build, she would give them a place to build but not to inherit. The land dispute emerged later but it is 1st appellant who utilizes the land and the respondent has never used that land.

Lastly, was DW6 who testified that Wahito and her children are the ones who stay on that land. Munene Kariuki does not stay on that land as he has his own land. Harun had 3 wives namely Ngima, Gachabi and Wanjiru mother of Wahito and each eldest child of the wives had land. They had gone to the clan, chief's office and District Officer's office and all ruled the appellant could file Succession Cause to inherit her mother's land which she inherited from her husband.

After hearing the case the Honourable Court having regard to all the evidence adduced found that there were documents marked Ex.P1 and EX.P2 being the certificate of official search dated 21/6/05 and green card opened on 1st July 1959 which showed that the parcel of land Kirimukuyu/Kiria/85 which is 0.48ha. is registered in the names of Munene Kariuki and Wanjiru Kariuki, at the ratio of ½ share for each. The green card further indicates that the aforementioned registration was made pursuant to the succession certificate issued on 31/1/1980 a copy of which is exhibited as a certificate in court (Ex.P3).

The appellants have appealed to this court on grounds that the learned trial magistrate erred in law and in fact in failing to consider the defendants' evidence and submissions and that the trial magistrate erred in law and in fact by misdirecting herself in law by taking into consideration irrelevant factors or failing to take into account relevant factors in her judgment and decision. Moreover that trial magistrate erred in law and in fact in arriving at a judgment that was against the weight of evidence and in failing to appreciate that the suit was time barred under the Limitation of Actions Act Cap 22 Section 7 and therefore exceeded her jurisdiction. Lastly that the learned trial magistrate erred in law and in fact by failing to appreciate that the defendants had been on the suit land for over thirty (30) years and that the plaintiff had no valid cause of action.

Appellants filed written submissions and on grounds 1, 2, 3 and 4 argued that the learned trial magistrate erred in law and in fact in failing to consider the defendants/appellants evidence and their within submissions and considering irrelevant facts and thereby arriving at a judgment that was against the weight of evidence. The defendants appellants stated that they had all along lived in the suit land which belonged to their grandfather one Harun Kariuki and Wanjiru Kariuki. Their land was separate from the respondents land and was encroaching on their portion and that the respondent held the land as a trustee for Wanjiru Kariuki who could have sold the land because she was drunkard. All the defendants denied knowledge of the Succession Cause. This court finds that the aforesaid issues were considered by the honourable trial magistrate at the last paragraph of page 2 and the 1st, 2nd, 3rd and 4th paragraphs of page 3 of the judgment where the court analyzed the appellants' defence. The court analyzed the evidence that the appellants had always stayed on the land which belonged to their grandfather Kariuki Munene and grandmother Wanjiru Kariuki. Each wife of his grandfather was given land by the old man however, the plaintiff who was son to the 1st wife was given the 3rd wife's land to hold as trustee. The appellants were categorical that they were not aware of the Succession Cause that created half share each for Munene Kariuki and Wanjiru Kariuki in Kirimukuyu/Kiria/85. I do find that the honourable trial court considered all this facts to find that the green card showed that both Munene Kariuki and Wanjiru Kariuki had half share in the parcel of land pursuant to a certificate issued on 31/1/1980. This court finds that the magistrate's hands were tied by the certificate of succession and the only available remedy was the appellants to move the High Court for a declaration of trust or to apply to revoke the certificate.

On the grounds Nos,5, 6, 7, 8 and 11 the appellants argue that the trial Magistrate did not appreciate that the suit was time barred and therefore the trial court did not have jurisdiction. This court finds that the suit was not time barred as time began running upon registration of Munene Kariuki and Wanjiru Kariuki as joint proprietors on the 25/4/2005 and the restriction by the District Officer by letter dated 8/6/2005 which was entered on 9/6/2005. This grounds are unfounded and dismissed.

On grounds 9 and 10, this court finds that the issue of trust was not before the court as it was not pleaded as a counter claim though enough evidence was adduced to that effect. This court further finds that the

Magistrate's courts have jurisdiction to entertain suits based on customary trust subject to pecuniary and geographical jurisdiction however, the trial court's hands were tied by the fact that a certificate of succession had been issued by the court which could only be revoked by the High Court on application by the appellants. The upshot of the above is that the appeal is dismissed with no order as to costs as this is a family dispute.

Dated, signed and delivered at Nyeri this 14th day of March 2014.

A. OMBWAYO

JUDGE