



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC CASE NO. 183 OF 2014 (O.S)**

**IN THE MATTER OF L.R NO. NYERI/UASO NYIRO/45**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA AND ORDER 37 RULES 1 AND 7 OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**STEPHEN MATHENGE MWANIKI ..... 1ST PLAINTIFF**

**BILHA WANJIRU MATHIBU ..... 2ND PLAINTIFF**

**-VERSUS-**

**JOHN NDERITU MATHENGE ..... DEFENDANT**

**JUDGMENT**

1. The plaintiffs herein took up the summons dated **27th August, 2014** and amended on **28th November, 2014** for determination of the following questions:-

1) **Whether the registration of the defendant, John Nderitu Mathenge, as the proprietor of L.R NO. Nyeri/Uasonyiro/45 is subject of a customary trust in favour of the estates of Samuel Mathenge Mwaniki and Benard Mathibu Mwaniki and the heirs/survivors of the said Samuel Mathenge Mwaniki and Benard Mathibu Mwaniki"**

2) **If the answer to question (1) above is in the affirmative, whether the said trust should be determined and all the beneficiaries ascertained and granted their respective shares"**

3) **Whether the 2nd plaintiff has become entitled to the property (L.R No. Nyeri/Uasonyiro/45) by adverse possession"**

4) **If the answer to (3) above is in the affirmative, whether the 2nd plaintiff should be**

**registered as the absolute proprietor of the suit property, L.R No. Nyeri/Uasonyiro/45"**

**5) Whether the defendant should be ordered to sign the necessary documents of transfer to facilitate the transfer of the suit property to the plaintiffs and in default the Deputy Registrar of this court authorized to sign the documents of transfer"**

**6) Who should pay the cost of the suit/application"**

2. The application is supported by the affidavits of the 1st and 2nd plaintiff sworn on **27th August, 2014** and on **28th November, 2014**. In the affidavit sworn on 28th November, 2014 the 2nd plaintiff has, *inter alia*, deposed that the suit property (L.R NO. Nyeri/Uasonyiro/45) was registered in the name of the defendant to hold in trust of his deceased husband and father in law to wit, Bernard Mathibu Mwaniki and Samuel Mwaniki Mathenge. According to the 2nd plaintiff, although the property was acquired by the defendant from Settlement Trust Fund, since the property was encumbered, the defendant agreed with Samuel Mwaniki Mathenge (her father-in-law) that in consideration of her father-in-law paying the loan that existed in respect of the suit property, the defendant would transfer the land to him.

3. Pursuant to that agreement, her father-in-law and her husband, Bernard Mathingu Mwaniki (deceased) moved into the land in 1967 and started developing the land as they paid the loan. Her father in law continued paying the loan until 2002 when he passed on.

4. It is the 2nd plaintiff's case, that in breach of his promise to her father-in-law, in 2014 the defendant caused the suit property to be registered in his name.

5. Explaining that her family has all along known the suit property to be their land, the 2nd plaintiff contends that her deceased father-in-law, her deceased husband and herself had acquired prescriptive rights over the suit property.

6. The plaintiffs' claim is opposed through the replying affidavit of the 2nd defendant sworn on 12th September, 2014. In that affidavit, the defendant admits that he obtained the suit property from Settlement Fund Trustee (SFT) through loan but denies that he was assisted by his late brother or any other person in meeting his loan obligations to SFT. The defendant also denies having entered into an agreement with his brother to pay the loan and having promised his brother that he would transfer the suit property to him. Instead, the defendant explains that his brother was his caretaker on the suit property and that his brothers remained in the suit property by his consent and not as an owner or co-owner of the suit property.

7. It is the defendant's case, that after his brother passed on, he asked his son, Bernard Mathibu Kariuki, to take over management of the property because he was teaching in a neighbouring school.

8. The defendant denies the allegation that the 2nd plaintiff has effected massive developments on the suit property and states that he is the one who effected the developments in the suit property.

9. The defendant also explains that, when the 2nd plaintiff's husband passed on in 2014, he obtained an injunction to restrain the 2nd plaintiff from burying her husband in the suit property.

## **EVIDENCE**

### **The plaintiffs case**

10. When the matter came up for hearing, the 1st plaintiff who testified as P.W.1 informed the court that he is the administrator of the estate of his father, Samuel Mwaniki Mathenge, a brother of the defendant. He reiterated the contention that his father settled in the suit property in 1967 and lived thereon until 2001 when he fell sick. He also reiterated the contention that his deceased father and the defendant had entered into an agreement that his father finishes paying the money the defendant owed SFT and the defendant would transfer the suit land to him.

P.W.1 further informed the court that his brother, Benard Mathingu Mwaniki, lived in the suit property until he passed on in 2014.

11. According to P.W.1, the defendant only began laying claim to the suit property after his brother passed on in 2014.

12. With regard to the claim that his father and brother were mere caretakers of the suit property, he stated that it is not true as the defendant was not paying them for the alleged role.

13. Explaining that his father and brother extensively developed the suit property and farmed thereon, he stated that the money used to pay the loan came from the farming activities which his father carried thereon.

14. In support of their case, P.W.1 produced the documents listed hereunder and urged the court to declare that the defendant holds the suit property in trust for them.

The documents produced by P.W.1 are:-

- a) Official search in respect of the suit property, dated 11th August, 2014;
- b) Grant of letters of administration issued to him in respect of the estate of the deceased;
- c) Tally receipt dated 15th April, 1979;
- d) Statement of account dated 30th September, 1980 in the name of the defendant but delivered to his father;
- e) Statement of account dated 31st March, 1994;
- f) Letter dated 1st April, 1967 and a translation in respect thereof;
- g) Demand letter dated 25th August, 2014.

15. In cross examination the 1st plaintiff stated that he is aware that the defendant got the suit property from SFT on loan. Although he had nothing to show that it was his father who was paying the loan or the agreement allegedly entered into between his father and the defendant to the effect that his father was to pay the loan and the defendant would transfer the suit property to him, he maintained that the loan was paid from the proceeds of farming which his father carried on the suit property.

16. Concerning the letter addressed to his father, Pexbt 6, he admitted that the letter was not signed by his father and that it does not indicate which plot it is in respect of.

17. P.W.1 claimed that before he died, his father told him that the defendant was supposed to have

transferred the suit property to him but did not tell him why he had not done so.

18. The 1st plaintiff admitted that none of his deceased relatives, his mother, father and brother was buried in the suit property and that the suit property is not part of the estate of the deceased as per the grant issued to him, Pexbt 2.

19. The 1st plaintiff also informed the court that he does not know who fenced the suit property.

20. Concerning the structures erected on the suit property, the 1st plaintiff maintained that they were erected by his father and his late brother.

21. In re-examination, the 1st plaintiff stated that he did not include the suit property in the confirmed grant because it was still in the name of SFT.

22. The 2nd plaintiff who testified as P.W.2, informed the court that she lives in the suit property and that she has been living thereon since 1995 and that when she got married she found her husband and her father-in-law living thereon. She reiterated her contention that there was no dispute about their use and occupation of the suit property and that disputes only arose after her husband passed on in 2014. Concerning the contention that her husband lived in the suit property as a care taker of the defendant, she stated that she was not aware of that.

23. Explaining that for the entire period she has been in the suit property the defendant has never asked her to account for the produce or come to cultivate the suit property, the 2nd plaintiff urged the court to find that the defendant holds the suit property in trust for them.

24. In cross-examination, P.W.2 stated that she had heard that the defendant had obtained the suit property from SFT on loan and that she had information that the loan was paid by her father-in-law from proceeds from the farm.

25. Like P.W.1, P.W.2 conceded that the entire suit property measuring approximately 50 acres is fenced but she does not know who fenced it. She stated that it is possible that the fence and the trees in the suit property could have been planted by the defendant.

### **The defence case**

26. The defendant who testified as D.W.1 reiterated his contention that he was given the suit property by SFT by way of loan and that after completing payment of the loan, he was issued with a title deed. He produced the title deed he obtained in respect of the suit property as Dexbt 1.

27. The defendant admitted that his late brother lived in the suit property but maintained that he does not hold the suit property in trust for his late brother and/or the plaintiffs. Nevertheless, he admitted that he has never lived in the suit property but has fenced it and has been cultivating thereon.

28. On the alleged agreement between him and the 1st plaintiff's father, he stated there was no such agreement. He admitted having allowed the 2nd defendant's husband to live thereon as a caretaker and argued that, that does not mean he gave him the land.

29. On cross-examination, the defendant stated that he could not remember when he allowed his brother to start living in the land or when he stopped living there.

30. He admitted having stated the reason he allowed his brother to live on the land was because he had no land, which is not true (his brother had his own land).

31. He maintained that he did not promise to transfer the land to his brother or his next of kin.

### **Submissions**

32. On behalf of the plaintiff, reference is made to the letter allegedly written by the plaintiff dated 1st April, 1967 and the cases of Godfrey **Kagia Githire v. George Ndichu Kagia & 4 others (2008)eKLR** and **Onyango Omoke v. John Omoke Kisumu C.A No.10 of 1981** and submitted that in the absence of any written contract to prove that the 1st plaintiff's father and the 2nd defendant's husband lived in suit property as employees of the defendant (caretakers of the suit property), the evidence concerning acquisition of the suit property should be taken as true. It is further submitted that the defendant has not provided any cogent evidence to show that the 2nd plaintiff remained on the suit property on any arrangement other than that entered in 1967 between him and the plaintiffs' late father.

33. It is further submitted that for all the 48 or so years the plaintiffs' predecessors in claim lived in the suit property, the defendant did not conduct himself as an owner of the land or employer of the occupants of the suit land. The court is urged to take into consideration the contribution of the plaintiffs' predecessor in claim in acquisition of the suit property.

34. On behalf of the defendant, a brief summary of the evidence adduced by the parties to this suit is given and submitted that the letter/document dated 1st April, 1967 is not an agreement or contract capable of conferring an interest in land as it is neither signed nor attested as by law required. It is also submitted that the document does not indicate the parcel of land it relates to.

35. On whether the defendant holds the suit property in trust for the plaintiffs, it is submitted that there is no evidence to show that the defendant had the intention of sharing his beneficial interest in the suit property with the plaintiffs or their predecessors in claim.

36. On whether the plaintiffs' or their predecessors in claim contributed in acquisition of the suit property, it is submitted that no evidence has been adduced to prove direct contribution. It is also submitted that whereas the defendant's brother has many children, none of them testified in support of the alleged trust in favour of their father.

37. Concerning the cases cited in support of the plaintiffs' case, it submitted that the circumstances which obtained in those cases are different from those in this case.

38. With regard to the claim for adverse possession, it is submitted that the plaintiffs' cannot sustain a claim for adverse possession against the defendant's title, the same having been issued in 2014. In this regard reference is made to the case of **Dhariwal Hotels Limited v. Sato Properties Ltd** where it was held:-

**“Time can only begin to run from the date was registered....In Swalehe v. Nassim R. Mohammed C.A No.16 of 2000 the Court of Appeal held that adverse possession does not apply to land before registration...”**

39. It is also submitted that there is no evidence capable of showing that the plaintiffs' possession or occupation of the suit land was adverse to the defendant's interest therein. Their entry therein is said to have been consensual hence incapable of forming a basis for a claim for adverse possession. In that

regard reference is made to among other cases, **Paul Gathara Kihara v. Stephen Muchai Kihara (2014) e KLR; Samuel Kihamba v. Mary Mbaisi (2015) e KLR; Gathure (alias Gichuhi) v. Dedan Gichuri Mwambonje (2014) e KLR; Rodgers Mwambonje v. Dougulous Mwambonje (2014) e KLR.**

### **Analysis and consideration**

40. I have read and considered the pleadings, evidence and the submissions made in respective of cases of the parties in this case.

41. Beginning with the claim for adverse possession, on the authority of **Dhariwal Hotels Limited v. Sato Properties Ltd** *supra* the applicant's claim for adverse possession is unmaintainable on the ground that time for the purposes of the title held by the defendant began to run in 2014, when the defendant was issued with title to the suit property. In this regard also see the case of **Titus Kigoro Munyi V. Peter Mburu Kimani (2015) eKLR** where the Court of Appeal stated:-

**“In the case of Francis Gitonga Macharia – v- Muiruri Waithaka, - Civil Appeal No. 110 of 1997 this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent.”**

42. With regard to the claim that the defendant holds the property in trust for the plaintiffs, that claim should be gauged on the basis of the test enunciated by the Court of Appeal in the case of **Salesio M'itonga v. M'ithara & 3 Others (2015)eKLR** thus:-

**“It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki -vs- Gichuki – Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust.....We concur with the following findings by the High Court:-**

**“Trust must be proved by credible evidence adduced by the person claiming that a trust exists. See Wambugu vs. Kimani supra....”**

43. Does the evidence adduced by the plaintiffs/applicants meet the threshold for proof of existence of a trust relationship between themselves and the defendant"

My answer to this question is negative. I say this because firstly, the suit property is neither family nor ancestral land; secondly, it is not in dispute that it is the defendant who acquired the suit property from SFT by way of loan; thirdly, there is no evidence capable of proving that it is the plaintiffs father who paid for the suit property (the receipts produced by the plaintiffs' are not issued in the name of the plaintiffs' father; there is no evidence capable of proving that by allowing the plaintiffs and/or their relatives to stay on the suit property the defendant had an intention of giving them and/or their relatives any share of the suit property; fifthly, the plaintiffs' have failed to lead evidence capable of proving that on account of the alleged contribution in acquisition of the suit property, they are entitled to a share of the suit property.

44. Having returned a negative verdict to the issue of the plaintiffs/applicants entitlement to the suit property, I consequently, find the suit/application herein to be without merit and dismiss it with costs to the defendant/respondent.

**Dated, signed and delivered at Nyeri this 23rd day of December, 2015.**

**L N WAITHAKA**

**JUDGE.**

**In the presence of:**

Mr. Macharia for the plaintiffs

Hellen Ngelu - daughter in law to the defendant

Counsel for defendant and Defendant John Nderitu Mathenge – absent

Court assistant - Lydia



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