



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 180 OF 2016 (O.S)

IN THE MATTER OF

SECTION 38 OF THE LIMITATION OF THE ACTIONS ACT, CAP. 22 LAWS OF KENYA

AND

IN THE MATTER OF L.R NO. KIINE/KIBINGOTI/NGUGUINE/962

AND

IN THE MATTER OF L.R NO. KIINE/KIBINGOTI/NGUGUINE/967

BETWEEN

LOISE WAMBUI WARUI (Suing as the legal representative

of the Estate of Silas Wamai Kariuki).....PLAINTIFF

VERSUS

KIBIA KARIUKI.....DEFENDANT

JUDGMENT

The Plaintiff/Applicant commenced this suit by an Originating Summons dated 3rd November, 2016 in which she seeks a declaration that she has acquired a portion of the suit land parcel number KIINE/KIBINGOTI/NGUGUINE/262 measuring approximately 1.17 Ha. or thereabouts by Adverse possession.

The plaintiff therefore contends that the rights and interests over the aforesaid land parcel number KIINE/KIBINGOTI/NGUGUINE/262 to the defendant have extinguished and that the defendant title be recalled and cancelled.

The Plaintiff/Applicant also averred that an order be issued directing the Land Registrar-Kirinyaga County to register her as the proprietor of a portion of the said land parcel NO. KIINE/KIBINGOTI/NGUGUINE/262 measuring approximately 0.585 Ha. by way of Adverse possession.

In the alternative, the plaintiff/Applicant is seeking a determination to be made that the defendant/respondent is holding land parcel number KIINE/KIBINGOTI/NGUGUINE/967 measuring approximately 1.39 acres in trust for himself and his brother Silas Wamai

Kariuki, now deceased and an order do issue for determination of the said trust and a portion of 0.70 acre be transferred and registered in the name of the plaintiff.

The plaintiffs are also seeking costs of this suit.

By way of a response, the defendant filed a written statement dated 05/12/2016 and a replying Affidavit on 07/03/2019.

PLAINTIFFS/APPLICANTS' CASE

The plaintiff testified as PW1 and stated that Silas Wamai Kariuki (deceased) was her husband and Wakini Kibia is her Mother-in-law. She said that her mother-in-law was a single mother and was blessed with three children. The first born is Penninah Wakini and the second born was Kibia Kariuki while the third born was Silas Wamai who is her husband. She further stated that during land demarcation and Adjudication, their family was given land by the clan being L.R NO. KIINE/KIBINGOTI/NGUGUINE/967 which was registered in the name of Kibia Kariuki to hold in trust for himself and the other family members. She stated that her mother-in-law could not be registered as proprietor since women were not allowed to own property under Kikuyu customary law but was registered in the name of the first born son.

The plaintiff also stated that they started using the suit land while they were in the colonial village and around 1971, the defendant purchased land parcel number KIINE/RUIRU/262 measuring approximately 3 acres where she has settled with her family since 1980 to-date. She said that she occupies a portion of 0.58 Ha. or thereabouts. The plaintiff further stated that she is now entitled to the said portion of 0.58 Ha. out of land parcel number KIINE/RUIRU/262 by way of adverse possession.

In the alternative, the plaintiff stated that she is entitled to a portion of 0.70 acre out of land parcel number KIINE/KIBINGOTI/NGUGUINE/967 on behalf of the Estate of Silas Wamai Kariuki, being half share of the said land given to the defendant, also known as MAINA KARUMBA as a trustee.

PW2 was Harrison Muchiri Karumba. He was referred his statement which he recorded on 30/07/2018 which he adopted in his evidence. He said that the defendant's mother, Wakini Kibia (deceased) who was his Aunt was not married but was blessed with three (3) children namely Wangithi, Kibia and Silas Wamai. He said that the clan decided to give family land to the eldest son who is the defendant herein since women would not be registered as owners of land. He stated that the clan land given to the defendant was L.R NO. KIINE/KIBINGOTI/NGUGUINE/967 measuring approximately 1.4 acres. He said that sometimes in 1971, the defendant purchased land parcel NO. KIINE/RUIRU/262 measuring approximately 3 acres where the defendant's brother and his wife and children moved around 1980 and have settled to-date.

PW3 was Peterson Mwangi Gatitu who stated that he belongs to Ambui Mbari ya Marigu clan where the parties in this suit also belong. He stated that he is the treasurer of the clan and that his father was an uncle to the defendant herein and was in the allocating Committee during the demarcation period.

He stated that the defendant's mother, Wakini Kibia was unmarried at the time of land demarcation and consolidation and by then, women could not be registered as owners of land. That the clan therefore gave land to Wakini's family, but the said land parcel NO. KIINE/KIBINGOTI/NGUGUINE/967 measuring about 1.40 acres

was registered in the name of the eldest son, being the defendant herein. That Wakini had 2 other children namely Wangithi and Silas Wamai, husband to the plaintiff herein, but now deceased. That the family of Wakini utilized this land and around 1971, the defendant purchased land parcel NO. KIINE/RUIRU/262 measuring about 3 acres. That the defendant's brother, Silas Wamai together with his wife and children moved to this land around 1980 and settled there. Wamai died around 1993 and was buried on this land number KIINE/RUIRU/262.

PW4 was Penina Wangithi. She stated that her mother is Wakini Kibia (deceased). She said that her mother Wakini Kibia was a single mother who did not get married but was blessed with three (3) children namely Penina Wangithi (herself) being the eldest, David Maina Alias Kibia Kariuki and Silas Wamai. She stated that during land demarcation, her family was given land by the clan measuring about two (2) acres. She stated that the said land was registered in the name of David Maina Alias Kibia Kariuki to hold for his brother Silas Wamai.

DEFENDANT'S SUMMARY OF FACTS

The defendant on the other hand testified alone and stated that the plaintiff is the widow of his brother Silas Wamai (deceased). He said that he acquired land parcel number KIINE/KIBINGOTI/NGUGUINE/967 from one Lawrence Maina whom he had given a soft loan and opted to give him the land in lieu of repayment of the loan. He stated that the said Lawrence Maina was among the clan Committee members who were involved in giving out land. He said that his mother was a single mother and that under Kikuyu customary law, women were not given land and being the son of a single mother, he could not be given clan land on behalf of his mother who being a daughter, ought to have been married. He said that having acquired the said land by way of set-off with a man who owed him a soft loan, he is holding the land absolutely and not in trust for the plaintiff or anybody whatsoever. He stated that he could not have been given land to hold in trust for his family who were not entitled to clan land since his mother was unmarried and could only get land through her husband's clan in case of marriage.

PLAINTIFF'S SUBMISSIONS

The plaintiff identified the following two issues for determination;-

- 1) Whether customary trust exists over land parcel number KIINE/KIBINGOTI/NGUGUINE/967
- 2) Whether the plaintiff is entitled to any portion of land.

WHETHER CUSTOMARY TRUST EXISTS OVER LAND PARCEL NUMBER KIINE/KIBINGOTI/NGUGUINE/967

The plaintiff instructed the firm of Wangechi Munene & Co. Advocates who submitted that from cross-examination, the defendant conceded that while he was young and before he attained the age of majority, he was known as Maina Karumba and that in 1958, land parcel NO. KIINE/KIBINGOTI/NGUGUINE/967 was registered in his former name Maina Karumba. Learned counsel also argued that the defendant also admitted that upon attaining the age of majority, he assumed the name of Kibia Kariuki and he obtained National Identity Card under the new name of Maina Karumba. That when he purchased land parcel Number KIINE/RUIRU/262, He was registered as Kibia Kariuki and the Identity Card Number indicated in the title. She submitted that the Defendant got land parcel number KIINE/KIBINGOTI/NGUGUINE/967 while he was still a minor. In conclusion, the plaintiff at paragraph 16 urged this Court to make an inference of existence of trust as follows;

"16. In the absence of any evidence of debt payment by one Lawrence Maina Misheck who is even unknown, and in the absence of any other explanation as to how he became registered as the owner of land parcel number KIINE/KIBINGOTI/NGUGUINE/967 while he was a minor, and in view of the fact that it's common ground that during the time of land consolidation and demarcation women could not be registered as owners of land, and considering the concession by the defendant himself during cross-examination that in families which had no male head, the eldest son in that family would be registered as the owner of the land in trust of and on behalf of the family, and in view of the fact that the plaintiff....."

The plaintiff relied in the case of *Wilberforce Muthinga Nguru & Anor Vs Hezron Maina Titus Nguru, ELC case No. 832 of 2013 (Kerugoya) (U.r)*.

DEFENDAN'S SUBMISSIONS

The defendant through the firm of Wangechi Munene & Co. Advocate on the other hand submitted that the plaintiff brings this case in her capacity as the legal representative of the Estate of Silas Wamai Kariuki. She submitted that the plaintiff in her evidence stated that her husband died on 19/05/1993 and that she cannot therefore purport to bring a suit on adverse possession on his behalf as any rights he had were extinguished upon his death.

In the alternative, the defendant argued that the plaintiff has not proved that she has been in occupation of 0.585 Ha. (1.4625 acres) for a period not exceeding 12 years. The defendant further submitted that he only permitted/allowed the plaintiff to cultivate 1/4 acre (1/4 acres) of land parcel number KIINE/RUIRU/262 which he has always been willing to give her even before she sued him. She did not cite or refer to any case law.

LEGAL ANALYSIS AND DECISION

I have considered the viva-voce evidence and the documents produced by the parties in their evidence. I have also considered the pleadings as well as the applicable law. The plaintiff's claim is based on doctrine of adverse possession. **Sections 7, 13 and 38 of the Limitation of Actions Act** are the applicable law. **Section 7** of the Act provides as follows;

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person".

Section 13 of the same Act provides thus;

"1. A right of action to recover land does not accrue unless the land is in possession of some in whose favour the period of Limitation can run (which possession is in this Act referred to as adverse possession), and, where under Sections 9, 10, 11, and 12, a right of action to recover land accrues on a certain date and no person is in adverse on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3), the land is taken to be adverse possession of the land."

Superior Courts have set out principles guiding the law on acquisition of land by way of adverse possession. In the case **Kimani Ruchine Vs Swift Rutherford & Co. Ltd (1980) KLR**, it was held:-

*"The plaintiffs have to prove that they have used this land which they claim as of right; **nec vi; nec clam; nec precario** So the plaintiffs must show that the Company had knowledge (or means of knowing actual or constructive) of the possession or occupation. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration....."*

Again in the case of **Wambugu Vs Njuguna (1983) K.L.R 172**, the court held thus;

"Where the claimant is in exclusive possession of the land with leave and licence of the Appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined".

The plaintiff in her witness statement which was adopted in her testimony stated as follows:

"Initially, my Husband, myself and our children were all residing on land Parcel NO. KIINE/KIBINGOTI/NGUGUINI/967 but in the year 1980, the defendant convinced my husband, his younger brother to move with his family to land parcel NO. KIINE/KIBINGOTI/NGUGUINE/262 so as to leave the other land parcel NO. KIINE/KIBINGOTI/NGUGUINE/967T for farming".

My reading and understanding of that statement and evidence by the plaintiff is that the defendant's title and ownership of the suit land parcel NO. KIINE/KIBINGOTI/NGUGUINE/262 is acknowledged by the plaintiff. It is also to be noted that the plaintiff's occupation and possession of the suit land was by consent and not adverse. The plaintiff admits that the defendant convinced her late husband to move to the suit land parcel NO. KIINE/KIBINGOTI/NGUGUINE/262 which he bought around 1980. It is my view that the claim by the plaintiff of the suit property by adverse possession is untenable where possession and occupation is with permission of the owner as was held in the case of **Samuel Miki Waweru Vs Jane Njeri Richu, Civil Appeal No. 122 of 2001(U.r)**, where it was held;

".....it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High

Court correctly held in Jandu Vs Kirpal (1975) E.A 225, possession does not become adverse before the end of the period for which permission to occupy has been granted”.

In view of the matters aforesaid, I find that the plaintiff has not proved her claim for adverse possession on a balance of probabilities.

The plaintiff is also seeking an alternative prayer for declaration of a customary trust in land parcel number KIINE/KIBINGOTI/NGUGUINE/967. According to the plaintiff, the said parcel of land was given to her mother-in-law by Ambui- a- Mbari ya Marigu clan during land demarcation period but since women could not own land those days, the land was therefore registered in the name of the defendant who was the eldest son to hold in trust for himself and the rest of the family members. The plaintiff further stated that the reason why the defendant was registered proprietor of the two parcels of land belonging to the family was because her father-in-law was not alive and her mother-in-law could not be registered as proprietor. At the same time, the plaintiff in her own affidavit in support of this Originating summons stated that at the time of land demarcation and consolidation, the defendant’s mother who is also her-mother-in-law Wakini Kibia was unmarried. That position was confirmed by the defendant in his own

evidence when he stated that according to Kikuyu Customary law, he could not be given land on behalf of his mother who was unmarried daughter in the family who ought to have been married. To the contrary, the defendant contends that he acquired the suit land parcel NO. KIINE/KIBINGOTI/NGUGUINE/967 from one Lawrence Maina whom he had given a soft loan and who agreed to give him the said land in lieu of the debt owed. Customary trust is a matter of evidence and not inference. The burden of prove lies on the person who wishes the Court to make a finding as to the existence of such trust. It is an issue both of fact and law which requires serious demonstration through proper evidence. That was the holding by the Court of Appeal in the case of *Mbothu & Others Vs Waitimu & 11 Others, (1980), K.L.R 171* cited in the Estate of the late **Jonathan Kinyua Waititu (deceased) e KLR Succession Cause No. 488 of 2010** where it was stated:-

“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.

Since the plaintiff’s claim was based on trust, the law places the onus on her to prove the existence of such trust..... It is however clear from the evidence herein that the plaintiff has neither pleaded nor proved any of the particulars as to how the trust subject matter of this claim arose with respect to the suit land. There is really no evidence upon which this Court can make a finding that the defendant holds the suit land in trust for him”.

Turning to this case, the plaintiff stated that land parcel NO. KIINE/KIBINGOTI/NGUGUINE/967 is an ancestral land given to the family but registered in the name of the defendant to hold in trust for himself and other members of the family. On cross-examination, the plaintiff admitted that according to Kikuyu Customary law, girls who were not married were not given clan land during land demarcation and consolidation period. It is therefore incorrect for the plaintiff to say that her mother-in-law, Wakini Kibia who was unmarried and a single mother was given land by the clan. The defendant on the other hand stated that his mother was unmarried and would not have been given land under Kikuyu Customary law. He said that he acquired the suit land parcel NO. KIINE/KIBINGOTI/NGUGUINI/967 from one Lawrence Mara Misheck who agreed to give him in lieu of a soft loan he had advanced to him. The defendant also stated that the said Lawrence Mara Misheck was a clan Committee member who were involved in giving land. These averments given by the defendant on oath were not controverted or challenged by the plaintiff. I am inclined to agree with the defendant considering that I have already found that the defendant’s mother who is also the plaintiff’s mother-in-law was unmarried and was therefore not entitled to be given land by the clan. The plaintiff did not call a clan Committee member present during land Demarcation and consolidation to verify the correctness of his testimony. Failure to call a clan Committee member present during land demarcation and consolidation as a witness by the plaintiff renders her testimony hearsay and unreliable.

CONCLUSION

In view of the matters aforesaid, I find the plaintiff has failed to prove her claim on a balance of probabilities. This suit is therefore dismissed. Since the plaintiff and the defendant are close relatives, I order each party to bear her own costs. It is so ordered.

JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 11TH DAY OF MARCH, 2022.

.....

HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Ms Ndungu holding brief for Otuke*
2. *Mr. Ndana holding brief for Maina Kagio for the Plaintiff*
3. *Kabuta, Court clerk.*



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