



**Kwambai v Kwambai & 3 others (Environment & Land Case
95 of 2017) [2023] KEELC 16776 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16776 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 95 OF 2017**

EO OBAGA, J

APRIL 13, 2023

BETWEEN

EMMANUEL CHERUIYOT KWAMBAI PLAINTIFF

AND

RICHARD KOTUT KWAMBAI 1ST DEFENDANT

PHILIP CHIRCHIR 2ND DEFENDANT

JOSEPH KWAMBAI 3RD DEFENDANT

JUDAH KIPLAGAT TARUS 4TH DEFENDANT

JUDGMENT

1. The Plaintiff filed a suit against the Defendants in which he sought the following reliefs:-
 - a. A declaration order that the suit parcel LR No Tembelio/Elgeyo Border Block 5 (Ex Tooley)/30 belongs to the Plaintiff.
 - b. An injunction order permanently restraining the Defendants by themselves, their servants and/or agents from claiming, trespassing, occupying and/or in any other way interfering with the Plaintiff's parcel of land LR No Tembelio/Elgeyo Border Block 5 (Ex Tooley)/30 measuring approximately 10 acres.
 - c. Costs of this suit.
 - d. Any other or further relief this honourable court may deem fit and just to grant.
2. The 1st Defendant filed a defence and raised a counter-claim in which they sought the following reliefs:-



- a. A permanent injunction restraining the Plaintiff from further attempting to and/or threatening to evict the 1st Defendant from the portion of the suit parcel of land to wit. LR No LR No Tembelio/Elgeyo Border Block 5 (Ex Tooley)/30 measuring 5.0 acres or thereabouts.
 - b. The 1st Defendant prays for an order of this honourable court for a declaration to the effect that the Plaintiff being the registered owner of the suit parcel of land to wit. LR No LR No Tembelio/Elgeyo Border Block 5 (Ex Tooley)/30 measuring 5.0 acres or thereabouts holds the same in trust for the Plaintiff and the 1st Defendant.
 - c. An order of this honourable court partitioning the suit parcel of land into equal portions of 5.0 acres each to vest to the Plaintiff and the 1st Defendant respectively and the Plaintiff be compelled to execute necessary transfer and/or completion documents to effect transfer of ½ portion of the suit parcel of land in favour of the 1st Defendant.
 - d. Costs of the counterclaim.
3. The Plaintiff is an elder brother of the 1st Defendant. The 2nd, 3rd and 4th Defendants are sons of the 1st Defendant.
 4. On November 20, 2019, the Plaintiff's suit and the Defendants counter-claim came up for hearing. On that day, neither the Plaintiff nor the Defendants were in court. The parties were also not in court. The court proceeded to dismiss the matter for non-attendance.
 5. On February 24, 2020, the Defendants' advocates wrote to the Deputy Registrar informing him that the Plaintiff's suit had been dismissed on November 20, 2019 and that the matter should be fixed before a judge for purposes of taking a hearing date for the counter-claim. The matter was finally placed before the judge who set down the counterclaim for hearing.
 6. The counter-claim was finally heard and it is the subject of this judgement. Before I delve into writing the judgement, I must make observations on the effect of the order of November 20, 2019. The hearing date of November 20, 2019 had been given on July 23, 2019 in the presence of counsel for the Plaintiff and the Defendants.
 7. When the case came up for hearing, both the Plaintiffs' counsel and Defendants' counsel were not in court. The Plaintiff and the Defendants were also not in court. The court then made the following order which I quote in verbatim, 'matter dismissed for non-attendance'.
 8. There was no application to set aside the order of November 20, 2019 by either the Plaintiff or the Defendants. The court did not specify that it dismissed the Plaintiff's suit. It was therefore misleading for the Defendants' lawyer to say that the Plaintiff's suit was dismissed and the counter-claim was alive.
 9. As both the Plaintiff's advocate and the Defendants' advocates were not in court, it is both the plaintiff's suit and the Defendants' suit which were dismissed.
 10. In dismissing the suits herein, the court used the term matter. According to Longman Dictionary of contemporary, English, the term matter in the context of the suits herein is defined as 'things of a particular kind or for a particular purpose.'
 11. In the instant case, the suit and counter-claim are interlinked. What therefore the court dismissed was the entire matter meaning both the main suit and counterclaim. The Defendants' counsel was therefore wrong in fixing the counter-claim for hearing without first seeking for its reinstatement. However, be that as it may, I will proceed to determine the counter-claim on merits in case I am wrong in the interpretation I have given to the order of November 20, 2019.



12. The 1st Defendant testified that in 1976, his late father together with the Plaintiff decided to purchase 10 acres which belonged to Ex-tooley Farm LR No 9272. The land which they bought is now known as Tembelio/Elgeyo Border Block 5 (Ex-tooley)/30 (suit property).
13. The 1st Defendant testified that the 10 acres were going for Kshs 3,700/=. His late father paid half of the purchase price and he and the Plaintiff shared the balance equally. He testified that prior to the filing of this suit by the Plaintiff, he had cultivated a portion of his 5 acres for 3 ½ years.
14. The 1st Defendant further testified that the Plaintiff fraudulently had himself registered as owner of the entire 10 acres on May 28, 2013. It is on this basis that he wants the court to order that the suit property be shared equally that is the Plaintiff getting 5 acres and 5 acres for himself.
15. The 1st Defendant contends that the Plaintiff is holding the 5 acres in trust for him. In support of his case, the 1st Defendant produced the three documents in his list of documents as exhibit 1,2 and 3 respectively.
16. The 1st Defendant stated that he has built a house on the suit property, the same way his brother the Plaintiff has done. The 1st Defendant filed written submissions on November 14, 2022.
17. I have considered the evidence adduced by the 1st Defendant as well as the submissions filed by him. The 1st Defendant is alleging that the Plaintiff fraudulently caused the suit property to be registered in his name and that therefore the court should order that the suit property be shared equally.
18. The 1st Defendant's evidence was not controverted but that does not absolve him from meeting the evidential threshold required. The 1st Defendant claimed that his late father contributed half of the purchase price that is Kshs 1850/- It therefore follows that he contributed Kshs 925/= and the Plaintiff contributed a similar amount. There was no evidence adduced to show that this was the case. Despite the 1st Defendant having witnesses who recorded statements he did not call them.
19. The 1st Defendant is hinging his claim on trust. The law is clear that the issue of trust is a matter of evidence. In *Wambugu –VS- Kimani (1992) 2 KAR 58*, it was held that trust is a question of fact which must be proved by evidence.
20. In the instant case, the 1st Defendant did not adduce any evidence to show that the Plaintiff was holding the suit property in trust for him. The 1st Defendant claimed that they purchased 10 acres. The certified copy of the register which he produced as exhibit 1 shows that the suit property is 3.640 hectares which is equivalent to 8.9 acres. The other documents he relied on is a receipt for 500/= which was produced as exhibit 2. The other document which he produced was a certificate of lease in respect of Elgeyo/ Marakwet/Iten/Township/31 which is in his name and that of the Plaintiff. This copy of certificate of lease was produced as exhibit 3.
21. The allegations of fraud against the Plaintiff were unsubstantiated. The mere fact that in one of the properties, the Plaintiff and the 1st Defendant are jointly registered as proprietors does not mean that the suit property should also be in the names of the two. The 1st Defendant was under obligation to adduce evidence to show that the suit property was ancestral land and that the Plaintiff was holding the title in trust for him.
22. The documents which were mentioned in paragraph 5 of the 1st Defendant's submissions were not produced in evidence and the law is clear that submissions cannot be a substitute for evidence. Submissions only act as a backup for what is pleaded and supported by evidence. The 1st Defendant only produced three documents which were on his list of documents. It is therefore clear that the



Defendants have failed to prove their case on a balance of probabilities. The Defendants' suit in the counterclaim is dismissed with no order as to costs.

DATED, SIGNED and DELIVERED at ELDORET on this 13th day of April, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Kagunza for Defendant.

Court Assistant –Laban

E. O. OBAGA

JUDGE

13th APRIL, 2023

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