



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELC CIVIL SUIT NO. 104 OF 2009

MARGARET NKIROTE.....1ST PLAINTIFF

ERASTUS KIRIMI MUTUNGI.....2ND PLAINTIFF

LUCY KAIMURI.....3RD PLAINTIFF

VERSUS

MUTWIRI MUTUNGI.....DEFENDANT

JUDGMENT

Background

1. The parties herein a family. The first Plaintiff, Margaret Nkirote is the mother of 2nd plaintiff (Erastus Kirimi) and defendant (Mutwiri Mutungi). She is also the mother of Mbui Mwitungi who is deceased. Mbui is father of the 3rd plaintiff (Lucy Karimi). The 1st plaintiff was wife of Mutungi Mukindai who is deceased. At the heart of the dispute is a 13 acres parcel of land No. ABOGETA/U-KIUNGONE/285 registered in the name of the defendant. The plaintiffs are claiming entitlement to this land on the basis of trust.

2. Vide a plaint filed on 21/07/2009, the plaintiffs requested for judgment against the defendant in the following terms;

1) A declaration that the defendant holds LR NO. ABOGETA/U-KIUNGONE/285 in trust for the Plaintiffs and himself.

2) An order compelling the defendant to subdivide and transfer LR NO. ABOGETA/U-KIUNGONE/285 as follows

a) 1st Plaintiff – 1 Acre

b) 2nd Plaintiff – 4 Acres

c) 3rd Plaintiff – 4 Acres

d) Defendant – 4 Acres

3) Costs and Interest at court rates.

The Plaintiffs Case

3. The plaintiffs' case is that the whole family of Mutungi Mukindia (deceased) have lived and settled on the suit land which is their ancestral land where they have effected several developments on their respective portions, and that they have utilized this land for a long time.

4. It is the plaintiffs contention that defendant was registered over the suit land as a trustee for the plaintiffs and himself and was specifically directed by Mutungi Mukindia before his demise to share the suit land as set out in the plaint.

5. **PW1 ERASTUS KIRIMI** testified and adopted his statement dated 14th March 2017 where he stated in brief that he is a brother to the defendant, that he was born in 1968 and that all his life, he has lived on the suit land. He further stated that the suit land belonged to their father and before his demise, he showed each of his sons their portion of land. However, after his death, the defendant has tried to evict them from the suit land.

6. **PW1** further stated that defendant was born in 1955 and was registered as the owner of the land in 1970 to hold the land in trust for the other family members. He also stated that Kaguiria Mutungi is the same person as Mutwiri Mutungi and that defendant is the one who changed his own name.

7. In respect of another parcel of land ABOGETA/U-KIUNGONE/583 which defendant claims is the rightful place for the plaintiffs' to settle, PW1 stated that this land is still registered in the name of their deceased father and all the family members do utilize the land.

8. In support of the plaintiffs' case, PW1 produced a copy of the National identity card of defendant to show that the latter was born in 1955. He also produced a copy of the green card indicating that the suit land is in the name of defendant.

9. **PW2 MARGARET NKIROTE** testified and adopted her statement dated 14th March 2017 as her evidence. She averred that the defendant herein is her first born child, who was registered as the proprietor of parcel ABOGETA/U-KIUNGONE/285 in 1970 when he was a young man. The reason why his father registered him as the proprietor of the suit land was because he (defendant's father) had another parcel ABOGETA/U-KIUNGONE/583 and during that time, a person was not allowed to be a proprietor of two parcels of land. The defendant was meant to hold the land in trust for the family. However, defendant has refused to subdivide the land and share the same with his brothers as his father had instructed.

10. **PW3 FRANCIS MIRITI MARETE** testified and relied on his statement dated 14th March 2017 where he stated that he knows the parties to this suit as they are his neighbors. He reiterated what was stated by PW2 and added that all the parties save for the 3rd Plaintiff live on the suit land. The plaintiffs and defendant utilize different portions on the suit land.

11. **PW4 MAIRANYA NGARUNI** also adopted his statement dated 14th March 2017 as his evidence. He stated that he is a neighbor to the parties herein. He recalled that during the registration of land in their area, there was a kikuyu man who was registering the land and is the one who advised Mutungi Mukinda (deceased) that he could not be registered as the proprietor of two land parcels. Thus Mutungi caused his first born son, the defendant to be registered as the proprietor of the land to hold it in trust for the other family members.

The Defendants Case

12. The defendant filed his statement of defence on 28.9.2009, where he denied having been registered as the proprietor of the suit land as a minor as alleged by the plaintiffs. He avers that his registration in respect of the suit land is absolute, indefeasible and the plaintiffs have no claim over it.

13. Defendant **MUTWIRI MWITUNGI** testified as **DW1** and he adopted his statement dated 30th May 2016 as his evidence. He averred that he is the proprietor of LR. No. ABOGETA/U-KIUNGONE/285 and he does not hold this land in trust for the plaintiffs. He claims that the plaintiffs have instituted this suit so that they can get a bigger portion of land despite the fact that they are unwilling to occupy and utilize parcel no ABOGETA/U-KIUNGONE/583. During cross-examination DW1 stated that he got the suit land ABOGETA/U-KIUNGONE/285 from his grandfather. He also stated that the suit land is ancestral land.

Submissions

14. The plaintiffs in their submissions argued that they have demonstrated that the suit land was family land registered in the name of the defendant because their father had another parcel land but he was not allowed to be registered in respect of have 2 parcels.

15. In support of their case, plaintiffs relied on **Section 28** of the **Land Registration Act** which provides that;

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

(b) trusts including customary trusts;.....”

16. The plaintiffs also relied on **Petition No. 10 of 2015 Isaak M'inananga Kiebia Vs Isaaya Theuri M'Lintari and Another (Supreme Court of Kenya)**. Where the court held that to prove customary trust in land, one need not be in actual physical possession and occupation of the land.

17. The defendants on the other hand submitted that the plaintiffs had not proved their case on a balance of probabilities. He argued that the suit land was absolutely gifted to him by his father. He relied on the case of **Mbothu & 8 Others Vs. Waitimu & 11 others (1986) KLR 171** where the court stated that:

“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 intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.....”

18. Further, it was submitted that defendant was gifted this land and was registered as the owner way back in 1970 but the plaintiffs claim was instituted in 2009 after the death of the defendant's father (gifter) and therefore their claim lies naked in the eyes of the law. Defendant relied on Section 7 of the Limitation of Actions Act cap 22 which provides that ;

“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.”

Analysis and Determination

19. I have carefully analyzed the record of the court and I deem it fit to frame the issues for determination as follows;

a) Whether the defendant herein held LR. No. ABOGETA/U-KIUNGONE/285 in trust for the plaintiffs?

b) Whether the suit herein is barred by section 7 of the Limitation of Actions Act?

Whether the defendant herein held LR. No. ABOGETA/U-KIUNGONE/285 in trust for the plaintiffs?

20. The plaintiffs contended that during the time of registration Mutungi Mukindia (deceased) was not allowed to be the proprietor of 2 parcels of land and therefore the defendant being his first born son was registered as the proprietor of the suit land to hold the same in trust for the family. The plaintiffs have contended that defendant was a minor by then. PW1, a brother of defendant has availed the copy of ID card of defendant to show that defendant was born in 1955. He was therefore aged 15 or so years by the time the land was registered in 1970. Defendant has not rebutted that piece of evidence. He has also not denied that he is also the person known as Kaburia Mutungi. Defendant has claimed that he was given the suit land by his grandfather but he submits that he was gifted this land by his father.

21. It also came to light that the family of Mutungi Mukindia has always lived on the suit land. That is where they eke out a living. They have all put up their homes there except 3rd plaintiff who does not live on the suit land. However, she utilizes the portion of the land of her father, Mbui where there is coffee. Pw1 testified that both his father and brother Mbui Mwitungi were buried on the suit land. Plaintiff's Witnesses aver that, the parties in this suit, have been living, cultivating and developing the suit land.

22. In cross examination, defendant had stated that;

“I know Erastus Kirimi as my brother. He was born on that land 28. Erastus stays on that land. Margaret Nkirote is my biological mother. She stays on that land 285.....I grew up on that land 285. My father is called Mwitungi. He was buried on that land 285. I know Lucy Kirimi who is a child of my brother. My brother is called Mbui. Mbui passed on. Mbui was buried on that land 285.”

23. Further, defendant stated that ;

“I never bought the land no 285. It is ancestral land. No one was getting two parcels of land at the time of registration...”

24. From the foregoing analysis, including defendants own admission, **it is clear that the suit land no 285 is ancestral land.**

25. Section 28 of the Registered Land Act (now repealed) provides that;

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an

order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

26. In the case of **Kanyi versus Muthiora [1984] KLR 712** it was stated as follows:

“Registered land as per section 163 of the Act is subject to the law of England as modified in equity which brings in the doctrines of implied constructive and resulting trusts... a proprietor by 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”.

27. In the Supreme Court of Kenya Case **Petition No. 10 of 2015 Isaak M'inananga Kieba Vs Isaaya Theuri M'Lintari and Another, (supra)** the court set out Some of the elements that would qualify a claimant as a trustee as follows:

1. The land in question was before registration, family, clan or group land.

2. The claimant belongs to such family, clan, or group,

3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.

4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

5. The claim is directed against the registered proprietor who is a member of the family, clan or group”.

28. I have no doubts that defendant holds the land in trust for his other family members. I had an opportunity of seeing the 1st plaintiff on the witness box. She is an old frail lady. It is quite disturbing that defendant is ready to kick out his own mother in her sunset years from the place she has always called home, the place she has raised her children and the place where she has buried her husband and a son!.

Whether the suit herein is barred by section 7 of the Limitation of Actions Act?

29. This issue was aptly addressed by Justice Musyoka in Re-Estate of Charles Ngotho Gachunga (deceased) [2015] eKLR where he stated that,

“There is no limitation of action where the institution of trust or fiduciary relationship is involved as is made clear by Section 20(1) of the Limitation of Actions Act.”

30. In the case of Benina Wairimu Kabui vs. John Kinyua Kabui & Another, Kerugoya ELC NO.799 of 2013, the court while dealing with a question of limitation of actions stated thus

“This is essentially a claim under customary trust. It is not defeated by the provisions of Section 7 of the Limitation of Actions Act as is clear from the provisions of Section 20 (1) of the same Act. Similarly, in the case of MACHARIA KIHARI VS NGIGI KIHARI C.A CIVIL APPEAL No. 170 of 1993, the Court of Appeal held as follows; “Limitation period prescribed in Section 20 (2) of the Limitation of Actions Act will not apply to a trust coming into existence under customary law. Under customary law, the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law”.

31. I have nothing useful to add on this point.

Final orders

32. From the foregoing analysis, I find that the plaintiffs have proved their case on a balance of probability. I proceed to make the following orders;

I. It is hereby declared that defendant holds parcel no ABOGETA/U- KIUNGONE /285 in trust for the plaintiffs and defendant.

II. An order is hereby issued for the subdivision of the land ABOGETA/U-KIUNGONE/285 as follows;

i. Margaret Nkrote – 1 Acre

ii. Erastus Kirimi Mutugi – 4 Acres

iii. Lucy Kaimuri - 4 Acres

iv. Mutwiri Mutugi – 4 Acres

III. The Deputy Registrar of this court is hereby authorized to sign all necessary documents to give effect to the implementation of this Judgment.

IV. The land Registrar is hereby directed to dispense with the production of the original title deed for parcel ABOGETA/U-KIUNGONE/285 as well as the personal particulars of defendant e.g. his National ID, pin etc.

V. Any of inhibition, injunction, restriction or cautions that may be subsisting in respect of the suitland are hereby discharged to facilitate the aforementioned subdivision and subsequent registration of the suit land.

VI. As to cost, each party is to bear their own costs of the suit as parties are family members.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 27TH MARCH, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kirimi for plaintiff

2nd plaintiff

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE