



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 832 OF 2013

WILBERFORCE MUTHINGA NGURU.....1ST PLAINTIFF

RODAH WAMAITHA NGURU.....2ND PLAINTIFF

VERSUS

HEZRON MAINA TITUS NGURU.....DEFENDANT

JUDGMENT

Land parcel No. KIINE/KIBINGOTI/NGUGUINE/71 (the suit land) has since 4th August 1960 been registered in the names of the defendant herein. It is the subject of this dispute in which the parties are siblings with the defendant being the first born son and the 1st plaintiff the last born. The 2nd plaintiff is their sister. Their late father **TITUS NGURU** died in 1954 before the completion of the land demarcation process. It is the plaintiffs' case that the defendant was registered as the proprietor of the suit land to hold the same in trust for the entire family of the late **TITUS NGURU** and all the parties herein live on their respective portions. However, differences have arisen between them and despite having several meetings with clan members and even the Provincial Administration, the defendant has refused to transfer to the plaintiffs their portions thus giving rise to this suit in which the plaintiffs seek judgment against the defendant in the following terms:-

- a. *A declaration that the defendant holds land parcel No. KIINE/KIBINGOTI/NGUGUINE/71 in trust for himself and the plaintiffs.*
- b. *An order for determination of the trust by transferring 2/3 share of the land to the plaintiffs.*
- c. *Costs of the suit and interest.*

In his defence however, the defendant averred that he was allocated the suit land having made contributions to the clan at the time when the land was excised from a neighbouring clan and persons who did not make contributions were not allocated land. He then invited his late mother to settle on the suit land where she moved in with the plaintiffs who were minors. The plaintiffs have now abused that privilege and the defendant counter-claimed for their eviction from the suit land adding that he does not hold it in trust for the plaintiffs who are mere licencees.

The 1st plaintiff **WILBERFORCE MUTHINGA NGURU** testified on behalf of his sister the 2nd plaintiff and told the Court that the defendant is the eldest son in their family while he is the youngest. When their late father **TITUS NGURU** died in 1954, land demarcation had not been done and so when it was eventually done in 1958, the defendant was registered as the proprietor of the suit land on 4th August 1960 to hold in trust for the family and all of them have been living on the same but in 2004 when their mother died, the defendant refused to give the plaintiffs their share of land even after the clan members intervened. The parties herein are the only children of the late **TITUS NGURU** and the defendant

utilizes the larger portion of the suit land since he started working on it while the plaintiffs were still in school. The plaintiffs therefore seek that the suit land be shared equally between the parties herein. They also sought the dismissal of the defendant's counter-claim.

On his part, the defendant, while confirming that the plaintiffs are his siblings, denied that he holds the suit land in trust for them. He testified that their clan was involved in a land dispute with another clan and so it was resolved that members contribute money towards the recovery of their clan land. He contributed Ksh. 300/= and after the land was recovered, it was decided that only those who contributed be given land and that is how he ended up being registered as the proprietor of the suit land measuring three (3) acres. He testified that he lived on the suit land with his mother before the plaintiffs followed her. He conceded however that the plaintiffs live on the suit land. He asked the Court to order for their eviction therefrom.

At the end of the trial, submissions were filed both by Mr. Maina Kagio advocate for the plaintiff and Mr. Kinyua Kiama advocate for the defendant.

I have considered the parties respective testimonies and the submissions by counsel. The following are not in dispute:-

1. ***That the suit land has been registered in the names of the defendant since 4th August 1960.***
2. ***That the parties are siblings with the defendant being the eldest son and 1st plaintiff the youngest.***
3. ***That all the parties live on their respective portions of the suit land.***
4. ***That the suit land previously belonged to their clan.***

The issues that call for my determination include:-

- a. ***Is the defendant holding the suit land in trust for himself and the plaintiff or is it his sole property***
- b. ***Are the plaintiffs mere licencees of the defendant who are liable to eviction for abusing that privilege***
- c. ***Who shall meet the costs of this suit.***

The plaintiffs claim is based on trust. It is their case that they have always lived on their respective portions of the suit land but matters took a turn for the worse following the demise of their mother in 2004 when the defendant refused to have the suit land shared equally among the three siblings. During examination in chief by his own advocate Mr. Kiama, the defendant confirmed that indeed the plaintiffs have lived on and developed their respective portions of the suit land. He said:-

“It is true that the plaintiffs live on the land in dispute. 1st plaintiff has 200 stems of coffee on the land. It is me who gave him a portion to live on when he married. The 2nd plaintiff also lives on the portion used by our late mother. She just cultivates a small portion which our mother used to plough. It is true that she has put up a house on the land”

Although in his own testimony he had told the Court that he was registered as the proprietor of the suit land because he contributed Ksh. 300 when there was a dispute between their clan and a neighbouring clan over land, during cross-examination by Mr. Kagio advocate for the plaintiffs, he changed tact and denied that the suit land was part of the land acquired by their clan. He however had no receipts or any other evidence, oral or otherwise, to show that indeed he was registered as owner of the suit land due to the financial contribution that he made towards acquisition of the same from another clan. He however conceded that during those days, the first born would be registered to hold land in trust for the family. He said as follows during cross-examination:-

“So it is true that when my father died, demarcation had not been done. I was the first born in the family. It is true that when land belonged to the clan, the

first born would be registered to hold it in trust for the family. But this was not clan land”

No evidence was led to suggest that the late **TITUS NGURU** had other land on which he lived. Indeed there is evidence that the parties’ late mother was also living on the suit land till her demise in 2004. Since the land demarcation process ended after the death of **TUTUS NGURU** and the fact that all the parties herein and their late mother have been living on the suit land, this is enough evidence upon which this Court can conclude that the defendant was only registered as proprietor of the suit land to hold in trust for the family of **TITUS NGURU**. The fact that the suit land was registered in the defendant’s names does not relieve him of his responsibility and duties as a trustee. ***Section 28 of the repealed Registered Land Act*** under which the suit land was registered provides that the registration of one as proprietor of land, while conferring on him all the rights and privileges that go with such registration, it shall not ***“be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee”***

A similar provision is found in ***Section 25(2) of the new Land Registration Act 2012***. See also the case of ***KANYI VS MUTHIORA (1984) K.L.R 712*** where the Court of Appeal held that the registration of land in the name of a party does not relieve him of his obligation as a trustee nor extinguish the rights of those entitled to it under customary trust.

The parties herein are Kikuyu and in the Case of ***NJUGUNA VS NJUGUNA (2008) 1 K.L.R 889***, the Court of Appeal held that under Kikuyu Customary Law, the eldest son inherits land as a Muramati to hold it in trust for himself and the other heirs and that as a Muramati, the eldest son has a duty to distribute such land to the heirs. See also the case of ***GITUANJA VS GITUANJA 1983 K.L.R 575*** cited by Mr. Kagio. It is common ground that the father to the parties herein died before the land demarcation process and therefore he had not made his wishes with respect to the suit land yet. However, the fact that all the parties and their mother have developed and live on the suit land is a clear indication that the defendant must have known all along that his registration as the proprietor of the suit land could only have been in trust for the family of the late **TITUS NGURU**. The defendant cannot therefore claim, as he has done in his counter-claim, that he is entitled to evict the plaintiffs from the suit land. If indeed the suit land belonged to him as the absolute owner, then he ought to have evicted the plaintiffs as far back as 1960 when he became the registered owner. He did not do so. His counter-claim can only be an after-thought and a reaction to the plaintiff’s suit and I must dismiss it. From the circumstances of this case, there is overwhelming evidence of a trust in favour of the plaintiffs herein. There is no evidence to suggest that the defendant acquired the suit land by making a financial contribution. The custom of the eldest son being registered as proprietor of land in trust for the family is not without precedent. The defendant himself confirmed it in his evidence. I am satisfied that indeed the defendant was, by virtue of being the first born, registered as the proprietor of the suit land to hold in trust for himself and the family of the late **TITUS NGURU**. That explains why all the family continues to live on the suit land and to purport to evict the plaintiffs would not be keeping with the principle of inter-generational and intra-generational equity or the culture and social principles applied on the parties community which are part of the guiding principles that this Court is enjoined to apply by virtue of ***Section 18 of the Environment and Land Court Act***.

Ultimately therefore, and upon considering all the evidence herein, this Court makes the following orders:-

1. ***Judgment is entered for the plaintiffs against the defendants in the following terms:-***

- a. ***A declaration that the defendant holds land parcel number KIINE/KIBINGOTI/NGUGUINE/71 in trust for himself and the plaintiffs.***
- b. ***An order for determination of the trust by transferring 2/3 share of the land to the plaintiffs. Such transfer to take into account the portions now occupied by the parties.***

2. ***That defendant’s counter-claim is dismissed.***
3. ***Each party to meet their own costs.***

B.N. OLAO

JUDGE

22ND APRIL, 2016

Judgment dated, signed and delivered in open Court this 22nd day of April, 2016.

Mr. Muchira for Mr. Kinyua Kiama for Defendant present

Mr. Macharia for Mr. Kagio for Plaintiff present

Right of appeal explained.

B.N. OLAO

JUDGE

22ND APRIL, 2016