



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC NO. 621 OF 1993

1. CHARLES MOHERAI

2. ELIAS BOKE

3. NDERA MOGENA

4. RIOBA MOGENA.....PLAINTIFFS

VERSUS

1. JOSEPH MWITA MOGENA

2. PETER MUHINGIRA.....DEFENDANTS

JUDGMENT

The Plaintiffs brought this suit against the defendants on 6/12/1993 seeking the following reliefs:

- a) A declaration that 1st Defendant was registered as the proprietor of Bukira/Bwisaboka/609 to hold half share thereof in trust for the family of his deceased brother the Plaintiffs.
- b) A declaration that if the half share sold to 2nd Defendant was the one the plaintiffs were entitled to then such sale was unlawful and fraudulent in the circumstances.
- c) An order directing either of the defendants to transfer nine hectares to the defendant.
- d) A permanent injunction restraining any of the defendants from interfering with the plaintiffs' quiet enjoyment of such parcel of land as the court will order they are entitled to.
- e) This honourable court to order the execution of all necessary documents by the executive officer if any party herein ordered does not so execute.
- f) Costs of the suit.

The 1st Defendant is an uncle to the 1st and 2nd plaintiffs and a brother to the 3rd and 4th Plaintiffs. The 2nd defendant on the other hand is not related to any of the parties to the suit. In their plaint dated 6/12/1993, the plaintiffs averred that during the process of land adjudication, the 1st defendant was registered as the proprietor of all that parcel of land known as LR No. Bukira/Bwisaboka/609 (“**the suit property**”) which was family land measuring 18 hectares. The plaintiffs averred that the 1st defendant

was supposed to hold the suit property in trust for himself and his three (3) brothers, namely the 3rd and the 4th Plaintiffs and the father of the 1st and 2nd plaintiffs who was deceased by then. The Plaintiffs averred that in breach of the said trust, the 1st defendant caused the suit property to be sub-divided into two (2) portions namely, L.R No. Bukira/Bwisaboka/879 (**“plot No. 879”**) and L.R No. Bukira/Bwisaboka/880 (**“plot No. 880”**) and proceeded to sell and transfer to the 2nd defendant plot No. 880 measuring 9 hectares while retaining plot No. 879 in his name. The Plaintiffs averred that they were entitled to a half portion of the suit property and that one of the defendants is unlawfully holding the portion of the said parcel of land which is due to them. The Plaintiffs averred that, the 2nd defendant had been interfering with the portion of the suit property under their occupation with the intention of evicting them therefrom.

The 1st defendant did not file a statement of defence to the plaintiffs’ claim while the 2nd defendant filed a defence on 9/5/1994. The 2nd defendant denied that the 1st defendant was registered as the proprietor of the suit property to hold the same in trust for the plaintiffs. The 2nd defendant averred that he purchased a portion of the suit property from the 1st defendant in 1982 and the same was registered in his name as plot No. 880. He averred that he enjoyed quiet possession of plot No. 880 until 1993 when the plaintiffs made attempts to trespass thereon for which trespass they were arrested, charged, convicted and sentenced to serve 7 months imprisonment in Migori Court Criminal Case No. 2431/93. The 2nd defendant averred that the Plaintiffs had brought this suit in collusion with the 1st defendant with the intention of defeating his rights over plot No. 880.

When the suit came up for hearing, the 1st, 2nd and 3rd plaintiffs gave evidence. The 4th plaintiff was said to have died even before the suit was filed. It is not clear why he was joined in the suit as a plaintiff. For the defendants the 1st defendant was allowed to give evidence notwithstanding the fact that he did not file a defence. The parties were in agreement that his evidence would assist the court in arriving at a just decision on the matter. On his part, the 2nd defendant gave evidence but did not call any witness.

The 1st Plaintiff (PW 1), told the court that his father was known as Moherai Mogena and that he was deceased. He stated that his deceased father had two (2) brothers namely, the 4th Plaintiff and the 1st defendant. He also had a step brother, the 3rd Plaintiff herein. PW 1 stated that plot No. 609 (“the suit property”) was family land which was owned by his grandfather. He stated that the 1st defendant had informed him that he (the 1st defendant) had sold a portion of the suit property measuring 100 feet by 100 feet to the 2nd defendant. This information was given to him in 1993. He later learnt that the suit property had been sub-divided into two (2) portions namely plot No. 879 and plot No. 880 which were registered in the names of the 1st defendant and the 2nd defendant respectively. PW 1 stated that his family is occupying plot No. 880 and that they have no other parcel of land. He stated that they were not aware of and were not consulted when a portion of the suit property was being sold to the 2nd defendant. He stated that the suit property belonged to the 1st defendant and his brothers including Moherai Mogena, deceased and that the same was registered in the name of the 1st defendant to hold in trust for the family. He stated that although the 2nd defendant was registered as the owner of plot No. 880 in 1982, he had not occupied the said parcel of land. He had only put up a structure at a shopping centre nearby where he was operating a mill.

The 2nd defendant (PW 2) was the next to give evidence. He told the court that PW 1 is his brother and that they were occupying plot No. 609 which is family land. He stated that they came to learn in the year 1993 that the 1st defendant had sub-divided plot No. 609 into two (2) portions and sold one portion thereof to 2nd defendant. He stated that his father died when he was young and corroborated the evidence of PW 1 that the 1st defendant was registered as proprietor of the suit property to hold in trust for himself and other members of the family of Mogena Marwa who were in occupation hereof.

The 3rd defendant, Ndera Mogena Marwa (PW3) told the court that the 1st defendant is his brother. Their

father was known as Mogena Marwa, deceased. He stated that plot No. 609 belonged to their father, Mogena Marwa and that their father had not divided the said parcel of land among his children as at the time of his death. PW 3 stated he was aware that the 1st defendant had sold to the 2nd defendant a portion of the suit property. He stated that the 1st defendant is his elder brother and that during the land adjudication in 1970, he was in Kericho. He stated that when he came back from Kericho in 1979, he found when land adjudication had already taken place and the family land had been registered in the name of the 1st defendant.

After the close of the evidence for the plaintiff, the parties agreed to allow the 1st defendant to give evidence even though he had not filed a statement of defence. The 1st defendant (DW 1) told the court that the 1st and 2nd plaintiffs are his nephews while the 3rd and 4th plaintiffs are his step brothers. DW 1 stated that he sold to the 2nd defendant a portion of land measuring 100 feet by 100 feet on which he wanted to set up a posho mill. The purchase price was Kshs.6000/= of which the 2nd defendant paid Kshs.2000/= only leaving a balance of Kshs.4,000/=. He stated that the 2nd defendant transferred plot No. 880 to his name fraudulently. He stated that his brothers were not around when he sold land measuring 100 feet by 100 feet to the 2nd defendant. He stated that the 2nd defendant did not purchase land from him more than the said 100 feet by 100 feet. He stated that the other plaintiffs were also not around when he sold land to the 2nd defendant. DW 1 told the court that when he went with the 2nd defendant to Homa Bay, it was for the purpose of transferring to him land measuring 100 feet by 100 feet which he had sold to him which was a commercial plot. He stated that although he was the only one occupying the suit property, it was family land. He admitted that he executed a transfer in favour of the defendant but insisted that it was only for the commercial plot which measured 100 feet by 100 feet. He stated that he signs documents using thumb print. He denied having sold to the 2nd defendant land measuring 9 hectares at a consideration of Kshs.16,400/=. He also denied having received such amount from the 2nd defendant.

In his defence, the 2nd defendant (DW 2) told the court that in 1980, the 1st defendant sold to him a portion of the suit property at a consideration of Kshs.16,400/=. The suit property was surveyed and subdivided. He was given possession of the said portion of the suit property and he put up a building on a part of it for a poshomill while the rest he used for cultivation. He stated that he occupied the land that was sold to him by the 1st defendant peacefully until 1993 which the 1st defendant's nephews and step brothers the plaintiffs herein entered the same and started cultivation thereon. He stated that the portion of the suit property that had been sold to him was registered as plot No. 880 and measured 8.57 ha. The 1st defendant remained with the portion that was registered as plot No. 879. He stated that the sale was approved by the Land Control Board after which they proceeded to Homa Bay with the 1st defendant who executed a transfer in his favour at the Homa Bay Law Courts before the same was registered on 30/4/1982. He stated that he took possession of plot No. 880 immediately in 1980 and that the transfer of the property took some time because there was a caution that had been registered against the title of the suit property by a third party. He stated that when the plaintiffs invaded plot No. 880 they had come from Tanzania. A report of the invasion was made to the police and they were arrested, charged and convicted. He stated that the plaintiffs have their own parcels of land and that their quest is for more land. DW 2 told the court he has charged plot No. 880 to I.C.D.C to secure a loan that he obtained from that institution.

After the close of evidence, the parties were directed to make closing submissions in writing. The same were duly filed and are on record. I have considered the plaintiffs' claim as pleaded and the evidence that was tendered in proof thereof. I have also considered the 2nd defendant's statement of defence and the evidence in proof thereof. Finally, I have considered the submissions by the advocates for the parties. The parties did not agree on issues for determination by the court. From the pleadings and evidence on record, the following in my view are the issues which arise for determination in this suit:

- (i) Whether the 1st defendant was registered as proprietor of Land Parcel Number Bukira/Bwisaboka/609 ("the suit property") to hold in trust for himself and the Plaintiffs?

(ii) Whether the sale and transfer of a portion of the suit property measuring 8.57 ha. and registered as Land Parcel Number Bukira/Bwisaboka/880 (“plot No. 880”) by the 1st defendant to the 2nd defendant was lawful?

(iii) Whether the Plaintiffs are entitled to the reliefs sought?

(iv) Who should bear the costs of the suit?

The first issue:

From the evidence on record, it is clear that the plaintiffs and the 1st defendant are related. The 3rd and 4th Plaintiffs and the 1st defendant are brothers. They are sons of Mogena Marwa, deceased. The 1st and 2nd Plaintiffs are the sons of Moherai Mogena, deceased. Moherai Mogena was also the son of Mogena Marwa. The 1st and 2nd Plaintiffs are therefore nephews of the 1st defendant. The plaintiffs’ contention that the suit property was at all material times before land adjudication family land owned by Mogena Marwa deceased has not been controverted. The same also applies to the 3rd and 4th Plaintiffs’ claim over the said property through Mogena Marwa. There is also no dispute that the plaintiffs are occupying land that was formerly comprised in the suit property. There is no evidence that the plaintiffs own any other parcel of land. Having considered the totality of the evidence on record, I am satisfied that the plaintiffs have established customary trust with respect to the suit property. There is unchallenged evidence that 1st and 2nd plaintiffs’ deceased father, the 3rd and 4th plaintiffs, and the 1st defendant were brothers. There is also unchallenged evidence that during the land adjudication at Bukira/Bwisaboka, the 1st and 2nd plaintiffs’ father was deceased while the 3rd Plaintiff was away in Kericho. It appears from the evidence on record that it was only the 1st defendant who was present at home. Having regard to the relationship between the parties and the circumstances under which the 1st defendant was registered as proprietor of the suit property, I am persuaded that the 1st defendant was to hold the suit property in trust for himself and his brothers. In the case of *Wambugu Vs. Kimani (1992) 2 KAR 58*, it was held that trust is a question of fact which must be proved by evidence.

I am satisfied in this case that the plaintiffs have established trust relationship between them and the 1st defendant with regard to the ownership of the suit property. The 2nd defendant has contended that the plaintiffs are not entitled to the declaration of trust sought on account of among others their failure to provide the particulars of trust in accordance with Order VI rule 8 of the repealed Civil Procedure Rules. This rule has been reproduced in Order 2 Rule 10(1) of the Civil Procedure Rules 2010. I am in agreement with the 2nd defendant that the plaintiffs did not plead particulars of breach of trust in their plaint contrary to the foregoing provisions of the Civil Procedure Rules. I am of the view however that the omission is not fatal to the relief sought by the plaintiffs for various reasons. First, this is an issue which the 2nd defendant should have raised at the pre-trial conference stage. It is too late for the 2nd defendant to raise the issue now after the suit has been fully heard. Secondly, it was open for the 2nd defendant to move the court under Order 2 Rule 10(2) of the Civil Procedure Rules, 2010 to compel the Plaintiffs to supply the particulars alluded to. The 2nd defendant having failed to exercise this right must be taken to have waived it. Finally, this court is enjoined under Article 159(2) (d) of the Constitution of Kenya to administer justice without undue regard to procedural technicalities. The 2nd defendant has not pointed out in what respect it has been prejudiced by the plaintiffs failure to provide particulars of breach of trust. The issue has in the circumstances been raised merely as a technical objection which I am inclined to overlook for the sake of substantive justice. The other objection that has been put forward by the 2nd defendant to this relief is that the plaintiffs have sought a declaration on behalf of deceased person. Again, I am in agreement with the 2nd defendant that the plaintiffs’ prayers are not happily warded. As I have pointed out above, these are matters of form. The Plaintiffs have not brought this suit on behalf of a deceased person. They have brought the claim against the defendants as of right. The court would ignore the sloppy drafting and make an appropriate order to give effect to its decision.

The second issue:

Having held above that the 1st defendant held the suit property in trust for himself and the plaintiffs, he could not deal with the suit property without seeking the consent or approval of the plaintiffs. There is unchallenged evidence on record that the 1st defendant did not involve the plaintiffs in the sale of a portion of the suit property (plot No. 880) to the 2nd defendant. In the circumstances the 1st defendant breached the trust subject to which he held the suit property.

Section 28 of the registered Land Act, Chapter 300 Laws of Kenya (now repealed) provided as follows:

“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 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 in which he is subject as a trustee.” (Emphasis mine).

As I have stated above, the 1st defendant being a trustee of the suit property could not lawfully sell a portion thereof to the 2nd defendant without the consent and/a permission of the plaintiffs who were beneficiaries of the trust. It is my finding therefore that the sale of a portion of the suit property to the 2nd defendant that was carried out in breach of trust was illegal.

The third issue:-

For the reasons that I have given above, I am satisfied that the plaintiffs are entitled to a declaration that the 1st defendant held the suit property in trust for them and that the sale of a portion thereof to the 2nd defendant was unlawful. I am unable however to direct the defendants to transfer land measuring 9 ha. to the plaintiffs. I have noted from the evidence on record that the suit property was subdivided into two (2) portions namely, plot No. 879 and plot No. 880. Plot No. 879 which measures about 9 hectares is registered in the name of the 1st defendant while plot No. 880 which measures 8.57 ha. is registered in the name of the 2nd defendant. I have noted further that plot No. 880 is charged to I.C.D.C to secure a loan of Kshs.250,000/=. I am in agreement with the submissions by the 2nd defendant that the plaintiffs should have sought the cancellation of the subdivision of the suit property and the two titles that emanated therefrom and the restoration of the title of the suit property in the name of the 1st defendant before they could seek transfer of their share of the said property to their names. This is because, the plaintiffs are not beneficiaries of plot No. 879 or plot No. 880 but of plot No. 609 (**“the suit property”**). It is in respect of that parcel of land that they can get their beneficial interest arising from the trust relationship that they had with the 1st Defendant in relation thereto. Even if the plaintiffs had sought the cancellation of the titles for plot No. 879 and plot No. 880, this court would not have done so in the absence of I.C.D.C who had a charge over plot No. 880 such order would affect their interest in the property and cannot be made without hearing them. In view of the current state of the pleadings, it is difficult for the court to also to grant the injunction sought. The injunction sought by the plaintiffs must attach to a particular property. The plaintiffs want it to attach to **“such parcel of land as the court will order they are entitled to.”** As I have stated above, I am unable to direct the defendants to transfer any parcel of land to the plaintiffs, I cannot therefore grant injunction on the terms sought by the plaintiffs. The remaining reliefs sought by the plaintiffs are consequential in nature.

In the final analysis and for the reasons above, the plaintiffs suit succeeds in part. I hereby enter

judgment for the 1st, 2nd and 3rd plaintiffs against the defendants on the following terms:-

- i. I declare that the 1st defendant was registered as the proprietor of all that parcel of land known as Bukira/Bwisaboka/609 to hold the same in trust for himself and the Plaintiffs.
- ii. I declare that the sale of a portion of all that parcel of land known as Bukura/Bwisaboka/609 by the 1st defendant to the 2nd defendant which is registered as Bukira/Bwisaboka/880 was unlawful.
- iii. Each party shall bear its own costs of the suit.

Signed at Nairobi this.....day of2016

S. OKONG'O

JUDGE

Delivered, Dated and Signed at Kisii this 15th Day of April 2016

J. M. MUTUNGI

JUDGE

In the presence of

.....for Plaintiffs

.....for Defendants