



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 268 OF 2014 (FORMERLY SPMCC NO. 249/012)

GITIBA MUNGA.....1ST PLAINTIFF

SUSAN WAIRIMU MUNGA.....2ND PLAINTIFF

NANCY WANJIRU MURIUKI.....3RD PLAINTIFF

BANCY MABUTI WACHIRA.....4TH PLAINTIFF

VERSES

PETER NDEGE MUNGA.....1ST DEFENDANT

JULIUS WARUI MUNGA.....2ND DEFENDANT

JUDGMENT

Vide a plaint Amended on 24th April 2013 pursuant to an order of this Honourable Court issued on 4th April 2013, the Plaintiffs are seeking the following orders;

- a) A declaration that the Defendants hold land parcel numbers, INOI/KAMONDO/995, INOI/KAMONDO/996 and INOI/KAMONDO/3635 in trust for themselves and the Plaintiffs.**
- b) An order for determination of the trust by sharing out equally land parcel number INOI/KAMONDO/995, INOI/KAMONDO/996 and INOI/KAMONDO/3635 among the Plaintiffs and the Defendants. The portion sold out by the 1st Defendant being land parcel number INOI/KAMONDO/3636 measuring 0.10 Hectares to be taken into account while computing the 1st Defendant's share.**
- c) Costs of the suit with interest.**

The 2nd defendant filed a statement of defence dated 1st November, 2019 denying the Plaintiffs' claim and sought to have the case dismissed with costs. The 1st Defendant had filed his statement of defence in the former suit on 27/09/2012 also denying the Plaintiffs' claim.

Plaintiffs' Case

The Plaintiffs called Julius Gitiba Munga, the 1st plaintiff as their first witness (PW1). He stated that the 2nd, 3rd, and 4th plaintiffs are his sisters while the defendants are his brothers. He said that the 2nd defendant is the eldest in their family and that their father (deceased) was Munga Warui. He testified that during land demarcation and Adjudication, their father was given land by the clan being parcel number INOI/KAMONDO/148. However, his father occupied land parcel number INOI/KAMONDO/147 belonging to one Mbogo Rugungu while the said Mbogo Rukungu occupied their fathers' land parcel number INOI/KAMONDO/148. Their father (now deceased) had agreed with the said Mbogo Rukungu that they exchange/rectify the registration so that each obtains a title for the parcel of land he occupies. Unfortunately, his father died before the rectification could be done. However, his elder brother who is the defendant herein proceeded with the transaction with the blessings of the family members. The process of rectification was completed in May, 1985 and that the defendant was to hold the said land parcel number INOI/KAMONDO/147 in trust for the entire family. He further stated that sometimes on 08/08/1985 or thereabouts, his brother the defendant herein sub-divided the suit land parcel number INOI/KAMONDO/147 into three portions, namely INOI/KAMONDO/995, 996 and 997 respectively. Land parcel number INOI/KAMONDO/995 measuring about 0.72 Hectares was transferred to their brother Julius Warui while land parcel number INOI/KAMONDO/996 remained in his name. However, he sub-divided

land parcel number INOI/KAMONDO/997 to numbers INOI/KAMONDO/3635 and 3636. He further stated that his brother sold land parcel number INOI/KAMONDO/3636 measuring about 0.10 Hectares to one Stephen Maina Muraya and Nancy Wawira Gichobi. He said that the defendant now holds parcels number INOI/KAMONDO/996 measuring 0.77 Hectares and INOI/KAMONDO/3635 measuring 0.67 Hectares.

The second witness called by the plaintiffs was Nancy Wanjiru Muriuki (PW2) who is the 3rd plaintiff herein. The witness referred to her witness statement dated 17th December, 2015 which she adopted in its entirety in her evidence. According to her, their father, one Warui Munga (deceased) was the registered owner of land parcel number INOI/KAMONDO/148 although he occupied land parcel number INOI/KAMONDO/147 belonging to one Mbogo Rukungu. Her late father Warui Munga and Mbogo Rukungu agreed to exchange/rectify the registration to the two parcels of land so that each obtains a title for the parcel of land they occupy. She stated that one of her brothers Peter Ndege Munga who is the 1st defendant herein proceeded with the transaction with the blessings of the family members which was completed in May, 1985 with the understanding that he was to hold the same in trust for the entire family of Warui Munga.

She further stated that sometime on 08/08/1985, the 1st defendant subdivided the suit land parcel number INOI/KAMONDO/147 into 3 portions namely, INOI/KAMONDO/995, 996 and 997. He thereafter transferred land parcel number INOI/KAMONDO/995 to their other brother Julius Warui Munga, the 2nd defendant herein. He left land parcel number INOI/KAMONDO/996 in his name and sub-divided land parcel number INOI/KAMONDO/997 into two portions namely, INOI/KAMONDO/3635 and 3636. He then sold land parcel number INOI/KAMONDO/3636 to one Stephen Maina Muraya and Nancy Wawira Gichobi and remained with land parcel number INOI/KAMONDO/3635 in his name.

Defendants Case

The 1st defendant gave his testimony as PW1 and stated that he is the registered owner of the suit land parcel number INOI/KAMONDO/148 which was given to him by his mother in 1975 absolutely and not to hold in trust for anybody whatsoever. He stated that his father died in 1962. He admitted that they used to live in land parcel number INOI/KAMONDO/147 while their land parcel number INOI/KAMONDO/148 was occupied by one Mbogo Rukungu. Before his father passed on, he had agreed with the said Mbogo Rukungu to exchange the title deeds to reflect the parcels each of them occupied. The purported exchange did not materialize before the demise of his father. On 08/08/1985, he managed to sub-divide the suit land into three parcels being land parcel numbers INOI/KAMONDO/995, 996 and 997 respectively. He transferred land parcel number INOI/KAMONDO/995 to his brother Julius Warui Munga (2nd defendant) and land parcel number INOI/KAMONDO/996 to his other brother Gitiba Munga. He thereafter sub-divided the remaining parcel number INOI/KAMONDO/997 into two portions namely INOI/KAMONDO/3635 and 3636. He later sold land parcel number INOI/KAMONDO/3636 to one Stephen Maina Muraya and Nancy Wawira Gichobi. He said that he only has parcel No. INOI/KAMONDO/3635 and that he has a family and not ready to share with his sisters.

The second defence witness was Mwikamba Kibuti who hails from Ukashiku clan with the plaintiffs and the defendants herein. He stated that the suit land parcel number INOI/KAMONDO/147 was given to the plaintiffs and the defendants father, one Warui Munga (deceased) who was married to one Wanjira Munga (also deceased) and were blessed with six children, three boys and three girls who are also parties in this suit. He said that the three sons are living in the suit land but the three sisters are not occupying the suit land. He also stated that the claim by the three sisters is time barred and that in 1975 when the land was given by the clan, girls were not recognized as being entitled to land under Kikuyu customary law but those rights only came into place after the Promulgation of the new Constitution in 2010.

Legal Analysis and Determination

I have carefully listened to the testimony of the parties and their witnesses. I have also considered the documents produced and their submissions. The issues for determination can be framed as follows;

a) Whether the Plaintiffs have established customary trust on the suit Land?

b) Who is liable to pay costs?

WHETHER THE PLAINTIFFS HAVE ESTABLISHED CUSTOMARY TRUST ON THE SUIT LAND

Customary trust is an overriding interest recognized under Section 28 of the Land Registration Act, No. 3 of 2012 on land which need not be noted in the register. The law provides as follows:

Overriding interests

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

a) -----

b) *Trusts including customary trusts.*

The plaintiffs' claim is hinged on customary trust. The 2nd defendant in his testimony admitted that the suit land parcel number INOI/KAMONDO/148 which was subsequently exchanged with land parcel number INOI/KAMONDO/147 which they were occupying was a clan land. It is not also in contention that the suit land parcel number INOI/KAMONDO/147 was subdivided by the 1st defendant in 1985 into three portions being land parcels number INOI/KAMONDO/995, 996 and 997 respectively. The certificate of search in respect of land

parcel number INOI/KAMONDO/995 measuring 0.72 shows that the same is registered in the name of Julius Warui Munga and land parcel number INOI/KAMONDO/996 was later transferred to Gitiba Munga during the pendency of this suit while parcel number INOI/KAMONDO/997 which remained in the name of the 1st defendant was subdivided into two portions namely INOI/KAMONDO/3635 and 3636. Land parcel number INOI/KAMONDO 3636 was sold by the proprietor, Peter Ndege Munga to one Stephen Maina Muraya and Nancy Wawira Gichobi. The 1st defendant remained with land parcel number INOI/KAMONDO/3635 measuring 0.67 Hectares only. The process of sub-dividing and sharing of the suit land by the 1st defendant among his siblings is an acknowledgment that he was holding the same in trust for himself and his two brothers who were in occupation under kikuyu customary law. The 2nd 3rd and 4th plaintiffs who were not in occupation of the suit land did not object the sub-division sharing and transfer of the suit land among the three brothers. The three sisters did not raise any objection or place any caution on the suit property before the same was sub-divided in the year 1985 and subsequently shared among the three brothers. I agree with the submissions by the defendants that even claims under customary trust become stale if beneficiaries do not raise within a reasonable period especially where the claimant is not in occupation. From the year 1985 to 2014 is more than 29 years. The 2nd, 3rd, and 4th defendants who are married do not occupy the suit land. Their claim under customary trust in my view has become stale and overtaken by events when the subject land was sub-divided and either transferred to third parties or shared amongst the 1st plaintiff and the defendants herein.

Conclusion

In view of the matters aforesaid, I find that the plaintiffs' claim against the defendants has not been proved on a balance of probabilities and the same is hereby dismissed. Since the parties are siblings, I order each to bear their own costs.

Judgment READ, DELIVERED and SIGNED in the open Court at Kerugoya this 21st day of January, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Wambui holding brief for Maina Kagio for Plaintiff
2. 1st Defendant – present
3. 2nd Defendant – present
4. Kabuta, Court clerk – present.