



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
E.L.C.A NO 80 OF 2014
FORMERLY KERUGOYA SUCC 291 OF 2013

UGWERI CLAN (*Suing through*)

MUGO MARINDI.....1st PLAINTIFF
MWANIKI MWANGARIO..... 2nd PLAINTIFF
MBAKA KITHUMU..... 3rd PLAINTIFF

VERSUS

MBAKA MITAMBO.....DEFENDANT

JUDGEMENT

INTRODUCTION

The Ugweri clan through Messrs Mugo Marindi (Chairman), Mwaniki Mwangario (Secretary) and Mbaka Kithumbu (Treasurer) have by their amended plaint dated 19th June, 2013 sought the following orders:

1. The defendant to expedite the distribution of the suit land to the Ugweri clan inhabitants.
2. Costs of this suit.
3. Any further relief that this court may deem fit and just to grant.

The plaintiffs' claim is opposed by the defendant who has asserted that he is the lawful registered owner of the suit land.

The Plaintiff's Case:

The plaintiffs called three witnesses namely Mugo Marindi (PW 1), Mwaniki Mwangario (PW 2) and Mbaka Kithumbu (PW 3). According to Mugo Marindi who is the chairman of the Ugweri clan, the suit land reference number Mbeere/Mbita/1924 is registered in the name of the defendant as a representative of the Ugweri clan. It is this clan that had authorized him to be registered as such.

PW 1 further testified that the defendant has refused to subdivide and distribute the resulting parcels to the members of the clan. As a result of his refusal to distribute the suit land, the Ugweri clan

and clan members dismissed the defendant as their chairman from office.

PW 1 additionally states that the suit land measures seventeen hectares point sixty two (17.62) in size. It is still registered in the name of the defendant, although they lodged a caution against the suit land in the Siakago Land Registry. The search certificate was produced P. Ex 2.

It is also the evidence of PW 1 that the suit land was not divided because there was a dispute between the Ikunda and Ugweri clans in respect of the suit land. It is the evidence of PW 1 that the defendant was representing the clan in all court cases concerning land. As soon as the cases were finalized, the land was subdivided and given to its members.

As an appreciation of the good services rendered by the defendant in successfully representing the clan in land cases in court, the defendant was given land parcels numbers Mbeere/Mbita/2790 and Mbeere/Mbita/2480.

The evidence of PW 1 is supported by that of PW 2. According to PW 2, the suit land belongs to the clan and that the defendant had refused to distribute it to clan members. PW 2 as a secretary to the Ugweri clan committee produced the proceedings before the land adjudication committee Board as exhibit 2 P.EX 1 to show that the land belongs to Ugweri clan. The decision of the second board was produced as 2 PEX 2. Those records show that Mbaka Mitambo is the registered owner. The evidence of PW 2 is that the defendant was registered as owning the land on behalf of the Ugweri clan. He also testified that Ugweri clan won the case against the Ikunda clan in respect of the suit land.

The evidence of the Ugweri clan treasurer (PW 3) is that the defendant was the clan chairman until 2012, when he was dismissed for refusing to distribute the suit land. According to PW 3, the defendant was registered as the owner of the land as trustee on behalf of the Ugweri clan. PW 3 further testified that the clan gave the defendant land parcel number Mbeere/Mbita/2790 in appreciation of successfully representing the clan in land cases in court.

It is also his evidence that the clan did not give him the suit because there was a case pending before the adjudication committee and adjudication board between the defendant and Njeru Metho. In this case, the defendant was acting in his representative capacity on behalf of the Ugweri clan.

The Defendant's Case:

The case of the defendant is that he was elected to represent the Ugweri clan to act for them in all land disputes. Thereafter, the clan subdivided the lands. According to him, the clan gave him the suit land. He says that he is now worried that they now want to re-possess the suit land from him, which they gave him in 1978.

Furthermore, he says that the plaintiff's as members of the adjudication committee, knew the procedures of land adjudication. It is also his evidence that the plaintiffs would have appealed to the objection board if they were not satisfied with the decision of the adjudication board, which awarded the suit land to him.

Finally the defendant says that he was given the suit land because of what he had done for the clan.

Under cross-examination, the defendant stated that the plaintiffs want to re-possess the suit land so that they can give it to their children. It is also his evidence that none of the land adjudication members that gave him the suit land will today come to court to state that they gave him the land. He says all of them have turned against him because the suit land is now productive. He also says that when he was given that suit land it was not productive. It was given to him because it was not productive as it is situated on a hilly country side. He admitted under cross-examination that there are people who were given parcels of land on the hilly country side.

The defendant denied being given land parcel numbers Mbeti/Kiamuringa/590 and

Mbeere/Mbita/2790 as rewards for the good services rendered to the clan, when he was the clan chairman. Furthermore, he says that he does not know that the two parcels of land were given to him by the clan as rewards.

It is to be noted that the defendant turned out to be an evasive witness while under cross-examination. I made a note to this fact as required by Order 18, Rule 7 of the Civil Procedure Rules of 2010.

The Applicable Law

In the light of the evidence adduced in court, the law that is applicable in this case is as follows:

The evaluation of the evidence tendered by both sides as stated in *Okale & Ors v R (1965) EA. (CA)*. According to the Court Of Appeal in *Okale and Others v. R*, a trial judge is required to consider the evidence produced by both parties before proceeding to make findings of fact. The second issue of law in this case is whether the defendant was registered as a trustee on behalf of the Ugweri clan or he was simply registered as the sole owner of the land as he claims in his evidence.

Issues for Determination:

In view of the evidence produced in court and the applicable law, the following are the issues for determination:

1. Whether or not the defendant was given the suit land as a trustee
2. Whether or not the defendant was given the land in his individual capacity.
3. Who bears the costs of this suit.

Evaluation of the Evidence, Findings and the Law

I have considered the entire evidence produced by the plaintiffs and the defendant. The evidence of the plaintiffs who testified as PW 1, 2 and 3 is credible, cogent and consistent. According to them, the suit land was registered in the name of the defendant as a trustee on behalf of the Ugweri clan. The Ugweri clan and its members were the beneficiaries of the suit land.

It is their evidence that the suit land would be subdivided and distributed to clan members because it was the subject matter of a dispute between the Ugweri and Ikunda clans. This is consistent with the evidence of the plaintiffs that the defendant used to represent them in all land disputes and that after completion of each case, the land would be divided and distributed to clan members.

Furthermore, there is credible evidence that the clan rewarded the plaintiff 2 parcels of land as rewards for his exemplary service that he had rendered to the clan while representing them in land disputes. I find these witnesses to be credible and I believe their evidence.

I find the evidence of the defendant to be incredible. According to him, he did not know that the two parcels of land that the plaintiffs gave him were rewards for his exemplary services. As a former chairman of the Ugweri Clan, he knew the procedure of subdividing and distributing all clan land to its members. It is therefore incredible for him to state that he did not know that the parcels of land given to him were rewards. I find that he knew that this parcels of land were given to him as rewards. Furthermore, the defendant's evidence that nine members of the adjudication committee who gave him the suit land were against him and that they were unlikely to give favourable evidence to him is yet an indication of him being an incredible witness. He did not state why all the nine committee members who allegedly gave him the suit land would be against him.

Finally, the defendant testified that the suit land is situate on hilly country side and he was given

that land because it was unproductive. His further evidence is that the suit land turned out to be productive following the growing of miraa on the suit land. It is because it now turned out to be productive that the plaintiff want to re-possess it. I do not believe the defendant in this regard. He admitted in cross-examination by PW 3 that their clan members were allocated land by the clan on the hilly country side that are equally unproductive. I do not believe the defendant that the clan treated him differently from the other persons whom the clan had allocated land on the hilly country side. I do not believe that he was being discriminated against by the clan.

From the evidence that was produced in court and the applicable law, I find that the plaintiffs have proved their case on a balance of probability against the defendant. I therefore dismiss the case for the defendant.

Verdict and Disposal Order

In the light of what I have stated in the foregoing paragraphs, I make the following orders:

1. A declaration that the defendant held the suit land as a trustee of Ugweri clan.
2. The certificate of title currently in the name of the defendant is hereby cancelled and declared null and void.
3. The certificate of title is now vested in the plaintiffs as trustees on behalf of Ugweri clan and its members.
4. The plaintiffs to subdivide the suit land and distribute it to clan members.
5. Costs and interest thereon at 12% are awarded to the plaintiffs.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this.....28th day of ...January.....2015

In the presence of the plaintiffs and the defendant

Court clerk Mr Mutero

Right of appeal under Section 66 Civil Procedure Act explained to parties.

J.M. BWONWONGA

JUDGE