



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 39 of 2015

SARAH NYAWIRA NJOGU (Suing as the Legal

Representative of Leonard Njogu Wamai).....PLAINTIFF

VERSUS

MUGUTA WAMAI alias PETERSON MWANGI WAMAL.....DEFENDANT

JUDGMENT

Summary of Facts

Vide a Plaintiff dated 30th March 2015 and supported by the affidavit of even date, the Plaintiff herein sued the Defendant for failing to allocate ½ a share of LR No. Kibingoti/Nguguine/190 (hereinafter referred to as the suit land) to the estate of the deceased Plaintiff. It is the Plaintiff's case that the suit land was allocated to the Defendant by the Uceera Clan to hold in trust for himself and his younger brother, the deceased Plaintiff. That both the Defendant and the Plaintiff's family had resided on the suit land until the demise of the Plaintiff, after which the Defendant chased the Plaintiff's family from the suit land. It is for this reason that the Plaintiff approached the court seeking the following orders:

- a) A declaration that the Defendant holds LR No. Kibingoti/Nguguine/190 in trust for himself and the estate of the Plaintiff;**
- b) That the trust be determined and terminated and ½ share of LR No. Kibingoti/Nguguine/190 be transferred to the estate of the Plaintiff;**
- c) Cost of the suit;**
- d) Any other relief that the court may deem fit to grant.**

The Defendant filed his statement of defence on 03rd June 2015, and later amended the same on 15th June 2015. While admitting that the deceased Plaintiff was his younger brother, he strenuously denies the Plaintiff's assertion that he holds the suit land in trust for the deceased Plaintiff. He agrees that he had lived with the deceased Plaintiff and his family on the suit land but contends that the deceased Plaintiff later purchased his own portion of land, being LR. No. Kiine/Kibingoti/Ngunguini/1552, and relocated his family there, sometimes in 1995. The Defendant has attached a copy of the search over the property, dated 17th March 2017 in which the deceased Plaintiff is registered as proprietor. It was on this portion of land that the deceased Plaintiff was buried. That while it is true that the suit land was allocated to him, he was not meant to hold the same in trust for his younger brother, the deceased Plaintiff. He has attached a copy of the title deed over the suit land, depicting him as the sole registered proprietor, with the title having been issued to him on 28th March 1988. Vide a statement filed on 03rd April 2017, he avers that he was indeed allocated the suit land by the Uceere Clan. That his father and other clan members were also allocated parcels of land. That a dispute arose between the Uceere Clan and another clan. That the dispute was resolved in favour of the other clan, with the result being that some members of the Uceere Clan, including his father, lost the parcels of land they had been allocated. That out of sympathy for his father and brother, he allowed them to live on his parcel of land, being the suit land herein. That his father passed away on 9th December 1997 and his brother, the Plaintiff, in 2001. He emphasizes that at no time during his younger brother's lifetime did they sit to discuss the allocation of the land to him. He therefore prays for the suit to be dismissed with costs.

The Plaintiff filed her reply to defence on 22nd June 2015. She maintains that the suit land was allocated to the Defendant to hold in trust for himself and the deceased Plaintiff. That the Plaintiff's purchase of LR. No. Kiine/Kibingoti/Ngunguini/1552 did not in any way terminate the rights held under trust.

The Plaintiff filed her submissions on 14th April 2021. She reiterated the contents of the plaint and supporting affidavit. She submits that the Defendant was the only one in their clan who was allocated land. That the deceased Plaintiff got married, built a house, bore children and planted coffee and other crops on the suit land. That the Defendant must have allowed this to happen because he acknowledged the existence

of a trust. That the purchase of another parcel of land by the Plaintiff did not extinguish his rights to the suit land. She urges the court to take notice of kikuyu customary law which allows the first born to be registered and to hold land in trust for the family. Reliance is placed on the Court of Appeal Case of **Henry Mwangi Vs Charles Mwangi Civil Appeal No. 245 of 2004 Nairobi**. It is her conclusion that the existence of a trust has been successfully proved and that the suit ought to be allowed.

The Defendant filed his submissions on 11th June 2021. He maintains that he is the sole registered proprietor of the suit land, having been so registered on 4th August 1960. That out of kindness he allowed his father and brother to reside on his land. That at no time did his brother report of the alleged eviction and that the alleged coffee plantation certificate held by the Plaintiff is merely a pass book for a savings account, which is inconsequential as far as proof of trust and possession are concerned. On the whole, it is his submission that the Plaintiff has failed to prove her case on a balance of probabilities. Reliance is placed on the decision in **Felista Muthoni Nyaga v Peter Kayo Mugo [2016] e KLR** and **Wambugu v Kimani (1992) e KLR**.

Issues for determination

- a) Whether the Defendant holds LR. No. Kiine/Kibingoti/Ngunguini/190 in trust for himself and the estate of the Plaintiff;**
- b) Whether the trust ought to be determined and terminated and ½ share of LR No. Kibingoti/Ngunguini/190 be transferred to the estate of the Plaintiff;**
- c) Who should bear the cost of the suit.**

Legal Analysis and Opinion

The Court has anxiously considered the Parties' rival pleadings, affidavits and Plaintiff's submissions.

There is no dispute that the Defendant is the sole registered proprietor of the suit land. Both Parties also agree that the Defendant and the deceased Plaintiff are brothers. There is also no dispute that the suit land was allocated to the Defendant by the Uceere Clan.

The point of dissension therefore is whether the suit land, when allocated to the Defendant, was meant to be held in trust for himself and the deceased Plaintiff. The Plaintiff avers that this is the case. The Defendant refutes this position and explains that the deceased Plaintiff's residence on the suit land was out of the Defendant's kindness. That the deceased Plaintiff later purchased his own land, LR. No. Kiine/Kibingoti/Ngunguini/1552 and relocated his family there. That upon his death, he was buried on that land. He further explained that at the time of demarcation and allocation of land, their father was alive and was also allocated a parcel of land, just like other clan members. That his father and other clan members lost their parcels of land as a result of a dispute with another clan, which dispute was resolved in favour of that other clan. That his father passed away on 9th December 1997 and his brother, the Plaintiff, in 2001. That at no time did his brother, the deceased Plaintiff lay claim on any portion of the suit land.

The rights of a proprietor of land vis a vis their obligation as a trustee of land are captured under **Section 25 of the Land Registration Act, No. 3 of 2012**. The Section provides as follows:

'1) The rights of a proprietor, whether acquired on first registration or 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) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 28 (b) of the Land Registration Act, No. 3 of 2012, notes that trusts form an overriding interest on land, whether or not they are so noted on the register:

'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 —

(a) Deleted by Act No. 28 of 2016, S. 11(a);

(b) trusts including customary trusts;

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(d) natural rights of light, air, water and support;

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) deleted by Act No. 28 of 2016, S. 11(b);

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) other rights provided under any written law.’ (Underline, mine)

Flowing from the two provisions above, the question of how to determine the existence of a trust surfaces. Courts have pronounced themselves extensively on the metrics to be applied.

The Court of Appeal in **Jutetabi African Adventure Ltd and Another Vs Christopher Michael Lockiley [2017] e KLR**, citing the case of **Gichuki Vs Gichuki [1982] KLR 285 and Mbothu & 8 others Vs Waititu and 11 others [1986] KLR 171** stated thus:

“...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 is implied.”

The Supreme Court in the case of **Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another [2018] e KLR** considered the elements required to qualify a claimant under customary trust 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.”

In **George Mbiti Kiebia & another v Isaya Theuri M’lintari & another [2014] e KLR**, the legal burden of proving the existence of a trust was placed on the Respondent’s shoulders. The court rendered itself thus:

“The legal burden to prove the existence of the trust rests with the respondents... It is our considered view that the appellants did not rebut and dislodge the testimony of the respondents who are not only in occupation and possession of Parcel No. 86 but also claim entitlement to Parcel No. 70 pursuant to their being members of the family that owned the ancestral clan land. We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and rebut the notion that the property is not free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the appellant did not go this extra mile that is required of him in relation to Land Parcel No. 70 and no evidence was led to rebut the respondents’ testimony.”

The existence of a trust must be founded upon the foregoing principles. Firstly, the burden of proving the existence of a trust lies with the Plaintiff. Her case is that the Defendant held the land allocated to him by the Uceere clan in trust for the deceased Plaintiff. Nothing else is tendered in support of this position. It has not been explained why the clan land was not given to the Defendant’s Plaintiff’s father, who was alive at the time, to hold in trust for the family. It is curious why the Plaintiff did not call a Clan Committee member and Plaintiff’s father and allocate or produce any documents in support of her case. The Defendant has pointed out that he has other siblings. The Plaintiff does not explain why the suit land should only be divided between the Defendant and the estate of the Plaintiff. Further, no explanation has been tendered as to why it was necessary for the Defendant to hold the suit land in trust for his brother. The Defendant’s explanation of how the father and other clan members came to be dispossessed of the parcels of land already allocated seems more persuasive to me. The fact that the deceased Plaintiff never laid claim over the suit land is also instructive.

From the foregoing, it is my view that the Plaintiff has failed to prove the existence of a trust on a balance of probabilities. Having said so, it is not necessary to go into the second issue. As to the issue of costs, it is trite law that costs follow the event unless good grounds for departure can be established. See **Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others HC EP No. 6 of 2013**;

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award

of costs is a matter in which the trial Judge is given discretion. ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

For all the reasons given, I find that this suit fails and the same is hereby dismissed.

JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 18TH DAY OF FEBRUARY, 2022.

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HON. E. C. CHERONO

ELCJUDGE

In the presence of:

1. Ms Muturi holding brief for Mr. Magee for Defendant
2. Mr. Maina Kagio holding brief for Wanjiru Wambugu for Plaintiff
3. Kabuta – Court clerk.