



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO 34 OF 2006

CECILIA KATHAMBI.....1ST PLAINTIFF

TRIPHOSA GACHERI.....2ND PLAINTIFF

ESTHER GAKII.....3RD PLAINTIFF

VERSUS

M'IMATHIU MBURIA.....DEFENDANT

JUDGEMENT

In a Plaint dated 5th April, 2006, the Plaintiff prays for Judgement against the defendant for:-

- a. *A declaration that land Parcel No. ABOGETA/UPPER-KITHANGARI/1360 in trust land and the Plaintiff entitlement has arisen due to their occupation, use developments with the defendant.*
- b. *An order that the defendant do cause the transfer of land Parcel No Abogeta/Upper-Kithangari 1360 into the 1st, 2nd and 3rd plaintiff names and in default the executive officer be empowered to sign all the transfer documents to effect the transfer thereon.*
- c. *A permanent injunction to restrain the defendant either by himself, his agents, servants and/or representatives from interfering or in any way dealing with land parcel No. ABOGETA /UPPER-KITHANGARI/1360.*
- d. *Costs of the suit and interest.*

In an amended defence dated 5th May, 2009 the defendant had a counter claim in which he prayed for the dismissal of the plaintiff's suit and that judgement be entered for him as follows:-

- i. *An Order for the removal of the caution lodged against Land Parcel Number ABOGETA /UPPER KITHANGARI/1360.*
- ii. *Costs and interests for the Counter Claim.*

From the evidence adduced by the parties, the Plaintiff's are daughters of the defendant. By the time they filed this suit their mother had died.

Their father had owned original parcel No. ABOGETA/UPPER-KITHANGARI/1135 into 5 portions comprising parcel Nos. ABOGETA/UPPER-KITHANGARI/1355, 1356, 1357, 1359 and 1360. They told the Court that their father had given all their brothers land to their exclusion. I find that they were reluctant to own up to the fact that their father's youngest son by the 2nd wife had not been given any land. I also find that they were reluctant to admit that they were not the only daughters of their father.

Their evidence and submissions were that their father held Parcel No 1360 for them. One of the reasons they claimed this parcel of land was because their mother was buried on it.

The Plaintiffs in their evidence insisted that they and their children lived on Parcel No. 3560. Their father contended that only the 1st and 2nd Plaintiff lived on Parcel No 1360. The 3rd Plaintiff told the Court that she had been married but had moved back to her father's land where she lived. On cross-examination she claimed that she had worked for her alleged husband, one Ndatha. Only reluctantly did she admit that she still worked for him changing her original version. Juxtapositioning her evidence and that of her father's, and what came out of her cross-examination by her father's advocate, I find that her father's evidence regarding her marriage status truthful. I think the reason that the Plaintiff insisted on all of them carrying an unmarried status was to distinguish themselves from their married sisters and to justify their claim to parcel 1360 to the exclusion of the other sisters who were married.

In his evidence, the defendant was categorical that he had never intended to disinherit his daughters, let alone to evict them from the Suitland. He explained that he had given his sons land except Japhet Mwenda, his youngest son, by his second wife, who was in school and had no identification documents. He lived on Parcel No 1356 with his second wife and intended to give this parcel of land to Japhet Mwenda when he became of age just as he had done for the other sons.

For the daughters he had intended to give the 3 Plaintiffs a piece of land measuring 150ft by 130ft , where he had buried their mother and where two of the Plaintiffs lived in a house he had built and lived in with their deceased mother. He had also intended to give the plaintiffs a plot measuring 40ft by 80ft which was next a shopping Centre . He told the Court that he intended to give all his daughter's plots from the subdivision of parcel No. 1360. He told the Court that the only reason he had not given all his daughters the intended plots was because the plaintiffs had cautioned the land. It is for this reason that in his Counter Claim he prayed for the removal of the Caution against Parcel No. 1360.

The Plaintiffs proffered the case of MUTEONGA versus NYATI 1984 [KLR] page 426 to buttress their position that the doctrine of trust is an equitable one and that it is applicable to land by virtue of section 163 of the Registered Land Act which provides for application of the common Law of England as modified by equity.

The Plaintiff also proffered the case of LIMULI VERSUS MAKO SABAYI [1976-80]1KLR to support their submission that trust need not be put in the register for a litigant to rely upon it and that there is nothing in the Registered Land Act that bars the declaration of a trust in respect of registered land even where its title is a first registration and further that there is nothing to prevent giving effect to such a trust by requiring the trustee to execute transfer documents.

In the area of trust, I find the plaintiff's authorities relevant to the extent that the land in question was ancestral land. This is in spite of the defendant's attempt to claim that he had paid Kshs. 25 for parcel No 324 Under the Native Land Tenure Rules, 1956 in 1965. I do find that this payment was in respect of ancestral land.

Be it that as it may, the defendant did not hold the land in trust for only the three plaintiffs. He held it in trust for his children and other who could lay claim under the trust.

I am therefore unable to declare that land Parcel No ABOGETA/ UPPER-KITHANGARI/1360 is trust land whose beneficiaries are only the three plaintiffs, to the exclusion of the other daughters and children of the defendant and other deserving claimants. Having said so, I am unable to order the defendant transfer Land Parcel No ABOGETA/UPPER-KITHANGARI/1360 to the 1st, 2nd and 3rd defendants. I am also unable to grant a permanent injunction to restrain the defendant either by himself , his agents servants and or representatives from interfering or in any way dealing with land Parcel No. ABOGETA/UPPER-KITHANGARI/1360.

I order the removal of the caution lodged against Land Parcel Number ABOGETA/UPPER-KITHANGARI/1360 to enable the Defendant to subdivided and allocate the resultant plots to the

beneficiaries of the trust he holds to his daughters, including the Plaintiffs, and any other deserving persons.

Regarding costs, I order that this being a dispute between three daughters and a father, parties will bear own costs.

It is so ordered.

Delivered in Open Court at Meru **this 25th day of June 2015** in the presence of :-

CC: Lilian/Daniel

Mrs Ntaragwi for Defendant

Mwanzia for Plaintiff-Absent

P.M. NJOROGÉ

JUDGE