



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE 24B OF 2015

ELISHA OKOTH OTIENO 1ST PLAINTIFF

FANUEL ACHOLA OTIENO 2ND PLAINTIFF

ISAIAH OJOWI OTIENO 3RD PLAINTIFF

VERSUS

JARED OTIENO AOKO Sued On His Own Behalf And As The Legal Administrator Of The

Estate Of ELIZAFAN AOKO GUMBO, DECEASED
DEFENDANT

RULING

1. The parcel of land known as **LR No. Kamagambo/Kongundi/334** measuring 43.0ha (hereinafter referred to as "**Plot No. 334**") was at all material times registered in the name of one, Elizaphan Aoko Gumbo, deceased (hereinafter referred to only as "**the deceased**"). Plot No. 334 was registered in the name of the deceased on 2nd January 1971 on first registration. The deceased died on 16th August 1990 and one of his sons, Jared Otieno Aoko, the defendant herein was appointed as his legal representative on 17th December 2002. The deceased was the son of one, **Gumbo Ado** (hereinafter referred to only as "**Gumbo**"). Gumbo had a brother by the name **Ajwang Ado** (hereinafter referred to only as "Ajwang"). Ajwang on the other hand had a son known as **Daudi Otieno Ajwang** (hereinafter referred to only as "**Daudi**") who died on 17th May, 2003. The plaintiff's herein are the sons of Daudi. The deceased had allowed Daudi and members of his family who included the plaintiffs herein to occupy a portion of Plot No. 334. After the defendant was appointed as the administrator of the estate of the deceased as aforesaid, he caused Plot No. 334 to be sub-divided into twenty seven (27) portions of various sizes which he thereafter transferred and registered in the names of the heirs and/or beneficiaries of the estate of the deceased. Among the sub-divisions of Plot No. 334 were LR Nos. Kamagambo/Kongudi/1106, 1107, 1109 and 1111 (hereinafter referred to as "Plot Nos. 1106, 1107, 1109 and 1111"). The plaintiffs who were considered as beneficiaries of the estate of the deceased were allocated Plot Nos. 1106, 1107 and 1109 which were duly transferred and registered in their names. Plot No. 1111 on the other hand was registered in the name of the defendant.
2. The plaintiffs brought this suit against the defendant claiming that Plot No. 334 was family land and that the deceased held the same in trust for himself and his cousin Daudi and members of his family who includes the plaintiffs. The plaintiffs have contended that as the sons of Daudi, the defendant had an obligation and a duty pursuant to the said trust to allocate to them the portion of Plot No. 334 that was under their occupation when the said parcel of land was sub-divided and portions thereof allocated to the beneficiaries of the estate of the deceased as aforesaid. The

- plaintiffs have contended that the portion of Plot No. 334 that was occupied by Daudi and members of his family is now comprised in Plot Nos. 1106 and Plot No. 1111 after the sub-division of the said parcel of land.
3. The plaintiffs have contended that in breach of the trust relationship that existed between Daudi and the deceased aforesaid, the defendant has caused Plot No. 1111 which forms part of the original Plot No.334 that belonged to Daudi to be registered in his name thereby disinheriting and/or dispossessing the plaintiffs of their share of family and/or ancestral land. The plaintiffs have sought judgment against the defendant for a declaration that the defendant holds Plot No. 1111 in trust for the plaintiffs, an order cancelling the registration of the defendant as the proprietor of the said parcel of land and compelling the defendant to transfer the same to the plaintiffs and, a permanent injunction restraining the defendant from entering upon, evicting, interfering with and/or in any other manner dealing with the said parcel of land.
 4. Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 19th January 2015 seeking; a temporary injunction restraining the defendant from entering upon, evicting and/or interfering with their occupation, use and/or possession of Plot No. 1111 pending the hearing and determination of this suit and in the alternative, an order for the maintenance of status quo relating to current occupation, use, and/or possession of the said parcel of land by the plaintiffs pending the hearing and determination of the suit property. The application was brought on the grounds that were set out on the face thereof and on the affidavit of the 1st plaintiff sworn on 19th January 2015.
 5. In his affidavit, the 1st plaintiff has narrated the history of the parties' respective families and that of Plot No. 1111 most of which I have set out herein earlier and need not reproduce here. The 1st plaintiff has annexed to his affidavit a copy of the register for Plot No. 334, a copy of certificate of official search on the register for Plot No. 334, a copy of Grant of Letters of Administration Intestate in respect of the estate of the deceased, a copy of the mutation form through which Plot No. 334 was sub-divided into various portions, a copy of the register for Plot No. 1111, a copy of certificate of official search on the register for Plot No. 1111 and copies of photographs said to have been taken on Plot No. 1111.
 6. The plaintiffs' application was opposed by the defendant through a replying affidavit sworn on 18th March 2015. In response to the application, the defendant denied that Plot No. 334 was family land and that the deceased held the same in trust for Daudi and the plaintiffs. The defendant contended that Plot No. 334 was registered in the name of the deceased on first registration after the adjudication process and as such the deceased was the sole and absolute proprietor thereof. The defendant admitted however that the deceased had allowed Daudi to occupy a portion of Plot No. 334. He contended however that Daudi was allowed to occupy a portion of the said parcel of land purely out of compassion that the deceased had on him as he was landless. The defendant stated that the portion of Plot No. 334 on which the deceased allowed Daudi to put up his homestead was demarcated and the boundary thereof fixed.
 7. The defendant averred that before his death, the deceased has divided Plot No. 334 informally among his sons which division factored in the portion of that parcel of land on which he had settled Daudi. The defendant averred that upon the death of the deceased and after Grant of Letters of administration in respect of the deceased's estate had been issued to him, he caused Plot No. 334 to be subdivided and portions thereof allocated to the sons of the deceased in accordance with the wishes of the deceased. The 1st defendant averred that the plaintiffs who are the sons of Daudi were not left out in the said allocation of portions of Plot No.334. The 1st defendant stated that the plaintiffs were allocated Plot Nos. 1106, 1107 and 1109 which comprised the portion of Plot No. 334 that the deceased had allocated to their father, Daudi.
 8. The defendant averred that upon being allocated the said parcels of land, the plaintiffs went of a selling spree. They embarked on sub-division and wanton sale of the said parcels of land with the result that they are now virtually landless. This according to the defendant is what has generated the clamour for more land by the plaintiffs from the defendant. The defendant stated that the plaintiffs' claim for Plot No. 1111 was first taken before Rongo Land Disputes Tribunal. The said tribunal awarded the plaintiffs the said parcel of land. The said award was challenged before this court and was duly quashed. The defendant averred that the plaintiffs were allocated the portion of Plot No. 334 which they had all along occupied and used and denied that the homestead of

Daudi extended to Plot No. 1111. The defendant contended that there is no basis upon which the orders sought by the plaintiffs can be granted and termed the plaintiffs application an abuse of the process of the court. The defendant annexed to his affidavit among other, copies of the registers for Plot Nos. 1106, 1107 and 1109 and, a copy of the judgment in Kisii E&LC Misc. Civil Application No. 2 of 2012 (JR).

9. When the plaintiffs' application for injunction came up for hearing on 14th May 2015, I directed that the same be argued by way of written submissions. Both parties filed submissions as directed by the court and the same are on record. I have considered the plaintiffs' application and the defendant's replying affidavit filed in opposition thereto. The principles for granting temporary injunction are well settled. In the case of **Mrao Ltd. –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** that was cited by the plaintiffs' advocates, these principles were set out as follows:-

- i. The applicant must show a prima facie case with a probability of success.
- ii. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.
- iii. If the court is in doubt, it will decide the application on a balance of convenience.

10. The plaintiffs case if I have understood it correctly which I believe I have, is based on customary law trust. It is not in dispute that Plot No. 334 was registered in the name of the deceased under the Registered Land Act, Cap 300 Laws of Kenya (now repealed) on first registration. The defendant has contended that the registration of the deceased as the proprietor of the said parcel of land conferred upon him absolute ownership thereof. The defendant has submitted further that the plaintiffs have not demonstrated that they have any right or interest over Plot No.1111 which has been infringed or is likely to be violated by the defendant if the injunction sought is not granted. I am in agreement with the argument by the defendant that the registration of the deceased as the proprietor of Plot No. 334 conferred upon him the absolute ownership of the said parcel of land together with all the rights and privileges associated with such ownership and that such rights were not liable to be defeated save as provided in the Registered Land Act, Cap 300 Laws of Kenya (now repealed). This argument finds support in sections 27 and 28 of the Registered Land Act which are reproduced in sections 24 and 25 of the Land Registration Act, 2012.

11. There is however a proviso in section 28 of the Registered Land Act to the effect that the rights of a proprietor of land set out above are subject to any duty or obligation that such proprietor may have as a trustee. That proviso is reproduced in section 25(2) of the Land Registration Act, 2012. In the case of **Kanyi –vs- Muthiora [1984] KLR 712**, Chesoni, Ag J.A stated as follows at page 721:-

“Section 143 of the Registered Land Act did not apply as there was no question of rectification of the register but a transfer by a trustee to a beneficial owner. The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi's rights under Kikuyu customary law. Kanyi was not relieved from her duty or obligation to which she was a trustee to Mathiora's land: see proviso to section 28 of the Act and Gatimu Kinguru –vs- Muya Gathangi [1976] KLR 253. There was overwhelming evidence of a trust in favour of Nyokabi.”

In the case of **Gatimu Kinguru –vs- Muya Gathangi [1976] KLR 253**, that was cited by Cheson Ag. J A. above, **Madan J.** had stated as follows at page 263:-

“Under section 143 (1) a first registration may not be attacked even if it is obtained, made or omitted by fraud or mistake. It was not so obtained in this case. The registration was done in pursuance of custom, which may be described as a custom of primogeniture holding and by consent of everyone concerned. The section does not exclude recognition of a trust provided it can be established. Parliament could not have intended to destroy this custom of one of the largest sections of the people of Kenya. It would require express legislation to enable the court to so hold.”

In the case of **John Gitiba Buruna & Another –vs- Jackson Rioba Buruna, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003 (unreported)** that was cited by the plaintiffs, the court stated as follows:-

“Although the rights of a registered proprietor of land are indefeasible under section 28 Registered Land act, such registration does not as the proviso to section 28 states relieve a proprietor from any duty of obligation to which he is subject as a trustee.”

12. It is clear from the foregoing cases that the issue as to whether or not the deceased's title over Plot No. 334 and Plot No. 1111 could be impeached on account of any duty that the deceased may have owed as a trustee to Daudi and the plaintiffs is beyond question. The only question that begs for an answer is whether the plaintiffs have on a prima facie basis proved the existence of such trust. In the case of **Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR**, the Court of Appeal stated as follows on the nature and proof of trust:-

“It was argued on behalf of the appellant that there was no sufficient evidence to prove customary law trust. On our own re-evaluation of the evidence we are satisfied that there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did.”

In the case of **John Gitiba Buruna & Another –vs- Jackson Rioba Buruna (Supra)**, the court stated that:-

“In the case, the appellant pleaded facts and adduced evidence which proved that the suit land was his own share of his father's land which the first respondent caused to be registered in his wife's name (first appellant's) in the absence of the respondent”.

13. What has the plaintiffs placed before this court in proof of the customary law trust which is the basis of their claim herein? The plaintiffs have pleaded in their pleadings and deposed in their affidavits in support of the present application that the plaintiffs and the defendant share a great grandfather known as Ado. Ado had two sons, Gumbo Ado who was the father of the deceased and Ajwang Ado who was the father of Daudi. The deceased is the father of the defendant while Daudi is the father of the plaintiffs. The plaintiffs have pleaded that Plot No. 334 was a family land that was initially owned by Ado. It was thereafter inherited by Ado's sons, Gumbo and Ajwang. After the death of Gumbo and Ajwang, the ownership of the said parcel of land was supposed to move to the deceased and Daudi as the sons of Gumbo and Ajwang respectively. The plaintiffs have averred that during the land adjudication, the deceased caused himself to be registered as the sole proprietor of Plot No. 334 leaving out his cousin Daudi who was also in occupation of the said parcel of land and who was entitled to a portion thereof.

14. The plaintiffs have averred further that after the death of the deceased, the defendant who is his administrator caused Plot No. 334 to be sub-divided which sub-division gave rise to among others Plot No. 1106 and Plot No. 1111. The plaintiffs have averred that the deceased held a portion of Plot No. 334 in trust for Daudi and his family and that upon sub-division of Plot No. 334 the defendant was supposed to transfer to the plaintiffs the portion of the said parcel of land that was held by the deceased in trust as aforesaid. The plaintiffs have averred that after the aforesaid sub-division of Plot No. 334, the portion thereof that was occupied by Daudi and his family and which was held in trust for him by the deceased fell within Plot No. 1106 and Plot No. 1111. The plaintiffs have averred that the defendant transferred Plot No. 1106 to them but declined to do likewise with Plot No. 1111 in breach of the said trust.

15. The defendant has neither admitted nor denied that he shares common ancestry with the plaintiffs. The defendant has contended that Daudi's occupation of a portion of Plot No. 334 was as a result of the deceased's act of philanthropy and magnanimity. The defendant has contended that Daudi was a landless person who was allowed to partake of the deceased's acts of generosity when he arrived from Tanzania after the adjudication process had taken place. The defendant has contended that Daudi was not occupying a portion of Plot No. 334 as of right but on compassionate grounds. The defendant has contended further that upon the subdivision of Plot

- No. 334 he honoured the deceased's wish that Daudi's family should be allocated a portion of the said parcel of land that he had allowed them to occupy. In that regard, he allocated to the plaintiffs and transferred to them not one parcel as claimed by the plaintiffs but a total of three plots namely, Plot Nos. 1106, 1107 and 1109. The defendant has denied that Plot No. 1111 was part of the land that was occupied by Daudi and his family.
16. What is before me is an interlocutory application; I am not supposed to make conclusive findings on contested issues of fact. On the material before me however, I am satisfied that the plaintiffs have established a prima facie case of constructive trust. I am not persuaded at this stage that Daudi was merely an "invited guest" of the deceased who was allowed by the deceased to occupy a portion of Plot No. 334 out of compassion. I am not convinced that it is out of that compassion and magnanimity that Daudi's children, the plaintiffs herein, were allocated a total of three plots measuring a total of 3.18ha. following the sub-division of Plot No. 334. The defendant having failed to deny expressly in his statement of defence and replying affidavit filed in opposition to the present application that the deceased and Daudi were related, I am inclined to believe the plaintiffs' contention that that is the case. If Plot No. 334 was ancestral land and was occupied during the land adjudication by both the deceased and Daudi who were cousins and the same was registered in the name of the deceased alone, it must be implied that the deceased held the portion of that parcel of land that was occupied by Daudi in trust for him.
 17. I am of the view that it was in recognition of that trust that the three parcels of land aforesaid were transferred by the defendant to the plaintiffs. It was not in pursuance of the deceased's magnanimity as claimed by the defendant. The plaintiffs have contended as I have stated above that Plot No. 1111 is part of the portion of Plot No. 334 that was occupied by Daudi and his family and as such part and parcel of the land that was held by the deceased in trust for him. The plaintiffs have annexed photographs of homes said to belong to Daudi and the 1st plaintiff and which they claim to be situated on Plot No. 1111. The defendant has dismissed this contention. He has claimed that the said homes are situated on part of the three parcels of land which he had allocated and transferred to the plaintiffs. The defendant has however not pointed on which particular parcel of land the said homes are situated. I am not able to determine this issue on affidavit evidence. It will have to await plenary hearing. The much I can say is that if indeed the homesteads of Daudi and members of his family are situated on Plot No. 1111 then the plaintiffs' claim over the said parcel of land is not frivolous and an abuse of the process of the court as claimed by the defendant.
 18. Due to the foregoing, I am satisfied that the plaintiffs have established a prima facie case against the defendant. The next issue to consider is whether the plaintiffs stand to suffer irreparable harm if the orders sought are not granted. The plaintiffs have claimed that they are in occupation of Plot No. 1111 and that the defendant has threatened them with eviction from the said parcel of land. The defendant has not denied these allegations. The defendant has claimed that the plaintiffs have trespassed on Plot No. 1111. I am convinced that if the plaintiffs are evicted from Plot No. 1111 which they claim to occupy, they would suffer irreparable injury.
 19. In view of the foregoing findings, I am satisfied that the plaintiff has satisfied the conditions for granting a temporary injunction. Injunction is however an equitable remedy. It is therefore discretionary. It is a principle of equity that he who comes to equity must come with clean hands. I am in agreement with the contention in paragraph 3 of the defendant's replying affidavit that the plaintiffs lied to this court and concealed material facts. In their plaint and affidavit in support of the present application, the plaintiffs maintained that they were only allocated one parcel of land by the defendant namely, Plot No. 1106. Annexures "J03(a)", "J03(b)" and "J03(c)" to the defendant's replying affidavit show that the plaintiffs were allocated a total of three parcels of land namely, Plot Nos. 1106, 1107 and 1109. The plaintiffs have not denied the contents of this affidavit. The plaintiffs concealed to this court the allocation to them of plot No. 1107 and Plot No. 1109 by the defendant. A party who lies to the court or deliberately conceals material facts from the court does not deserve an equitable remedy. In the circumstances, I am not inclined to exercise my discretion in favour of the plaintiffs even though they have met the conditions for granting a temporary injunction. I would instead grant them the alternative prayer which seeks the maintenance of status quo.
 20. In conclusion, I would allow the plaintiffs application dated 19th January 2015 in terms of prayer 5 thereof. The costs of the application shall be in the cause.

Delivered, Dated and Signed at Kisii this 27th day of August, 2015.

S.OKONG'O

JUDGE

In the presence of;

Mr. Ochwang'i for the plaintiffs

Mr. O. M. Otieno for the defendant

Mr. Omwoyo Court Assistant

S.OKONG'O

JUDGE