



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**HCC NO. 8 OF 2010**

**RECHO WEKESA NGOKHO.....PLAINTIFF**

**VERSUS**

**BEATRICE NGOKHO & 5 OTHERS.....DEFENDANTS**

**J U D G M E N T**

The plaintiff, Recho Nekesa Ngokho, instituted this suit by way of the plaint dated 26th January, 2010 praying for judgment against the defendants jointly and severally for a declaration that parcel No. Kakamega/Nzoia/198 Nzoia settlement scheme belongs to her and the defendants have no right whatsoever over it and for an order of eviction of the defendants from the property .

It is averred in the plaint that at all material times, the plaintiff has been the owner of the suit property measuring 17.0 hectares or thereabout situated at Nzoia settlement scheme having been allocated the same by the Settlement Fund Trustees (SFT) in 1966. That, she fully paid the loan outstanding and obtained a title deed. That, the defendants are her co-wives and step children having no rights over the suit property but have rights over a neighbouring plot No. 197 measuring thirty (30) acres which was allocated to the plaintiff's late husband, Jeremiah Ngokho Wamachio.

The plaintiff contends that instead of occupying plot No. 197, the defendants decided to settle on the suit property without any justification. She therefore prays for the orders sought in the plaint.

The defendants, **Beatrice Ngokho, Melap Ngokho, Peter Ngokho, Amos Ngokho, Jairus Ngokho** and **David Masika Ngokho**, filed a statement of defence and counterclaim dated 19th February, 2010, in which they aver that the suit property belonged to the late Jeremiah Wamachio Ngokho ( the deceased) who caused it to be allocated to the plaintiff to hold for the benefit of his family.

That, upon the suit property being allocated, the deceased caused his entire family including the defendant to settle thereon and since the year 1966, the defendants have occupied, developed and worked on the suit property without any interruption and interference from the plaintiff until the year 2008 when the deceased passed away.

The defendants aver that both the suit property and Plot No. 197 were used for the joint benefit of the entire family of the deceased and therefore, their settlement on the suit property was justifiable. They contend that the plaintiff is not entitled to the orders sought in the plaint and aver

in the counterclaim that the deceased acquired the suit property in 1966 for the benefit of his family but because it could not be registered in his name, he caused it to be allocated to the plaintiff. Therefore, the plaintiff hold, the suit property in customary trust for the entire family of the deceased.

The defendants pray for an order of injunction to permanently restrain the plaintiff, her agents/servants from alienating, disposing, charging, selling and/or in any manner whatsoever dealing with the suit property and a declaratory order to the effect that the plaintiff holds the suit property in customary trust for the defendants and the entire family of the late Jeremiah Ngokho Wamachio and that the property be transferred to his (deceased's) estate.

In the reply to the defence and defence to counterclaim dated 22nd March, 2010, the plaintiff contends that the suit property has never belonged to the deceased but that it was allocated to her by the Settlement Fund Trustee and having fully paid the necessary loan the property was registered in her name. That, the defendants are not occupying or working on the land and if they did so, then they were licensees whose license has now been revoked.

The plaintiff further contends that the defendants are trespassers on the suit property which was solely allocated to her for her own benefit and not the benefit of the entire family of the deceased.

The plaintiff denies the allegations by the defendants that the suit property was acquired by the deceased in 1966 for the benefit of his family and that the defendants have developed, occupied or worked on the property with her full knowledge and if they did so, the action was illegal as they were mere licensees.

the plaintiff also denies that she holds the suit property in customary trust for the entire family of the deceased and contends that she cannot be restrained by way of a permanent injunction from her own property which she is free to deal with in the manner she feels like. She further contends that the defendant's counterclaim is bad in law and prays for its dismissal together with the defendants' defence.

The pleadings foregoing are more or less fortified by the evidence led by the plaintiff and the defendants at the hearing of the case. It has emerged from the pleadings and the evidence, that the registration of the suit property in the name of the plaintiff is not disputed the right of ownership in respect thereof is therefore not in doubt.

Indeed, the record from the Land Registrar otherwise known as the green card (P. Ex. 7) indicates that the material register was opened on 22nd November, 1980 with the name of the Settlement Fund Trustees (SFT) appearing as the owner of the suit property before it was transferred to the plaintiff in the year 2009 resulting in the issuance of a title deed (P. Ex.6 ) on the 25th November, 2009.

The effect of registration of the suit property in the name of the plaintiff was to confer to her absolute proprietorship in terms of Section 27 and 28 of the Registered Land Act (Cap 300 Laws of Kenya). The plaintiff indicated in her evidence that prior to being granted legal ownership of the property, the same had been allocated to her way back in 1966. The necessary allotment letter dated 22nd November, 1966 was produced (P. Ex. 1). It was issued by the Ministry of Lands & Settlement through the Settlement Fund Trustees describing the suit property as Plot No. 198 Nzoia Settlement Scheme. The plaintiff stated that the property was granted on loan which was fully paid by herself. She produced receipts and other documents (P. Ex.2, 4 and 5) confirming the payments effected prior to the issuance of the title deed. The said receipts and documents are dated the year 2009.

Despite the registration of the suit property in the name of the plaintiff, the defendants contended that the property belonged to the late Jeremiah Wamachio Ngokho, husband to the first and second defendants and father to the third, fourth, fifth and sixth defendants. They further contended that

the deceased as the owner of the property caused it to be allocated to the plaintiff to hold for the benefit of his family.

The deceased was also husband to the plaintiff. The defendants went on to contend that after the property was allocated to the deceased, they occupied, developed and worked on it without any interruption or interference from the plaintiff until the year 2008 when the deceased died. They admitted that a different plot No. 197 belonged to the deceased but said that it was to be used jointly with the suit property for the benefit of the entire family of the deceased. It is clear from the foregoing contentions that the defendants claim of right over the suit property is based on the alleged ownership of the property by the Jeremiah Wamachio Ngokho and the alleged registration of the property in the name of the plaintiff to hold for the benefit or in trust for the benefit of the entire family of the deceased.

The sixth defendant, **David Masika Ngokho (DW1)**, testified as much on behalf of the rest of the defendants. He was supported in that regard by his brother, **David Ngokho Simiyu (DW2)**.

In his testimony, David Masika (DW1) stated that their deceased father acquired the suit property together with Plot No. 197 in 1966 thereby paving way for his large family consisting of seven wives including the plaintiff, the first and second defendant to moved from their original home in Chwele Bungoma to Nzoia Settlement Scheme were they settled on the suit property which measured 30 acres similar to plot No. 197. That, the late wives of the deceased including the deceased were all buried on the suit property currently occupied by 30 members of the deceased family. Masika (DW1), stated further that the children of a lady called Roselyn who was allegedly married to the deceased and who was a cousin of the plaintiff brought some tension in the family in the 1980's when they demanded that the suit property be registered in the name of one of them instead of the plaintiff, their aunt. However, the property was registered in the name of the plaintiff to hold in customary trust for the rest of the family. That, despite the tensions, the family lived peacefully until after the demise of the deceased when the plaintiff threatened to evict the rest of the family members from the suit property.

According to Masika (DW 1), the family graves in the suit property are a cultural symbol such that the threats by the plaintiff went against the Bukusu customs.

David Simiyu (DW2), indicated that after arriving from Chwele Bungoma, the family settled on both plot No. 197 and the suit property No. 198. He also said that after registration of the suit property , the family settled thereon.

The testimonies by Masika (DW1) and David (DW2), was an attempt to show that even through the suit property is registered in the name of the plaintiff, she hold, the same for her own benefit and that of the entire family of the deceased. That, she holds the same in customary trust for the rest of the family.

However, there being no dispute or substantial dispute that the suit property was actually allocated to the plaintiff by the Settlement Fund Trustees and upon full payment of the required amount by herself it was registered in her name and a title deed issued, it would follow that the allegation by the defendants that the property belonged to the late Jeremiah Wamachio Ngokho who caused it to be alienated to the plaintiff to hold for the benefit of his entire family is clearly devoid of credibility.

The receipts and all other documents (P. Ex. 1, 2, 4, 5, 6 & 7) showing that the suit property has always belonged to the plaintiff in her own right as opposed to the deceased were never discredited nor invalidated by any evidence from the defendants. Nothing has been placed before this court by the defendant to show that the said receipts and documents were obtained fraudulently or by other unlawful means or that there was contribution on the part of the defendants.

There was no credible evidence from the defendant from which the existence of a trust in relation to the suit property could be implied. The court cannot therefore hold that the suit property was registered in the name of the plaintiff to hold in trust for the defendants or any other family member of the deceased herein.

In any event, if there was indeed a trust, it would have been noted in the relevant register at the time of registration. The fact that the plaintiff as the beneficial allottee and later the registered proprietor of the suit property allowed members of her family to occupy, develop or work on the suit property did not translate into ownership of the property by the patriarch of the family. It simply meant that their presence on the property was a good will gesture from the plaintiff given without prejudice to their rightful occupation of plot No. 197 which was solely allocated to the deceased patriarch.

The burial of the deceased on the suit property did not also translate into ownership of the same by himself where there exists a valid title issued in the name of the plaintiff. Neither can the burial of the deceased in the property be treated as a creation of a customary trust over the same in favour of the defendant. If anything, the defendants are licensees on the property and remain there at the pleasure of the plaintiff.

It is not that they do not have anywhere else to go, there is plot No. 197 waiting for them. In sum, the plaintiff would be entitled to the prayers sought in the plaint with the result that the counter claim by the defendant would stand dismissed.

Consequently, judgement is entered for the plaintiff against the defendants in terms of prayer (1) of the plaint.

With regard to prayer (2), the parties are members of one family. They should work out modalities for the movement of the defendants from the suit property to plot No. 197 or any other modality to bring the dispute to an amicable and peaceful and without usage of force necessitated by an eviction order. However, in default, the plaintiff be at liberty to apply for necessary orders. Otherwise, the plaintiff is entitled to the costs of the suit while the counterclaim by the defendants is dismissed.

Ordered accordingly.

**J. R. KARANJA,**

**JUDGE**

**(Delivered and signed this 25th day of February, 2014)**