



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO. 63 OF 2000

NATHAN WANJALA MUINDI

JUSTUS KUCHIKHI MUINDI

JOHN MASUNGO MUINDI

ALFRED MUKUKE MUINDI

ANTHONY MUINDI NAMASAKA..... PLAINTIFFS

VERSUS

JULIUS WEPUKHULU MUINDI.....DEFENDANT

JUDGMENT

1. The five Plaintiffs have sued the Defendant for a claim over land parcel Kimilili/Sikhendu/456. The 1st to 4th Plaintiffs are younger brothers to the Defendant while the 5th Plaintiff is a nephew to the Defendant. Before 6.11.1970 the land parcel no. Kimilili/Sikhendu/456 hereinafter referred to as “suitland” was registered in name of Muindi Namangala – deceased who is the father to the 1st – 4th Plaintiffs and the Defendant’s and grandfather to the 5th Plaintiff.

2. In the pleadings at paragraph 9 of the plaint, the Plaintiffs aver that the Defendant was registered as proprietor of the suitland as trustee for them since the land had belonged to their late father Muindi Namangala. That the trust should now be determined and the suitland be divided into six (6) equal portions as between the Plaintiffs and the Defendant. The Plaintiffs prayed;

(i) For a declaration that the Defendant was registered as the proprietor of title no. Kimilili/Sikhendu/456, as trustee for the Plaintiffs.

ii. An order that the trust in favour of the Plaintiffs be determined and the suitland subdivided into six (6) equal portions.

iii. An order that the defendant do transfer the respective portions awarded to the Plaintiffs and failing which the Deputy Registrar of this court to sign all such documents as would facilitate the registration of the transfers.

- iv. Costs of this suit.
- v. Any other relief that this honourable court would deem fit to grant.

3. The Defendant does not agree with the Plaintiffs claim over the suitland. He filed a defence in which he admits he is the registered owner of the suitland. However, he denies he was registered as trustee for his own behalf and for the benefit of the Plaintiffs. He pleads that he got the suitland through appeals in civil appeal No. 80 of 1987 as the Plaintiffs had sold the land to a Mr. David Mukanda and Julius Kiliswa without the consent of their father.

4. The Defendant avers further that the 1st & 2nd Plaintiffs used money from the sale of the suitland to buy land at Matunda of Kitale and Maeni in Bungoma respectively. The Plaintiffs have therefore not come to court with clean hands. He prayed that the suit be dismissed with costs to him.

5. The evidence of PW1 was taken by my brother J.K. Serگون Judge on 8th November 2005. At that time, the Plaintiffs were represented by Mr. Kiarie advocate while the Defendant was represented by their current advocates Mr. Khakula & Co. I took over the matter on 11th November 2013 and took the evidence of PW2 and the evidence of the Defendant and his witness.

6. From the pleadings on record, the 1st Plaintiff testified as PW1. He told the court their relationship within themselves and with the Defendant. Before their father died in 1973, he owned L.R. No. Kimilili/Sikhendu/456 measuring 2.4ha. This land was transferred to the name of a David Mukanda on 6.11.1970 without their knowledge. That David came to claim the land after the death of the Plaintiffs' father. They sat down as a family i.e. between the Plaintiffs, the Defendant and the clan elders and chose the Defendant to apply for letters of administration of their father's estate with a view to challenging David Mukanda's title.

7. The Defendant then filed suit against David Mukanda in Bungoma RMCC No. 115 of 1984 which suit was dismissed. He was unhappy with that decision and filed an appeal vide Kakamega HCCC No. 109 of 1985 which was successful. David appealed against the decision of the high court vide Court of Appeal civil appeal no. 80 of 1987. The court of appeal upheld the High Court's decision. He produced these judgments as pex. 2 and 3. Subsequent to the judgment, the defendant was registered as new owner of the suitland.

8. The 1st Plaintiff added that the land belonged to their father. They sat as family on 6.4.1998 in the Defendant's house to share the land. Each member was given a share. He referred to some minutes MFI P4. He urged the court to grant their prayers on the basis that they assisted each other to recover the land from David Mukanda.

9. On cross – examination, he said his father had 3 other pieces of land i.e. Kimilili/Sikhendu/456 and 406 situated at Kamusinde but could not remember the number of the third parcel where his father was buried. They did not record minutes authorizing the Defendant to sue David Mukanda in 1974 because they trusted him. David Mukanda had also sued the four of them in civil case no, 147 of 1989 which case was dismissed for want of prosecution. He denied receiving any money from David.

10. PW2 John Kundu Khisa said he knows both the Plaintiffs and Defendant whom they share with same clan. He was a secretary of the Bukolero clan during the relevant period. He confirmed the suitland belonged to Muindi Namangala – deceased before David Mukanda – a staff of Bungoma Land Registry changed it into his name. He testified further that the Defendant and 4th Plaintiff are brothers of same mother while 1, 2, 3rd and 5th Plaintiffs are also of the same mother/grandmother.

11. That before the plaintiffs' father died, he had given the Defendant 2.2 ha of land in number 1 area. According to PW2, the suitland was to be shared amongst the 6 sons. The clan held a meeting on 14.11.1993 with a view to share the land to the sons but it was not done because the defendant did not attend the meeting. The sharing was eventually done in April 1998 and he produced those minutes as

pex. 6. He also produced the judgment as pex. 7 which is similar to proceedings in Kakamega High Court civil case 147 of 1989 produced as pex. 9. According to this witness, the Defendant has refused to share the land to date.

12. On cross examination, he said he was not aware the suitland was sold to David nor the existence of CMCC No. 115 of 1994 or all the other decisions in the mentioned cases. He said the land was given to the Defendant on behalf of the family. The Plaintiffs then closed their case at this point.

13. The Defendant testified as DW1. His evidence; this land was sold by the 1st and 2nd Plaintiffs to two people. He was not happy by the action of the 1st and 2nd plaintiffs and filed a case in Kakamega which gave him this land. He is the one who cancelled David's title. At the time of clan meeting, the land was already in his name. He wondered whose land the clan was sharing. He produced a copy of green card as Dex.1 to show the land is his. He also produced as Dex. 2, a sale agreement which according to him was done by the Plaintiffs.

14. In cross-examination, he admitted he is the eldest son of Muindi – deceased. He does not remember the chief demolishing the houses of the plaintiffs that were on the suitland. Case No. 147 of 1989 was dismissed while he was on the land.

15. Julius Kiliswa testified as DW2. He said that in 1970, the Plaintiffs sold and sold the land to David Mukanda and 2nd person. The Defendant not being happy filed suit. The case went up to the court of appeal but which the Defendant won. He has not seen anyone claiming the suitland. The Plaintiffs should not claim this land as they had sold it and have not refunded anyone their money.

16. He denied knowing about family meeting where family made contributions towards the case. He alleged the Plaintiffs' sold land during the lifetime of their father. The Defendant then closed his case.

17. With the above background, I now turn to determine whether the Plaintiffs have proved their case against the Defendants. It is not in dispute that the parties to this suit are siblings. It is also not in dispute that the suitland was originally registered in name of Muindi Namangala – deceased up to 1970 when it was somehow transferred into the name of David Mukanda. It is not disputed that the Defendant is the current registered owner – see pex. 1 and Dex 1 (green card).

18. What is in dispute is whether the registration by the Defendant was as trustee for his own benefit and for the benefit of the Plaintiffs. The Defendant's pleadings and evidence before court sought to show that the Plaintiffs had sold off the suit land to David Mukanda and were therefore not entitled to lay claim over this land. Further that through his own effort the Defendant successfully sued David Mukanda and got back the title in his name.

19. This court finds it necessary to examine the manner in which the Defendant acquired the registration of the suit property and if that process did or did not establish a trust relationship between him and the Plaintiffs. The Defendant got registered as a result of the outcome of the proceedings between the Defendant and a David Mukanda produced as pex. 2 and 3.

21. In Pex. 2, the Defendant herein appealed to the High Court at Kakamega in HCCA No. 109 of 1985 against the decision of the Bungoma RMCC 115 of 1984. In those pleadings, David Mukanda (Respondent) claimed he had bought the suitland at a public auction held pursuant to a court order in Kimilili DMCC No. 266 of 1968. At page 3 of the judgment, the Judge had this to say

“There is therefore no doubt in my view from the evidence adduced by the Appellant and the circumstances of this case that the Respondent used his special position to fraudulently transfer the land in question without the knowledge of the registered owner of the land or the beneficial owner”.

The judge subsequently cancelled the registration of the Respondent as the proprietor of the suit premises and directed the Land Registrar Bungoma to register the Appellant (now

Defendant) as the proprietor thereof.

21. David Mukanda appealed to the court of Appeal sitting at Kisumu in civil appeal No. 80 of 1987. The judgment was produced as pex.3. At page 2 of the judgment, the judges said,

It is clear from the evidence that the purported auction did not comply with the mandatory provisions of Order 21 rule 62 of the Civil Procedure Rules. The circumstance of this case are such that on our part we find no difficulty in concluding that fraud was committed. The court of appeal confirmed the decision of the High Court.

22. There is document produced as Dex. 2 referred to by the Defendant as sale agreement between the Plaintiffs and David Mukanda. The document is dated 30.3.1970. It refers to Muindi Namangala - deceased agreeing to David Mukanda paying costs of Kshs.1067 in case No. 266/68 together with 3 cows already received and in return sold to him a portion of his land. The signature(name) of 3rd Plaintiff is shown as a witness. The 2nd witness only signed making it difficult to deduce who of the sons it was. The defendant did not tell this court according to him the sign was for which Plaintiff.

23. In analyzing this document and the judgments in Pex. 2 and 3 visa vi the evidence of the Defendant, it is obvious the Defendant has not told this court the truth. His evidence that the Plaintiffs sold the land to David Mukanda and another is clearly a lie. His Dex.2 shows that a portion of land was sold by their father to David Mukanda. The document did not refer to any title number nor to the suitland herein.

24. Secondly, both the judgment of the High Court and Court of Appeal (pex. 2 and 3) showed David Mukanda claimed he bought the land in a public auction pursuant to a court order in CC 266/68. The Courts' faulted the procedure in which the auction was conducted. They also faulted the Magistrate for admitting copies of documents of the auction which had been objected to by the Plaintiffs' advocate contrary to the rules of evidence. There is no mention by David or the Defendant during those proceedings that the suitland had been sold by either of the Plaintiffs. The allegation by Defendant and his witness that the 1st & 2nd Plaintiffs sold the land is thus an afterthought and has no basis.

25. I now turn to the Plaintiff's evidence to consider whether they have made out a prima facie case within the standards set by the law. PW1 testified that when they discovered David Mukanda was claiming their land, they held a family meeting and gave the Defendant authority to sue David on their behalf. PW1 said that they contributed money towards that case that took care of the legal and transport expenses incurred by the Defendant.

26. Although the Defendant denied receiving this assistance, he did not explain/revert this evidence by disclosing his source of income to solely afford an advocate to represent him in the Magistrate's Court, High Court and Court of Appeal. The Plaintiffs have also produced as pex. 9 proceedings in Kakamega HCC No. 147 of 1989 (O.S) in which David Mukanda sued Julius Wepukhulu Muindi (defendant), Justus Kuchikhi Muindi (2nd Plaintiff), Nathan Wanjala Muindi (1st Plaintiff), Masungu Muindi (3rd Plaintiff). That suit was dismissed for want of prosecution. In Pex. 10, is a certificate of official dated 1.7.1998 for L.R. No. Kimilili/Sikhendu/406 measuring 2.02 ha showing the Defendant is the registered owner as at 11.4.1972. The Defendant did not deny being the owner of this parcel. This confirmed PW2's evidence that the Defendant was given this land by his father before his father died.

28. The clan attempted unsuccessfully to share out this land amongst the sons of the late Muindi Namangala on 11.4.93 (pex.5). A second clan meeting was held on 16.4.1998 (pex. 6) in which the clan shared out the suitland. The clan meeting to share the land was probably because they saw the suitland as family land going by the contents of the minutes. In both meetings, the Defendant was absent. This made it difficult for the proposed sharing to be implemented. Do the circumstances of this case create a trust (customary)?

29. In case law of **Wambugu vs. Kimani [1992] 2 KAR 57, & Gichuku vs. Gichuki [1982] KLR 285**, it was held that trust is a question of fact and has to be proved by evidence. In **Phillicery Nduku**

Mumo vs. Nzuki Makau [2002] I EA 170, the Court of Appeal said, ***“where there is ample evidence that the disputed plot was owned by the Appellant's father (Deceased) and the entire family lived on it but was registered in name of deceased 1st wife after death of deceased, the 1st wife was to hold the suitland in trust for the entire family of the deceased.”***

30. In **Gathiba vs. Gathiba [2001] 2 EA 342** (see Odunga's digest pg. 486 paragraph 1326 A), the Court said, ***“The registration of the land under the Registered Land Act should and does not extinguish a trust originating from customary law simply because due to technical default during the registration, the words “as trustee” were not entered on the land register.”*** Applying this latter sentence to this case, the omission by the Plaintiffs' not to have recorded the minutes appointing the Defendant to file case challenging David Mukanda's title did not extinguish the trust created between the Defendant and themselves.

31. The Plaintiffs claim is supported by the clan minutes which recognized their interests over the suitland by distributing it, the Defendant having been given land parcel No. Kimilili/Sikhendu/406. In light of all the foregoing, I am satisfied that the Plaintiffs have proved their case within the standard of probabilities. I allow their suit and make orders;

(1). declaring the Defendant is registered as trustee in favour of the Plaintiffs in respect to L.R. Kimilili/Sikhendu/456.

2. The trust be and is hereby determined and the Defendant is directed to subdivide the land into six (6) equal portions.

3. The defendant do transfer the respective portions awarded to the plaintiffs' names within 30 days. In default, the Deputy Registrar of this Court shall sign such documents to facilitate the subdivision and transfer of the said portion due to the plaintiffs.

4. The Plaintiffs are awarded costs of the suit.

These shall be the orders of the court.

DATED, SIGNED and DELIVERED this 25th day of March 2014

A. OMOLLO

JUDGE.

