



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO 29 OF 2011

JAMES CHUMO.....PLAINTIFF

VERSUS

ZABLON KIPLANGAT CHUMODEFENDANT

JUDGEMENT

1. The Plaintiff **JAMES CHUMO** filed a plaint against the Defendant, **ZABLON KIPLANGAT CHUMO** on **12th April, 2011** seeking the following orders:

- a) Declaration that the parcel of land known as **KERICHO/KIPTERE/1953**(herein after referred to as the suit land) registered in the Defendant's name was held in trust, and the title thereof be cancelled and a new one be issued in the Plaintiff's name to the extent of his entitlement.
- b) Costs of the suit and any other relief this court may deem fit to grant.

2. The suit is based on the fact that the Plaintiff claims the defendant who is his elder brother is holding the suit land in trust for him and that the said registration in the defendant's name was actuated by fraud; in particular doing so without disclosing the Plaintiff's interest, subdividing it and transferring it to himself, and obtaining consent from the Land Control Board through false representation.

3. In his defence filed on 23rd September, 2011 the defendant denies all the Plaintiff's claims and has instituted a counterclaim praying for an order of permanent injunction to restrain the Plaintiff by himself or through his agents and/or servants from trespassing or in any way interfering with the suit land.

The Plaintiff's Case

4. The case was set down for hearing on 31st October, 2013. During the hearing, the plaintiff testified and called three witnesses. He produced the following documents as exhibits.

1. A copy of the extract of the green card for **Kericho/Kiptere/1953**.
2. Minutes of a meeting held on 15th June, 2005 before the Assistant Chief, Kalyongwet Sub-Location.

5. The Plaintiff (PW1) testified that the Defendant was his elder brother and that he was born in Nyamira

County where they had originally lived. When their father died, their mother sold the ancestral land in 1971, the proceeds of which she gave the Defendant and his stepfather to buy two acres of land in Nandi. They moved from Kisii and lived in Nandi for two years. Later their mother found some land in Kericho and the defendant sold the land in Nandi for Kshs. 2,600 and bought 2 acres of land in Kericho where they all settled in 1974.

6. In 1975, their mother and the Defendant sold more land in Kisii and bought 12 acres in Kitale. The plaintiff and his mother remained on the suit land until 2009 when his mother relocated to live with the Defendant in Kitale after her house was burnt down and she was injured during the tribal clashes.

7. He further testified that the suit land was registered in the Defendant's name being the eldest son who when their father died acted as their father to hold the family land in trust for the rest of the family. As a family, they had held several meetings on how to share the suit land and at one time involved the Assistant chief Kalyongwet location to assist them in resolving the dispute. During that meeting their mother admitted that she had bought the suit land and had it registered in the Defendant's name. It was resolved in that meeting that the Plaintiff should be given 1 acre, the Defendant 1 acre and their mother 0.9 acres.

8. On cross-examination, PW1 testified that he was 12 years old when their father died in 1971 and that is when they sold the land in Kisii. He however could not produce any documents to confirm the sale but stated that a search could confirm his story. He further testified that he was the owner of **Kericho/Kiptere/878** which neighbours the suit land and had purchased the same with proceeds from his business which he had run since 1981. He denied that his mother had given him money to buy any land.

9. On re-examination, PW1 reiterated that the suit land was registered in the Defendant's name in 1975 and being 16 years old at the time could not be registered alongside his brother because he was a minor. He maintained that he had bought **Kericho/Kiptere/878** with his own money from the proceeds of his business of dealing in cattle, and that his mother had only given him Kshs.6000 to pay dowry, not to buy land.

10. **CHRISTOPHER NYAMBETA OGOKO** (PW2) testified that he visited the firm of Orina & Co Advocates on 25th April, 2012 and recorded his statement, which he urged the court to adopt. In his statement, he states that he is an uncle to the plaintiff and that their late father had left his family in his (PW2's) care. He was the one who took their mother to pay the purchase price for the land in Nandi and also the suit land bought with proceeds from the land sold in Kisii. He further testified that the family stayed together at the suit land until they bought land in Kitale measuring 12 acres where the Defendant now resides also using proceeds from the land sold in Kisii. Both the suit land and the land in Kitale were registered in the Defendant's name as trustee because the plaintiff was still young.

11. **YUNES OGERA** (PW3) testified in Kiswahili that she lives in Matongo near Sondu and that she visited the firm of Orina & Co. Advocates on 25th April, 2012 and recorded her statement which she urged the court to adopt. In her statement, she stated that she was the eldest sister to the parties herein and that when their father died their mother sold the family land in Kisii measuring 24 acres and the proceeds were used to purchase the suit land. Her uncle (PW2) was the one who shouldered the responsibility of taking care of the family at that time. In addition she testified that her mother was misleading the court as she never liked the Plaintiff and some of her daughters and did not want the plaintiff to inherit property bought with the family land proceeds which was registered in the Defendant's name as a trustee.

12. On cross-examination, PW3 stated that the Plaintiff had his own land separate from the suit land which he bought with his own money. There was no re-examination.

13. **JANET CHEBET NGENO** (PW4) testified that she lived in Litein and was unemployed. She visited the firm of Orina & Co Advocates on 25th April, 2012 and recorded her statement which she urged the court to adopt. She stated that she was the youngest sister of the parties and corroborated the testimonies of PW1, PW2 and PW3 that when their father died he left the family in the care of their mother, her elder sister and the defendant. Their mother had sold the family land in Kisii measuring 24 acres and the

proceeds were used to purchase the suit land. Her uncle (PW2) was the one who shouldered the responsibility of taking care of the family at the time and stated that her mother was misleading the court as she never liked the Plaintiff and some of her daughters and did not want the plaintiff to inherit property bought with the family land's proceeds which was registered in the Defendant's name as a trustee.

The Defendant's Case

14. The Defendant also testified and called two witnesses. He produced the following documents among others:

1. Certificate of official search in respect to **Kericho/Kiptere/1927**.
2. Certified copy of official search in respect to **Kericho/Kiptere/1953**.
3. Letter dated 28th March, 2011 by the District Officer Sigowet Division.
4. Certificate of official search in respect to **Kericho/Kiptere/878**.

15. The Defendant (DW1) testified that he was a farmer and that he went to the firm of Siele Sagira on 23rd September, 2011 and recorded a statement, which conforms to what he stated in the defence, counterclaim and verifying affidavit. In his statement he stated that he was the absolute owner and proprietor of the suit land which he bought with his own money and was not holding it in trust for the plaintiff or for any of his siblings.

16. On cross examination, DW1 alluded to the title deed of the suit land which proved he was the one who bought it but stated that he had no other documents. He further stated that his mother bought the land in Kitale with proceeds from the sale of land in Kisii and that he did not know how the rest of the land was disposed off. He admitted that PW2 was his mother's relative. He reiterated that he bought the land in Nandi with his own money, which he later sold and bought the suit land and registered the same in his name.

17. On re-examination, DW1 reiterated that he bought the suit land and that his mother only moved to Kitale after being chased away by the Plaintiff. He testified that the Plaintiff had consistently defied court orders not to cultivate the suit land and that he should be restrained.

18. **AGNES CHELAGAT CHUMO** (DW2) testified that she was a farmer living in Kiptere and was a younger sister to the parties. She confirmed that she visited the firm of Siele-Sigira & Co Advocates on 23rd September, 2011 and recorded a statement in which she states that the Defendant bought the suit land together with another parcel of land in Kitale with his own money. The Defendant had allowed her to stay on the suit land to till and feed her children but the Plaintiff was violent towards her causing her serious harm facts that she reported to the police. She also testified that their mother had requested the Plaintiff to give her 3 acres of his land because their mother had given him the money to purchase his land but he refused. In addition she too had given the plaintiff money to buy her 1 acre of land parcel number **Kericho/Kiptere/2067** but the Plaintiff had so far refused to transfer the same to her.

19. On cross-examination, DW2 stated that she had always been in conflict with the Plaintiff who was her older brother since she gave him money to buy her land. She admitted that a meeting was held by the sub-chief but denied knowing the outcome of the meeting. There was no re-examination.

20. **SALOME KERUBO CHUMO** (DW3) testified in Ekegusii that she went to the firm of Siele-Sigira & Co Advocates on 23rd September, 2011 and recorded a statement, in which she stated that she was the mother to the parties in this suit and four other children. She testified that the suit land belonged to the Defendant and he was not holding the same in trust for anybody. She had fled to Kitale after the Plaintiff became violent towards her. She further claimed that the Plaintiff lived on land financed by her and that he should transfer 3 acres to Agnes (DW2) who lived and cultivated the suit land.

21. On cross examination, DW3 stated that the Defendant bought the suit land with his own money. She testified that the meeting at the Chief's office was to resolve a dispute relating to the Plaintiff's trespass on the Defendant's land and that there was no such determination by the Chief as to how the land ought to be divided. She confirmed that the land in Kitale was bought with proceeds from the land sold in Kisii and that the Plaintiff was the one who sold part of the land in Kisii (3 acres) to pay his dowry, and later sold 5 acres for Ksh.8000 and 1 acre at Ksh.15000. She denied being aware of land purchased in Nandi.

22. On re-examination, DW3 reiterated that the suit land belonged to the Defendant purchased with his own money and that at the Chief's meeting the Plaintiff was told to stop trespassing on the suit land. She admitted that she did not have a good relationship with the Plaintiff as he had beaten her and his sister (DW2) and they had reported the matter to the police.

Submissions

23. The Plaintiff filed written submissions in which he gave a background of the ancestral land in Kisii which was sold and the proceeds used to buy the suit land registered in the Defendant's name to hold in trust for the family. He also alluded to the Chief's meeting which resolved that the land be subdivided equally between the parties and their mother.

24. In addition, he submitted that **Section 3 of the Environment and Land Court Act** outlines the overriding objective of the Act to be **"to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act."** To this end, the court should recognize the Assistant Chief's determination as the same was consistent with **Article 60 (g)** of the Constitution in encouraging the use of community based initiatives in achieving the overriding objective of the Act.

25. Counsel further submitted on the concept of a trust under African customary law, and particularly relied on the case of *Kanyi v Muthiora (1984)* KLR 712, *Joseph Githinji Gathiba v Charles Kingori Gathiba (2001) 2 EA 342*, and *Mumo v Makau (2004) 1 KLR 13* in which the Court of Appeal stated that nothing precludes the declaration of a trust in respect of registered land.

26. The Defendant equally filed written submissions. He submitted that the Defendant bought the suit land with his own money, that it was in fact the Plaintiff who was given money by their mother to buy the land he currently resides on, a fact that shows that the suit land was not family land as was demonstrated in the case of *Paul Ndungu Kariuki & 3 others v Teresah Waithera Wainaina 2002* eKLR where Aganyanya J held that the appellants having failed to prove the proceeds of dowry were used to purchase the land and that the Respondent did buy the land proved that it was not family land but belonged to the Respondents.

27. On the issue of trust, counsel submitted that there was no such intention to create a trust, as was held in *Gichuki v Gichuki (1982)* KLR 285. Furthermore, for customary law trust to take effect there had to be three things present: existence of a family relationship, registration in the name of the eldest son and an undertaking that the land was held in trust for other family members. This was so held in *Alice Wanjiru Mwaura v Peter Njuguna Mwaura & Another (2013)* eKLR. Counsels submit that the third requirement was missing, and therefore there is no trust.

Analysis

28. From the pleadings, testimonies by witnesses and Documentary evidence adduced, I find the issues for determination to be as follows :

1. Was the suit land bought with proceeds from the sale of family land in Kisii?
2. If so, was the suit land registered in the defendant's name held by him in trust for the family? Or in the alternative is the defendant a legally registered owner and proprietor of the suit land?
3. If the land is found to be held in trust by the defendant Is the plaintiff entitled to a portion of the suit land?
4. Who bears the cost of the suit?

29. From the evidence before me, it is common ground that the family owned some land in Kisii, which was sold by DW3. It is also common ground that the defendant purchased land in Kitale with proceeds from land sold in Kisii. Although DW3 claims not be aware of the land in Nandi this position is corroborated by the testimony of PW2. PW1, PW2, PW3, and PW4 all testified that the suit land was bought with the proceeds from the land sold in Kisii. DW1, DW2 and DW3 deny that the money used to purchase the suit land emanated from the proceeds of the land sold in Kisii and instead state that the land was bought by the defendant using his own money. This is indeed a family that is split in the middle and it is difficult to tell which side is telling the truth. It appears that I will have to look for the truth elsewhere.

30. The meeting held on 15th June, 2005 chaired by the Assistant Chief, Kalyongwet Sub-location in the presence of the parties, DW3 and about six village elders seems to shade some light. DW1 is recorded as having stated " **I bought the shamba in dispute and it was registered by my elder son Zablon in his name.**" it emerged in the meeting that both the Plaintiff and defendant bought their parcels of land including the land in Kitale, using family money. This notwithstanding the elders passed the following resolution

" **the land in dispute should be subdivided equally between the two sonsas follows**

1. Salome Kerubo 0.8 acre

2. Zablon Chumo 1.0 acre

3. James Chumo 1 .0 acre”

31. I find DW3’s evidence contradictory. In the aforesaid meeting she claims she bought the suit land and that the Defendant bought the land in Kitale with family money. While testifying she claimed that the Defendant bought the suit land with his own money.

32. This is in contrast with the testimonies of PW1, PW2, PW3, and PW4 which are consistent that the money used to buy the suit land was from proceeds of the sale of land in Kisii. Going by the evidence adduced by DW3 in the meeting held on 15th June 2005, I am more inclined to believe that the suit property was bought with money from proceeds of the family land in Kisii.

33. Having determined that the suit land was bought with proceeds from the ancestral land, I shall now proceed to determine whether there existed a trust, i.e. whether the Defendant held the land in trust for the Plaintiff and his other siblings.

34. A trust is defined in the **Black's Law Dictionary, 8th and**, as ***“The right enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another person (the settlor) for the benefit of a third party (the beneficiary).”***

35. The Plaintiff alleges that by virtue of the land having been acquired through the proceeds of sale of family land in Kisii, it therefore follows that the Defendant, registering it under his name, was doing so in trust for his younger siblings.

36. Under Kipsigis Customary Law inheritance is partrilinal. The sons share land equally. The Administrator is usually nominated by the deceased in his will or ***“Unless there are obvious reasons for not doing so (e.g on account of absence or bad behaviour), the elders will always appoint the eldest son as the ribindet, if he is of age;***

The ribindet acts as trustee of the property of the minor heirs until they attain the age of majority when their shares are distributed to them.”

See Cotran, E., **Restatement of African Law, Volume 2, Sweet and Maxwell, 1969** at pgs116 and

37. Although the father of the parties appears to have been from the Kipsigis Community, the mother seems to be from the Abagusii Community where the family was residing when their father died. I will therefore consider the Kisii customary law which is similar to that of the Kipsigis. The administrator under Kisii customary law is known as *Omogaka bw'omochie*. He is usually nominated by the deceased in his will or by the *eamate* elders and is usually the eldest son of age of the deceased. His role is similar to that of the *ribindet*.

38. The roles of a *ribindet* and/or *Omogaka bw'omochie* is similar to that of a *Muramati* under the Kikuyu Customary Law. In *Joseph Gitau Githongo vs. Victoria Mwhaki Munya [2005] eKLR* the court while relying on the case of *Njuguna vs. Njuguna [1984] KLR 527* held that the eldest son under Kikuyu customary law inherits land as *Muramati* to hold in trust for himself and other heirs. He is therefore the recognized beneficiary for purposes of registration during the consolidation era.

39. Counsel for the Defendant had in his submissions stated that there was no such intention to create a trust, and relied on *Gichuki v Gichuki (supra)*. Furthermore, for customary law trust to take effect there has to be three things present: existence of a family relationship, registration in the name of the eldest son, and an undertaking that the land was held in trust for other family members, as was held in *Moses Mbugua v Mary Nyambura Ngethe (supra)* as quoted in *Alice Wanjiru Mwaura v Peter Njuguna Mwaura & Another (supra)* which was relied on by counsel for the defendant.

40. The meeting held on 15th June, 2005 chaired by the Assistant Chief, Kalyongwet Sub-location seemed to recognise this role of Administrator by the defendant when the elders arbitrating on the matter resolved that the suit land should be subdivided equally between the two sons based on the admission by their mother that she had bought the land. This was an implicit recognition of the fact that the suit land was held by the defendant in trust. I find that this implied that the registration of the suit land in the Defendant's name was done so for his and his siblings' benefit, thereby creating a trust.

41. I am persuaded by the argument advanced by counsel for the Plaintiff on the fact that nothing precludes the declaration of a trust in respect of registered land and I cite with approval the words of Bosire JA in *Mumo v Makau (supra)*

“Firstly, there is nothing in the Registered Land Act Cap 300 Laws of Kenya, (the Act) which precludes the declaration of a trust in respect of registered land, even if it is a first registration. Secondly, Section 28 of the Act, which reads as follows:

"28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee"

contemplates the holding of land in trust.”

42. After considering both the oral and documentary evidence adduced herein, as well as the pleadings

and written submissions and applying the law, I am satisfied that the Plaintiff has proved his case to the required standard.

43. For the reasons stated above:

(a) I declare that the parcel of land known as **Kericho/Kiptere/1953** that was registered in the Defendant's name is held in trust for the benefit of the Plaintiff and his siblings.

(b) I order that the Defendant herein do survey, subdivide and transfer to the plaintiff his entitlement of **Kericho/Kiptere/1953** within 90 days at his cost from the date hereof failing which the Deputy Registrar of this Honourable court to sign the respective transfer documents.

(c) I further order that the title thereof be cancelled and a new one issued in the Plaintiff's name, to the extent of his entitlement.

(d) Costs of the suit to be borne by the Defendant.

Dated, signed and delivered in open Court at Kericho this 26th day of May 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Orina for plaintiff

MR Siele for the defendant

CC:

L N WAITHAKA

JUDGE