



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 49 OF 2014

NAMU WACHIRA 1ST
PLAINTIFF

NAZARIO NDWIGA WACHIRA 2ND
PLAINTIFF

SEBASTIAN NJERU WACHIRA 3RD
PLAINTIFF

VERSUS

NJERU WACHIRA Alias SIMBA WACHIRA 1ST
DEFENDANT

JUDGMENT

The three plaintiffs by their plaint filed herein on 26th February 2014 seek the following orders as against the defendant:-

- a. *That land parcel No. KYENI/KIGUMO/59 was registered in the names of the defendant to hold in trust for himself and the three plaintiffs*
- b. *That the said trust be determined and the said land be sub-divided and shared equally between the plaintiffs and defendant*

The plaintiffs' claim as per their pleadings is that they and the defendant are brothers and children of the late WACHIRA NAMU and RUTH WACHIRA both deceased and that on 9th August 1961 the defendant was registered as owner of the parcel No. KYENI/KIGUMO/59 measuring 2.4 Ha or thereabout to hold in trust for himself and the three plaintiffs since their father WACHIRA NAMU was very sick. That both the plaintiffs and defendants live on their respective portions of the said land (hereinafter the suit land) but the defendant has refused to have the trust determined and has even attempted to file a case to evict them from the land hence this suit.

Though served with copy of the plaint and other documents on 8th March 2014, the defendant neither entered appearance nor filed defence and on 19th May 2014, interlocutory judgment was entered against him. The suit was thereafter listed for formal proof on 17th July 2014.

The 1st plaintiff gave evidence which was adopted by the two other plaintiffs. That testimony was that the plaintiffs and defendant are all brothers and children of the late WACHIRA NAMU and RUTH WACHIRA. The defendant is the eldest of the four brothers and the suit land was registered in his

names since their father was very sick. The land was given by the clan and the defendant was to hold it in trust for all of the parties herein who are living on the same and on which their late parents were buried. However, the defendant is now claiming to be the sole owner of the suit land and has even filed Civil Case No. 7 of 2003 at Runyenjes Court seeking their eviction but that request was dismissed – see Exhibit 7. That led to the filing of this suit.

The plaintiffs called as a witness AYUB NJAGI MAGONDU (PW4) their cousin and member of their clan who testified that in 1962 or thereabout when the clan was distributing land, the suit land herein was registered in the names of the defendant to hold in trust for his siblings because their father was un-well. However, the defendant has now refused to determine the trust and give the plaintiffs their respective shares.

I have considered the evidence by the plaintiffs and their witness. The same is un-controverted as the defendant did not enter appearance or file any defence.

It is clear from the Green Card (Exhibit 1) in respect of the suit land that the same is registered in the names of the defendant since 9th August 1961 although several cautions have been registered thereon. It is the plaintiffs case that the defendant who is their elder brother was registered as the owner of the land in trust for all of them. Their evidence has been supported by a clan member AYUB NJAGI MAGONDU (PW4) who is familiar with the suit land. That testimony, as I have stated above, remains un-challenged. Although the defendant is the registered proprietor of the suit land which is registered under the now repealed ***Registered Land Act***, it is now clear that such registration does not absolve the registered proprietor from his obligation as a trustee – ***KANYI VS MUTHIORA 1984 KLR 712***. It is also clear that under customary trust, the eldest son inherits land to hold in trust for himself and the other heirs – see ***NJUGUNA VS NJUGUNA 2008 1 K.L.R 889*** and also the recent Court of Appeal decision in ***HENRY MWANGI VS CHARLES MWANGI C.A CIVIL APPEAL NO. 245 of 2004 (NBI)***. It is clear therefore that the plaintiffs have not only adduced direct evidence that the defendant holds the suit land in trust for them, but also case law supports the proposition that the registration of land in one's names does not relieve him of his obligation as a trustee. I am accordingly satisfied that the defendant holds the suit land in trust for himself and the plaintiffs and I make a finding to that effect. I am also satisfied that the defendant has refused to determine the trust and is using the suit land as his sole property and hereby direct that the said trust be determined and the suit land be shared equally between the plaintiffs and defendant.

One issue that has concerned me is whether infact this suit has been caught up in the provisions of ***Section 7 of the Civil Procedure Act*** and is therefore res-judicata. I say so because, the plaintiffs produced proceedings in Runyenyes Resident Magistrate's Court Civil Case No. 7 of 2003 (Exhibit 2) involving the same parties herein over the same subject matter only that in the Runyenjes Court Case, the defendant was the plaintiff and he was seeking to eject the defendants (plaintiffs herein) from the suit land. That suit was dismissed for being time barred although in his judgment, the trial magistrate also alluded to the issue of trust.

For res-judicata to apply as a bar to a subsequent suit involving the same parties and subject matter, the following suit must be shown to exist:

- a. ***The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit***
- b. ***The former suit must have been between the same parties or parties under whom they claim***
- c. ***The parties must have litigated under the same title***
- d. ***The Court which decided the former suit must have been competent and finally***
- e. ***The former suit must have been heard and finally decided by the Court.***

Looking at the above which are the pre-conditions to apply before res-judicata can apply under ***Section 7 of the Civil Procedure Act*** and having looked at the pleadings and proceedings in the Runyenjes Court Case (Exhibit 2), I find that the parties were indeed the same parties herein litigating over the same subject matter now before this Court. However, the matter substantially in issue in this suit is that of

trust and although the trial magistrate in the Runyenjes Court did allude to the issue of trust, that Court presided over by a Resident Magistrate (D.O. ONYANGO) had no jurisdiction to deal with the claim founded on trust and therefore, that Court cannot be said to have been – competent Court – see illustration (d) above. In view of the above, I am satisfied that this suit is not caught up by the provisions of **Section 7 of the Civil Procedure Act.**

Ultimately therefore, having considered the un-controverted evidence of the plaintiffs and their witness, I am satisfied that they have proved their case against the defendant as required in law and I accordingly enter judgment for them as prayed. As the parties are family, I make no order as to costs. Finally, I direct that as much as possible the sub-division of the suit land should take into account the portions now occupied by the parties.

It is so ordered.

B.N. OLAO

JUDGE

25TH SEPTEMBER, 2014

25/9/2014

Before

B.N. Olao – Judge

Mwangi - CC

Mr. Ithiga for Plaintiff – present

Defendant – absent

COURT: Judgment delivered this 25th day of September, 2014 in open Court.

Mr. Ithiga for Plaintiff – present

Right of appeal explained.

B.N. OLAO

JUDGE

25TH SEPTEMBER, 2014

MR. ITHIGA: This is an Embu file. Could it be taken back to Embu for purposes of execution?

COURT: This file be transferred to Embu Environment and Land Court.

B.N. OLAO

JUDGE

25TH SEPTEMBER, 2014