



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC NO. 52 OF 2019

JOHN ISAAC OSANGIRE.....PLAINTIFF

= VERSUS =

BENARD OKAPESI IPAYE.....DEFENDANT

J U D G M E N T

1. The plaintiff John Isaac Osangire filed this suit on 29th August 2019 against the defendant pleading that they are blood brothers. He pleaded that L.R S. Teso/Amukura/188 measuring 4.4Ha was owned by their father Ipaye Osangire. The plaintiff also pleaded that his father allowed him to occupy and use a portion of this land measuring 2.1ha and which portion he has developed and is staying on todate.

2. The plaintiff impleaded the defendant that this land was transferred to the defendants' name to hold in trust for the sons of Ipaye Osangire. He set out the particulars of trust as follows:-

- (a) *L.R. No. South Teso/Amukura/188 is ancestral land which belonged to Ipaye Osangire.*
- (b) *That the plaintiff and the defendant are sons of Ipaye Osangire.*
- (c) *That the plaintiff occupy a distinct portion measuring 2.1 hectares.*
- (d) *That the plaintiff has developed the portion he is occupying extensively with full knowledge of the defendant.*
- (e) *That the plaintiff will otherwise have been registered on L.R No. South Teso/Amukura/188.*

3. The plaintiff accuses the defendant of breach of the trust particulars wherefore that;

- (a) *Embarking on sale of L.R. South Teso/Amukura/188.*
- (b) *Failing to note that the other children of Ipaye Osangire are entitled to portions of L.R No. South Teso/Amukura/188.*
- (c) *Assuming that the mere registration as owner of L.R No. South Teso/Amukura/188 entitles him to deal with the same as he deems fit.*
- (d) *Dealing with L.R No. South Teso/Amukura/188 before ensuring that the rightful beneficiaries have secured titles to their various portions.*

4. Reasons wherefore the plaintiff prays for judgment against the defendant for orders;

- (i) **A declaration order that the defendant hold L.R South Teso/Amukura/188 on his behalf and in trust of the plaintiff.**
- (ii) **An order that the defendant do sub-divide L.R No. South Teso/Amukura/188 and transfer to the plaintiff a portion measuring 2.1 hectares failing which the Deputy Registrar of this Honourable Court to sign all papers to effect sub-division of L.R No. South Teso/Amukura/188 and transfer a portion thereof measuring 2.1 hectares in the name of the plaintiff.**
- (iii) **Costs of the suit.**

5. In denying the claim, the defendant filed his defence on 2nd December 2019. The defendant pleaded that he is the legal owner of L.R. No. S. Teso/Amukura/188 and this suit has been filed to embarrass him and his family. It is the defendant's contention that the plaintiff has his own land. The defendant further avers that the court did not have jurisdiction. He urged the Court to dismiss the suit.
6. The hearing commenced on 3rd February 2021 with the plaintiff giving his evidence as **Pw1**. He reiterated that the defendant is his brother and their father is now old at 94 years. He stated that their father shared the land between the three (3) of them in 1992 by planting sisal boundaries. **Pw1** said that he placed a caution on the title in the year 2002 when he learnt of the defendant's actions of selling land, before the caution was removed in 2015 to enable their father share the land to them.
7. The plaintiff stated further that he was not made aware when the land was transferred to the defendant and denied the land was transferred to the defendant for administration. He also denied that land was never sold on his behalf for dowry and school fees. That part of the land sold to the 4 people did not concern my share. The witness was put to cross-examination and said that his father was still alive. That he was sure the portion he was occupying is measuring 4 acres. He did not know why their father transferred the land to the defendant's name.
8. Joseph Okapes Ajaa who calls the parties herein as his nephews gave evidence as **Pw2**. He stated that the father to defendant and plaintiff had inherited the suit land from his father. The witness stated that the land was registered in the defendant's name in trust for the three sons of Ipaye Osangire. This was done in 1992 in the presence of Liguru with each son taking possession of their positions. In cross-examination **Pw2** said he did not know in whose name the land is currently.
9. DW1 in his written statement stated that he is the rightful owner of L.R. S.Teso/Amukura/188 after his father Ipaye Osangire transferred it to him willingly as his eldest son. He added that the land was transferred to him with the knowledge of his two brothers. It is the defendant's contention that the Plaintiff was bought land elsewhere but went on to state that as the administrator, he was to take the initiative of giving each one of them a share which process was yet to take place. He however denied that the plaintiff was entitled to 2.10ha he was claiming.
10. In cross-exam, the defendant agreed that the land initially belonged to his father. That the plaintiff was bought for 2 acres of land from Jared Mumunya who is the owner of S.Teso/Amukura/124 but the title is yet to be transferred to their father's name. The witness admitted also that each of them have their distinct homes and their portions they are cultivating which looks equal. The defendant conceded that the portion he sold comprised in the share he was using and further conceded that the land was transferred to his name to hold in trust because their father was sickly.
11. Abraham Ogema gave evidence as the second defence witness on 2nd November 2011. He stated in his written statement that the suit land was transferred into the defendant's name with a duty on the defendant to carry out the subdivision to enable each of them get his share of the land. Dw2 stated that their father had sold 2 acres out of the suit land to pay for the plaintiff's children school fees, settle the plaintiff's dowry and also buy for him land elsewhere.
12. During cross-exam by Mr Bogonko learned counsel for the plaintiff, the witness said their father had received the suitland from their grandfather. He confirmed the land was registered in the Defendant's name because their father was sick and the defendant was later to share land between the three of them. That their father had shown each of them where to live on the ground, Dw2 lives on the upper side, the defendant lives in the middle and the plaintiff lives on the outer part.
13. From the evidence adduced, there is no dispute that the suit land was first registered in the names of the father to the defendant and plaintiff. It was subsequently transferred to the name of defendant. The question is whether or not the registration of the defendant was for personal benefit or he was to hold into rust for himself and his two brothers.
14. The matter was filed in court because the defendant denied he was holding the land in trust for the plaintiff. In establishing his claim, the plaintiff produced several documents inter alia, an order obtained in BSA CMCC Misc. Case No. 52 of 2002 issued on 7th October 2015 which stated thus *"The caution placed on land No. S. Teso/Amukura/188 be removed to enable Applicant transfer land to all his children including the Respondent. The said order be served on the lands' department"*.
15. The application having been made by Ipaye Osangire must have set out the reasons why he wanted the caution placed by the plaintiff to be removed. It is on the basis of those reasons he gave that the order of 7th October 2015 was made. Similarly, in paragraph 6 of the defendants' written statement dated 3/2/2020, he said thus, *"That I as an administrator, I was to take the initiative of giving each one of us his share which was within the knowledge that such process was to take place, that we were still in the process of carrying out sub-division I was served with the court summons and I came to learn my brother had taken me to court claiming that my father had given him 2.10 hectares which I was to give him equally and sign the transfer forms which is not true"*.
16. To further demonstrate the existence of a trust **DW2** reiterated similar sentiments of **DW1** at paragraph 6 of his written witness statement where he stated that, *"That after transferring the land to the defendant, it was now his duty to carry out sub-division to enable each one of us get his share as we had agreed"*. The plaintiff has explained that he was not told the land had been transferred to the defendant's name. He only discovered this when the defendant started selling the land as shown in the sale agreement dated 23rd July 2020 produced as *Pex 2*.
17. The plaintiff has adduced evidence that proves the existence of a trust in regard to the registration of the suit land in the name of the defendant includes;

- (i) They are family members.

(ii) They are both living on and cultivating the suit land.

(iii) The suit land is ancestral land.

18. It is in light of the foregoing that I enter judgment in favour of the plaintiff and make the following orders;

a) A declaration that the defendant holds L.R South Teso/Amukura/188 on his behalf and in trust of the plaintiff and their brother Abraham Ogema.

b) An order be and is hereby made that the defendant does sub-divide L.R No. South Teso/Amukura/188 and transfer to the plaintiff a portion measuring 3½ acres (1.45ha) plus provision for road of access.

c) In default, the Deputy Registrar to execute all the sub-division and transfer documents to effect the transfer of the portion measuring 1.4ha in the name of the plaintiff.

d) The plaintiff to meet the cost of the sub-division and transfer process for his portion.

e) Each party to bear their costs of the suit.

DATED, SIGNED & DELIVERED AT BUSIA THIS 28TH DAY OF APRIL 2022.

A. OMOLLO

JUDGE