



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT

HCC. NO. 187 OF 2012(O.S)

LAWRENCE GACHAU KIHU PLAINTIFF

VERSUS

MARY WANGUI MAINA1ST DEFENDANT

KIHU MAINA.....2ND DEFENDANT

JUD

G M E N T

The applicant filed Originating Summons on the 24th Aug, 2012. The subject matter of the suit is a piece of land **LR.NO LOC 2/KANDERENDU/63 (herein referred to as suit property)** measuring 13.7 acres. The land was registered in the names of **Kihu Nyanjui (Nyanjui)** as the trustee of the Kihu family during the land demarcation in 1962 as the eldest son in the family as their father died in 1943. In 1971, Nyanjui and his brother Kiarie Kihu agreed to take a loan of Kshs 27,000 secured by a charge over the suit property from the I.C.D.C to do business without informing other brothers including Maina Kihu (Maina). However Kiarie died in 1972 in a road accident.

It's stated that the land was placed for auction in the Daily Nation newspaper by **Maasai Auctioneers** in the year 1976 for lack of servicing the loan. The deceased **Maina Kihu** called his brothers to know how to clear the loan and discharge the charge. He stated that no one responded after 3 times so he went and took another loan from National Bank of Kenya and repaid the loan whose outstanding amount was 32,000. He then had the land transferred to his name in the year 1977 by **Nyanjui Kihu**.

In the year 2000 Nyanjui died and the applicant raised the issue of the ownership of the suit property with **Maina Kihu** when he realized it was registered in his name. He registered a caution against the suit property. **Maina Kihu** filed a reference in the **Kigumo Land Disputes Tribunal** seeking a finding on the status of ownership. The Tribunal found in favour of the applicant that the suit property was a family land subject to succession and each family member listed to get 2 acres of land, Maina having discharged the loan over it, the tribunal found he should own 2 acres more than the others, getting 4 acres to his name. The Senior Resident Magistrates Court in Kigumo adopted that finding as its ruling.

Maina was dissatisfied with that finding and appealed to the Nyeri Provincial Land Appeals Board in appeal no 5 of 2006, but died in 2008 before the appeal was finalized. The applicant being at a loss has filed in this court this application seeking for declaration against the respondents who are the beneficiaries of Maina as mother and son for orders that;-

- 1. The respondents to take up the letters of administration of the estate of Maina Kihu to***

enable subdivision of the suit land in accordance with the finding of the Land Tribunal as adopted by the Senior Resident Magistrates court on their failure to substitute him and prosecute the appeal.

2. The suit property was held by Maina as a trustee of the Kihu family hence subject to succession and distribution to the beneficiaries.

3. That the appeal pending before the Appeals Board has abated on failure of substituting Maina to enable prosecution to completion.

The 2nd respondent filed a replying affidavit denying any entitlement to the applicant over the suit property stating that since the deceased redeemed it alone while the applicant and the other brothers did nothing, the land rightfully passed to Maina Kihu as he did not benefit from the loan secured by the charge which he had to redeem by his own money. He says the deceased stood in a position of any person buying the land from auction and that the trust relationship ended with that bailing out of the suit land from the hand of the auctioneer single handedly and Nyanjui transferred the land to the deceased with no objection from the applicant.

The matter came up hearing on the 2.5.2013 and subsequently, the applicant was in person while the respondents were represented by **Mr. Muchiri**. The applicant reiterated the claims as filed. He added that it was all the brothers of Nyanjui who took the loan including the late Maina. PW2 testified that his father Ng'ang'a was the one who was left in custody of the land after the death Kihu Nyanjui in 1943 till 1963 when Nyanjui was registered as trustee of the Kihu family. The plaintiff's witnesses did not know much about the loan, but knew what happened at the Tribunal. They did testify that the brothers of the deceased were employed in their lifetime.

The 2nd respondent on his part testified that his uncles including the applicant took a loan which they failed to repay in time and the property was advertised for auction. His father Maina involved the other brothers but they were not interested. He stated that the ownership of the property to his fathers name was changed before the payment of the amount requested by the auctioneer to enable him pay as if he is redeeming his own property, but the agreement to that effect was oral.

The kihu family had other lands including Loc.3/ Githumo and Loc3/ Githumo/T25. The brothers of the deceased had other lands and Nyanjui purchased land in kikuyu. He stated that his father had to charge the same land to National Bank to pay for the loan he had obtained to pay for the initial loan of I.C.D.C. The respondents called a registrar to confirm the entries in the land registry as he had stated.

The parties closed their cases and filed their submissions. In the applicants submissions he states that since the appeal has not been prosecuted the ruling of the Tribunal remains valid as there has been no judicial review to quash that decision.

The respondents on their part raised the issues of the validity of the Tribunal verdict stating it did not have jurisdiction to deal with issues relating to trust hence that finding they seek to rely on is a nullity in law. He also states the persons sued have no capacity to be sued for not being the owners of the suit property.

From the foregoing the issues for determination are as follows:

- 1). Whether Nyanjui was holding the property in trust of the Kihu family.***
- 2). Whether Nyanjui had powers to charge the suit property to secure a loan with his brother Kiarie.***
- 3). Redemption of a trust property by a beneficiary.***
- 4). whether the tribunal had jurisdiction over the matter.***

5). **Rights of other beneficiaries under the trust in such circumstances where the trustee unfairly deals with the trust property.**

6). **Parties to this suit.**

On the issue of whether there existed any trust on the property, it was testified that the property was registered in names of Nyanjui being the eldest son of the family after their father died in 1943. In the Court of Appeal case of ***Njuguna Vs. Njuguna, (2008) 1 KLR*** It was found to be a custom in the kikuyu tribe that the eldest son of a family was registered to hold land on behalf of his siblings as a muramati. In the other cases of ***Jason Gitimu Wangara V Martin Munene Wangara & Others [2013] eKLR***, the court found that registration of a proprietor does not extinguish other rights in the land. In the case of ***KANYI VS. MUTHIORA, (1984) KLR, 712*** it was held that registration of land in the name of a proprietor under the Registered Land Act did not extinguish rights under Kikuyu customary law and neither did it relieve the proprietor of his duties or obligations as trustee. This is because caselaw has found that customary trust need not be registered (***HENRY MUKORA MWANGI V CHARLES GICHINA MWANGI [2013] eKLR***).

It is evident as at the time of taking the loan Nyanjui as the muramati of the family was holding the suit property as a trustee. A trustee has duties to perform in respect to the trust property among them investing the property to ensure it has good profits however charging a trust property is always a last resort in this end and anything done in respect of the trust property should be done with the consent of the beneficiaries. This being a family land charging the same without the authority of the beneficiaries is improper and since it was done to benefit only 2 of the many beneficiaries, it was an illegal act and a breach of Nyanjui's duties as a trustee.

However whereas there are remedies for breach of trust, when the beneficiaries know of the breach but acquiesce to the breach they are estopped from claiming against a trustee and since no one filed any claim against Nyanjui when most of the beneficiaries were of adult age, then upon his death they were estopped from claiming breach of trust.

The property charged can be redeemed after the date of redemption has matured. This can be done by any person having an interest in the property. This includes chargor and other persons claiming under him like assignees, longtime tenants. In case of land held on trust like in our case a trustee has the first right to redeem on behalf of the beneficiaries as the absolute owner of the land. However on a trustee's failure and with a good cause shown, a beneficiary can redeem the suit property. Since a beneficiary can redeem the other question that arises is whose property it is. The trustee held it on behalf of many, but now when the trustee redeems it alone, it is his own or whose. Beneficiaries right to take action was considered in the English case of ***Hayim -vs- Citibank NA (1987)1 AC 730***.

In this case it was held that "...When a trustee commits a breach of trust or is involved in a conflict of interest and duty or in other exceptional circumstances a beneficiary may be allowed to sue a third party in the place of the trustee. But a beneficiary allowed to take proceedings cannot be in a better position than a trustee carrying out his duties in a proper manner ..." It was also held "... A beneficiary has no cause of action against the third party save in exceptional circumstances, which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate, or to protect the interests of the beneficiary in the trust estate."

From the two positions in the common law jurisdiction which is persuasive, the court has seen that a beneficiary has no better standing and priority in an action than a trustee and they can only take action if the trustee has grossly failed in his duties to the trust estate. It has also been stated when the beneficiary has shown good cause and taken action he stands on the position of a good trustee taking his responsibilities properly.

In order to succeed, the beneficiaries must show two things. "... first show that the case is one in which the court should direct that the trustee assert his claim against the third party or, which amounts to the same thing, a case in which the trustee should be required to lend his name so that the beneficiaries

can claim...” In such actions the beneficiary becomes a claimant and the trustee and the 3rd party become the defendants. The action taken by Maina to repay the loan to redeem the property from being auctioned can be seen in this light in absence of indication of how he took the position to redeem. He became a better trustee to the estate than his irresponsible brother in the trust.

If it was to be argued that **Maina** was acting for his own benefit as his beneficiaries are arguing, then he ought to have executed an agreement with **Nyanjui** the trustee purchasing the interest in the trust property so as to stand in a position of a purchaser, or some legal document showing how the interest in the land passed from Nyanjui to himself, other than just redeeming the land. This is because sec 3(3) of the Law of Contract Act requires any disposition in dealing in land be in writing and signed by the parties thereto. The respondents did not exhibit any agreement of sale of the suit property. The court is left taking it as an instance of redemption of the trust property by a better trustee.

The other issue raised is whether the Tribunal had the jurisdiction to hear the matter related to trust in land. They have argued that the issue lies not in the tribunal which was set for the purposes of hearing boundary disputes. They relied on the Court Of Appeal case of **Joseph Karobia Gicheru Vs Michael Gachoki Gicheru(civil appeal no 161 of 2011)**, where the court found that proceedings which are a legal nullity are empty and no amount of acquiescence by the other party can confer such a tribunal jurisdiction and validity.

I have looked at the Land Disputes Tribunals Act no 18 of 1990 now repealed, and find that the jurisdiction of the Tribunals was limited in section 3 to “**(a)the division of, or the determination of boundaries to land, including land held in common;**

(b) a claim to occupy or work land; or (c) trespass to land.”

I have considered the limitation of jurisdiction provided there at and have come to conclusion that the issue of trust is not among those provided . In the case of **M’anthaka M’mwoga V M’boore Mwoga [2006] eKLR** “...where elders arbitrated over disputes as to ownership of land or trust thereof, their decision would be a nullity and is barred by fact of S.159 of the Registered Land or S.3(1) of the Land Disputes Tribunals Act.” this ousts the jurisdiction of the Land Disputes Tribunal hence its finding is a nullity as it had no jurisdiction to deal with the matters it delved in. I am also guided by the finding in the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**, where the court found that jurisdiction is everything. The tribunal having had no jurisdiction their finding is thus a nullity and cannot be relied on as the applicant proposes.

There is also raised the issue of the parties to the suit. The person sued are the beneficiaries of Maina Kihu in whose name the suit property is registered. The applicant has prayed that there be ordered substitution of the respondents in the place of Maina who has since died but no letters have been sought. In this matter I find that the administrators of the estate of a Maina Kihu are the right parties to be sued and are the right ones also to defend the suit. The respondents have not obtained the grants of representation and yet they have participated in these proceedings actively. I find since they are the beneficiaries of the estate of the late Maina Kihu in whom the titles is vested, the court has power to order that they take up the necessary letters of administration to the estate in question as prayed in the suit. In this point I rely on the decided case of **Joseph Kahindi & 313 Others V Mohammedali Sulemanji Essaji [2004] eKLR** where the court refused to dismiss a suit for want of capacity on the part of the beneficiaries of the estate of the deceased, as Order 1 Rule 9 & 10 allows the court to make orders as to joining the proper parties to a suit.

Having canvassed all the issues, I do find that in the circumstances of the case, **Maina Kihu** ,whose beneficiaries are the respondents, saved the suit property from being disposed off through an auction, I find despite absence of proper documents in the matter he did take a bold step in preserving the estate while the applicant and the others were also working and having an income and or did nothing to redeem the bad situation the trust property was placed in, and while they should have chipped in to assist in the repayment of the loan folded their hands, it is in interest of equity he gets the biggest share of the suit property. This I am guided by the finding in the case of **Godfrey Kagia Githire V George Ndichu**

Kagia & 4 Others [2008] eKLR where her ladyship Koome J as she then was, applied the rules of equity to find that helping in contributions assists in determining whether one has a share in property or not. Equity helps the vigilant and not the indolent.

I have not been addressed on the issue whether some of the claimants are the beneficiaries of Nyanjui and Kiarie or not who would not have gotten any share of this property their parents having been the beneficiaries of the initial loan. One should not benefit twice over the same property. Since that was not properly articulate at the trial I leave it at that. Had Maina had the right documents of purchase in an intended auction It would have been easier to find he stood in a position of a purchaser for value despite the problems in the trusteeship. Having said all that I make the following orders;-

- a). The respondents are ordered to take up the letters of administration of the estate of Maina Kihu in respect to **LR.NO.LOC 2/KANDERENDU/63**.
- b). The applicant and the other 4 claiming under the trust in this matter to get 1 acre each, while the remaining 8.7 acres to go to the respondents as the beneficiaries of estate of Maina Kihu.
- c). Each party to bear its own costs.

Dated, signed and delivered at Nyeri this 29th day of October 2014.

A. OMBWAYO

JUDGE