



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CIVIL CASE NO. 9 OF 2014
JACKSON EKIM OMAIDO.....PLAINTIFF
VERSUS
LUCIA NGAIRA
ROSELINE ADISA.....DEFENDANTS.
LUCY ODIAMA

J U D G M E N T

INTRODUCTION

1. The plaintiff is the registered owner of LR. No. 8699/7 (original number 8699/3/2) (suit land). The defendants are all widows of the late Collins Otwane Omunga who died on or around 1/8/2014 (deceased). The suit land is part of a larger parcel which was originally owned by a colonial settler called **Alfred Arthur Durani Martineau (Durani)**.

2. The father of the plaintiff **Jonam Omaido Mishael (Jonam)** was an employee of Durani. In 1972, Durani gave Jonam half undivided joint interest in the land. The deceased was too an employee of Durani who started off as a supervisor. The deceased rose to become a manager.

3. On 16/10/1992, Jonam died. His half undivided interest in the suit land automatically reverted to Durani. In 1994, Durani died. Durani had left a will in which he had bequeathed the suit land to the plaintiff. In 2008, the plaintiff had the suit land transferred into his name.

4. On 1/8/2014, the deceased died. The three defendants who are his widows started preparations to inter his remains on the suit land. This prompted the plaintiff to move to court where he filed this suit in which he seeks a permanent injunction restraining the defendants from interring the remains of the deceased on the suit land.

5. The defendants filed a defence and counter-claim in which they seek among other declarations that they and the dependants of the deceased are entitled to 359.5 acres of the suit land or the equivalent of one million shillings per acre and that the deceased's remains should be buried on the suit land.

PLAINTIFF'S CASE.

6. The plaintiff testified that he is the registered proprietor of the suit land. The suit land was originally

owned by Durani who later brought on board Jonam by giving him half undivided joint interest in the suit land. When Jonam died in 1992, his half undivided joint interest reverted to Durani. Durani then incorporated him to the management of the suit land which was called Amagoro farm. Durani died in 1994. Prior to the demise of Durani, he had prepared a will in which he appointed the plaintiff as executor of his estate. The plaintiff duly filed probate and was allowed to deal with the suit land. He testified that there was no objection to him being granted probate. No one contested Durani's will. He testified that the deceased was an employee at Amagoro farm and that he has no claim to any part of the land. The plaintiff testified that when Durani died, he retained the deceased as an employee of the farm.

7. Before Joram died, he was occupying a farm house which had been put up by Durani. When Jonam moved to a new house, he allowed the deceased to move into the old house. The deceased was also allowed to put up a temporary house on the farm where he stayed with two of his wives. By virtue of his employment status the deceased was allowed to grow maize and rear animals on the farm.

8. The plaintiff testified that when the deceased died, he offered to purchase 3 acres at a neighbouring farm where the deceased could be interred. The defendants were initially agreeable to the idea but they later changed their minds. The plaintiff testified that though he had previously allowed former employees who died to be buried on the farm, he did not want the deceased buried on the suit land as he foresaw that the deceased's children might in future bring problems when they start claiming part of the suit land. The plaintiff testified that the deceased had been allowed to bury two of her daughters on the suit land.

DEFENDANTS' CASE.

9. The second defendant who is the second wife of the deceased testified that the deceased was an employee of Durani. That Durani had given the deceased 359 acres and that the plaintiff had all along been telling them that he was aware that Durani had given the deceased 359 acres. She testified that the plaintiff had gone against that and that he was now preventing them from burying the deceased on the land.

10. The second defendant testified that each of their elder sons have been cultivating about 10 acres each. She testified that previously former employees have been buried on the suit land and that the plaintiff is preventing burial of the deceased on the farm in a bid to deny them their rightful share to the suit land.

ANALYSIS OF EVIDENCE AND THE LAW.

11. The plaintiff contends that the deceased has no stake in the suit land and that he should not therefore be buried on the suit land. on the other hand, the defendants are contending that the deceased should be interred on the suit land on the ground that Durani had promised the deceased 359.5 acres of the suit land. The defendants contend that even though the property is registered in the name of the plaintiff, he is holding the same in trust for the family of the deceased. The issues which emerge for determination are firstly whether Durani promised to give 359.5 acres of the suit land to the deceased and secondly whether the plaintiff is holding the suit land in trust for the family of th deceased.

12. The defendants are contenting that Durani promised to give 359.5 acres to the deceased in 1984. They contend that Durani promised to give the deceased and other employees land in lieu of payment for their salaries and wages which they had not been paid for long. The defendants contend that Durani promised to give each employee 5 acres. It is said that there were 41 employees. Fourty of them were promised 5 acres each and the deceased was promised 359.5 acres. Such promise if it was ever made was not documented. DW1 conceded in cross-examination that the plaintiff allowed the deceased to put up a mud walled structure on the farm. DW1 also conceded that the deceased died as an employee in the farm.

13. The defendants called DW2 Agostino Omuse who testified that he was employed by Durani in 1949. He left employment in 1987 after being sacked when he started agitating for a stake in Durani's land. He testified that in 1984 Durani convened a meeting in which he said that he was retaining 750 acres, Jonam was to get 750 acres and the plaintiff and his brother Walter Omaido were to get 200 acres each. The evidence of this witness is doubtful. He conceded in cross-examination that he was promised land after

this case is over. He even conceded that there is a time he was advised by the deceased to lie that there was no land available when some politicians wanted to have a share of the suit land. He stated that it is the deceased who advised them to lie because even the deceased wanted part of the land.

14. What is not in doubt is that the deceased was an employee of Durani. When Durani died, the deceased continued to be an employee of the plaintiff. The deceased was staying in a house which belonged to Jonam. The deceased sought permission from the plaintiff to put up a mud house in the suit land. This permission was granted by the plaintiff. This was conceded by DW1. DW2 also conceded that the deceased was staying in the house which was being occupied by Jonam. It is therefore not possible that the deceased would have been seeking permission to do all these if indeed he had been promised 359.5 acres by Durani.

15. The plaintiff produced documents showing that the deceased was an employee. Durani died in 1994. Durani had left a will. If Durani had promised the deceased any land, he will have stated so in his last will made in 1993. Even after Durani had died, the deceased still could not do anything on the suit land without the permission of the plaintiff. This is a clear recognition of the fact that he had no interest in the land. When the plaintiff was getting probate of the will of Durani, the deceased did not protest. The issue of promise of 359.5 acres is being brought up by the defendants. If there was indeed any promise, by Durani to the deceased, the deceased should have at least started laying claim to it soon after Durani died. I therefore find that there was no promise to the deceased by Durani. The second wife of the deceased who testified as DW1 did not even know when the alleged promise was made. DW2 conceded in cross-examination that he was promised land after this case is over. This is clear evidence that there is a scheme to get part of the plaintiff's land through a fraudulent scheme.

16. I now move on to consider whether the plaintiff is holding the suit land in trust for the family of the deceased. The suit land was not family land. This is land, which was initially owned by Durani. Durani on his own free will gave half share undivided joint interest to Jonam. When Jonam died in 1992 his share reverted to Durani who in his will gave the entire interest to the plaintiff. It is said that the deceased was uncle to the plaintiff. The plaintiff was an employee of Durani and he continued to be an employee of the plaintiff until his death. Since the suit land was not family land, there is no basis upon which the deceased's family can lay claim to any part of the suit land. The existence of a trust is a matter of evidence. One has to prove existence of right to the land. There has to be either contractual, filial or other relationship from which a trust could be implied. In the present case there is no basis upon which a trust could be implied. The mere fact that the deceased had worked on the farm for long does not entitle him to a share of the suit land. If indeed Durani wanted to give him any part of the suit land, he should have done so through his last will. I find that the plaintiff is not holding the suit land in trust for the deceased or his family and in any case the plaintiffs have no capacity to agitate for land on behalf of the estate of the deceased.

17. The mere fact that former employees of Durani and the plaintiff have been interred on the suit land does not entitle the defendants to bury the remains of the deceased on the suit land. The plaintiff's fears that if he allowed the deceased to be buried on the suit land, this will bring problems as his family will use that to lay claim to his land are fortified by the defendants counter-claim in which they are seeking 359.5 acres of the suit land. The plaintiff had offered to purchase 3 acres where the deceased could be buried. This offer was rejected. The deceased can be buried at the farm of his last wife. There was an argument that traditions dictate that the deceased be buried where his first wife is. If this is the case, then this is a custom which ought to have been proved by evidence from experts from the deceased's community. The deceased was living in a house given to him by Jonam. There is evidence that when he wanted to put up a temporary house, he had to seek permission from the plaintiff. He cannot therefore be buried in the suit land. He has no stake in the suit land. I find that the plaintiff has proved his case on a balance of probabilities. On the other hand, I find that the defendant's counter-claim which is incompetent has not been proved. The defendant's counter-claim is hereby dismissed with no order as to costs.

18. As the plaintiff has proved his case to the required standards, a permanent injunction is hereby given restraining the defendants by themselves, their agents and or servants from burying the remains of the

deceased on the suit land. Each party to bear their own costs.

[Dated, signed and delivered at Kitale on this 16th day of December, 2014.]

E. OBAGA.

JUDGE.

In the presence of Mr. Teti for plaintiff and Mr. Kraido for defendants.

Court Clerk – Isabellah.

E. OBAGA.

JUDGE.

16/12/2014.