



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ENVIRONMENT AND LAND COURT
ELC CASE NO. 278 OF 2013

JASON GITIMU WANGARA PLAINTIFF

VERSUS

MARTIN MUNENE WANGARA OTHERS DEFENDANTS

JUDGMENT

By his plaint originally filed in the Chief Magistrate's Court at Kerugoya, the plaintiff claiming to be the registered owner of a parcel of land known as MWEA/TEBERE/B/61 sought orders that the defendants be evicted from the said land (hereinafter referred as the suit land). He also sought for costs.

The 1st, 2nd, 3rd, 4th, 5th, 7th, 9th, 13th and 14th defendants filed defence in which they claimed that the plaintiff was registered as owner of the suit land in trust for other members of the family and that in any event, this suit was res-judicata as the Mwea Land Dispute Tribunal had already concluded the case. This issue was not taken up during the trial for obvious reasons. Most importantly, the defendants put in a counter claim urging the Court to find that the plaintiff holds the suit land in trust for the defendants and an order for the sub-division of the same equally between the plaintiff and defendants and separate title deeds be issued and also a permanent injunction restraining the plaintiff from evicting the defendants from the suit land.

The plaintiff testified that the defendants are his step brothers and he is the registered owner of the suit land. He produced the Title deed as an Exhibit 1 which he said he obtained in 1965 when the suit land was given to him by his father. He said the 10th defendant was also given his own land adding that the 2nd, 3rd, 10th and 11th defendants do not live on the suit land which is 35 acres. He therefore sought the eviction of the defendants.

His witness JONAH GITIMU MUBUTHI (PW2) who is a cousin to the parties and chairman of the Unjiru Clan testified that during the demarcation process, the plaintiff was given land since he was a secretary or clerk to the clan and his father also had other land but preferred to live on the suit land since it was near the river. He denied that plaintiff holds the land in trust for his siblings.

JOSEPH MUBENA MWIRIA (PW3) who is also a cousin to the parties also testified that the plaintiff was given the suit land during the period of demarcation since he was secretary to the committee. He also added that plaintiff's father had his own land although he lived on the suit land.

The 2nd defendant gave evidence on behalf of all the other defendants who adopted his evidence.

He told the Court that the parties are step brothers and that the suit land belonged to the clan and since their father had a large family, he was given the suit land by the clan but it was registered in the names of the plaintiff to hold in trust for the family because he was the eldest son and their father had another parcel of land. He added that his late father had seven wives and he was buried on the suit land together with the other six wives leaving only Naomi who is alive and lives on the suit land. He said his father had developed the suit land and there are twenty other homesteads on it. The witness added that this dispute was heard by the Tribunal which ordered the plaintiff to give them two acres each but they appealed and the Appeal Committee ordered that they be given 5 acres. However, all these proceedings were set aside by the High Court in Embu. He denied that the plaintiff was a secretary to the committee and insisted that the plaintiff holds the land in trust and should share it equally among the family. He produced as exhibit the certificates of search in respect of the suit land and also MWEA/TEBERE/238, the decision of the Land Dispute Tribunals as well as orders in Wanguru Civil Case No. 27B of 2006 and Embu High Court Misc Case No. 61 of 2010, photographs and a list of the family members. His co-defendants MARTIN MUNENE (DW2), SIMON MUCHIRI (DW4), FRANCIS GITHAKA (DW5), JOHN KARATU (DW6), JOSEPH MUREITHI WANGARA (DW7), PETER KAGIRI (DW8), ONESMUS MATHIKE (DW9) and JOSEPH MUCHIRI (DW10) all adopted his evidence and sought orders as per their counter-claim.

Both Ms Wangari for the plaintiff and Ms Thungu for the defendant put in written submissions which I have considered together with the evidence on record.

It is not in dispute that the parties in this dispute are brothers and that the plaintiff is the registered owner of the suit property. It is the submissions of plaintiff's advocate that under **Section 26 of the Land Registration Act 2012**, the plaintiff's title to the suit land cannot be defeated except on grounds of fraud or misrepresentation. The defendant's case is that the plaintiff was registered as owner as trustee for the family because during the period, it was a custom among the Kikuyu that the eldest son would be registered as owner of land in trust for the family.

In his evidence in chief, the plaintiff testified that he was given the suit land by the clan and when cross-examined by the Court, he confirmed that he was the first born of his father who had seven wives. He also confirmed that his father had two other parcels of land being MWEA/TEBERE/B 163 and MWEA/TEBERE/B 238 although he was living on the suit land and was buried there together with his six wives. It also came out clearly in the course of the trial that the parties' late father's only surviving wife namely Naomi and the defendants all live on the suit land. The land itself is 35 acres and although the plaintiff claims that he was given the land by the committee during the demarcation because he was the secretary or clerk, the Court finds it highly unlikely. Indeed he did not avail any evidence that he was a secretary to the committee or even minutes to confirm that the committee gave him the suit land. The Court is satisfied that it was more probable that in fact the land was given to his late father because of his large family of seven wives and over thirty (30) children and being the first born, the land was registered in his names to hold in trust for the family. That would explain why his father and his wives and indeed other family members are buried on the suit land. The plaintiff also in the course of his testimony said he was given the land by his father. It is highly unlikely that his father would give him alone the suit land leaving nothing for his siblings. From the evidence on record, the Court finds that the defendant's assertion that the plaintiff was registered as owner of the suit land in trust for the family is the more credible conclusion that this Court can arrive at.

Ms Wangari's submission that the registration of the plaintiff as owner of the suit land is conclusive proof of ownership is not supported in law or judicial precedence. There is nothing in the **Registered Land Act** (now repealed) and under which the suit land was registered, which precludes the declaration of a trust in respect of registered land even if it is a first registration. Secondly, **Section 28** of the same Act contemplates the holding of land in trust – see

MUMO VS MAKAU 2004 1 K.L.R 13(CA). The parties herein are Kikuyu and in **KANYI VS MUTHIORA 1984 K.L.R 712 (C.A)**, the Court held that the registration of land in the name of one party under the **Registered Land Act** does not extinguish the right of other parties who may be entitled to it under Kikuyu Customary Law. See also **MUKANGU VS MBUI 2004 2 K.L.R 256**. The new

Land Registration Act 2012 makes it very clear in **Section 28** that unless the contrary is expressed in the register, all registered land shall be subject to various overriding interest without their being noted on the register and one such interest is a trust including customary trust. In view of the above, Ms Wangari's submissions cannot be up-held. A customary trust need not be registered.

The existence of such customary trust is clearly borne out of the evidence herein. During cross-examination by the defendant's counsel Ms Thungu, the plaintiff stated as follows:-

"It is true that it was then the practice that the first born is given land. I was not holding the land in trust for anybody. The land is my land and my family. It was not for my brothers".

However, the plaintiff does not explain why only he was given the whole 35 acres of the suit land. It can only be that the **"practice"** of giving land to the first born that he himself alludes to arises out of Kikuyu custom. The defendants did confirm that the plaintiff as the eldest son was given the land by the clan to hold in trust for the family. In my view, there is sufficient evidence on record to make a finding that the plaintiff holds the land in trust for the family. This is supported by the fact that the parties who are all family live on the suit land and so too did their father who was buried on the same land together with his six wives as well as other family members. There is also evidence that there are some twenty homesteads on the suit land. Under those circumstances, the only conclusion that this Court can arrive at is that the plaintiff, though registered as proprietor of the suit land, holds the same in trust for the family and that registration does not relieve him of his duty as a trustee. As such, he cannot evict the defendants from the suit land as he now seeks and his claim is therefore dismissed.

On the other hand, the defendants have proved that the plaintiff holds the suit land in trust for them and the other family members which should therefore be shared equally. They are entitled to the orders sought in their counter claim.

The Court therefore makes the following judgment and orders.

1. ***The plaintiffs claim against the defendants is dismissed.***
2. ***Judgment is entered for the defendants against the plaintiff as per the counter claim as follows:-***

- (a) ***A permanent injunction restraining the plaintiff from evicting the defendants from the suit land***
- b. ***As trustee, the plaintiff shall ensure that the suit property is equally shared between the family bearing in mind that their late father had seven wives. The sub-division shall as much as practicable be in accordance with whatever portion the defendants are currently occupying. He shall facilitate the execution of the relevant transfer and other documents and in default, the Deputy Registrar of this Court to execute all the necessary documents for and on behalf of the plaintiff.***
- c. ***This being a family dispute, each party shall meet their own costs.***

It is so ordered.

B.N. OLAO

JUDGE

26TH AUGUST, 2013

26/8/2013

Coram

Ms Odhiambo for Wangari for Plaintiff present

Mr. Njagi for Thungu for Defendant present

1st, 2nd, 3rd, 4th, 5th, 7th, 9th, 13th and 14th defendants present

COURT:

Judgment delivered in open Court this 26th day of August 2013.

Right of appeal explained.

B.N. OLAO

JUDGE

26TH AUGUST, 2013