



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 991 of 2012

JOHN BURETT MUREI & 3 OTHERS.....PLAINTIFF

VS

SAWE TANUI CHELAGATDEFENDANT

(Preliminary Objection that suit not filed by legal representative of deceased – suit filed by way of Originating Summons seeking relief that defendant holds suit land in trust for the plaintiffs- Suit not seeking relief on behalf of Estate of deceased person- preliminary objection disallowed)

R U L I N G

This ruling is in respect of a Preliminary Objection taken by counsel for the respondent. The preliminary objection is that the entire suit is a nullity for want of locus standi on the part of the plaintiffs/applicants. To put the issues into perspective, I will lay out the background of this case.

This suit was instituted by way of Originating Summons brought under the provisions of Order 37 Rule 8 and 14 of the Civil Procedure Rules, 2010, and Sections 66,68 and 107 of the Land Registration Act, 2012. The O.S has been filed by four applicants (whom I will refer to as the plaintiffs) against the one respondent (defendant). It is the case of the plaintiffs that they are brothers to the defendant. It is further their case that their late father, one Cherigat Siron (Deceased), prior to his demise in 1990, had purchased shares in Kipkoror Farmers Co-operative Society which entitled him to 9 acres of land. He purchased these shares by paying an amount of Kshs.300/= in 1978. At the time the deceased died in 1990, the title deed to his entitlement had not been issued. It is their case that after their father died, they went to seek the title deed but realized that the defendant had already obtained the same in the year 1999. They thereafter instituted a complaint in the Land Disputes Tribunal which partitioned the suit land among the four of them and their mother. This decision of the Tribunal was quashed vide Eldoret High Court Civil Appeal No.74 of 2003 delivered on 9 May 2008, for the reason that the Tribunal had no jurisdiction to determine a dispute of this nature. The plaintiffs have now filed this O.S seeking to have determined the following questions

1. WHETHER Land parcel No. NANDI/MOGOBICH/JUBABET BLOCK 1/50 prior to registration in the Defendant's name belonged to the late CHERIGAT SIRON?
2. WHETHER the late CHERIGAT SIRON had purchased shares worth Kshs.300 from Kipkoror Farmers Co-operative Society so as to obtain Land Parcel No. NANDI/MOGOBICH/KIBABET 1/50 measuring approximately 9 Acres?
3. WHETHER the Defendant registered Land parcel No. NANDI/MOGOBICH/KIBABET 1/50 in his name using dubious or fraudulent means?
4. WHETHER NANDI/MOGOBICH/KABABE 1/50 registered in the Defendant's name be

declared that the Defendant was holding the same in trust for the Plaintiffs herein?

5. WHETHER this Honourable Court will compel the Defendant to divide NANDI/MOGOBICH/KIBABET 1/50 equally to the Plaintiffs herein?

6. WHETHER the plaintiffs are entitled to costs of the suit from the Defendant?

Alongside the O.S, the plaintiffs filed a Motion dated 10 October 2012, devoid of any indication under what provision of the law it is brought. It is an application seeking an order restraining the defendant and his agents from surveying, alienating, demarcating, selling, transferring, assigning, and or leasing the suit land registered as MOGOBICH/KIBABET BLOCK 1/50 pending the hearing and determination of the suit. The applicant first appeared before the High Court, on 10 October 2012 under certificate of urgency but were not successful in obtaining any restraining orders before my brother Azangalala J (as he then was). The application was however certified as urgent and given a hearing date of 17 October 2012. On 17 October 2012, Mr. Buluma learned counsel for the defendant, brought to the attention of court that he had filed a Preliminary Objection and the court ordered the preliminary objection to be heard on 5/12/12. On 5/12/12 I had the opportunity of hearing both counsels for the plaintiffs and defendants on the preliminary objection.

Mr. Buluma for the applicant urged me to find that the plaintiffs do not have the mandate to institute this suit. It was his argument that the present suit has been brought by the plaintiffs on behalf of their deceased father but without first obtaining a grant of letters of administration. It was his view that even if a trust is alleged by the plaintiffs, the defendant could only hold the suit land in trust for his deceased father and not in trust for the plaintiffs. Following this argument, it was his view that the plaintiffs first needed to obtain a grant of letters of administration before filing the present suit. He stated that the applicants do not hold any grant of letters of administration and for that reason, this suit was a nullity and must fail *ab initio*. Mr. Buluma referred me to the decision of Ibrahim J (as he then was) in Eldoret Civil Appeal No. 74 of 2003 (the precursor to this suit) where it was stated that “*The dispute herein does not fall within any of the aforesaid areas of jurisdiction of the Tribunal. The dispute before the Tribunal was an ownership dispute touching on title and also disputes relating to Succession of the Estate of the late Cherigat Siron.*”

To Mr. Buluma, this dictum was clear that the suit can only be for the benefit of the Estate of the deceased and therefore it was a prerequisite for the plaintiffs to first obtain a grant of letters of administration.

Mr. Chemoiyai, learned counsel for the plaintiffs, asserted that the plaintiffs had the requisite locus to institute this suit. He argued that the plaintiff’s case is based on trust; that the defendant in as much as he is the registered owner, holds the suit land in trust for the plaintiffs. He stated that the property belongs to the defendant and not to their deceased father and therefore does not comprise part of his estate for a succession cause to be necessary. He referred me to the same decision of Ibrahim J, wherein the parties were advised to file a civil suit. To Mr. Chemoiyai, this was the type of civil suit contemplated. Mr. Chemoiyai also referred me to the case of *Limuli vs Marko Sabayi (1979) KLR 251* a case in which the plaintiff had filed suit against his uncle who was holding the land in trust for his late father.

I have evaluated the pleadings herein and the arguments of counsel. I will restrict myself to whether the plaintiffs have locus in this suit. It is not in dispute that the plaintiffs do not hold any grant of letters of administration. In my view, for the plaintiff’s suit to survive, it has to be brought in their own capacity asserting their own rights. If the applicants are asserting the rights of their deceased father, or have filed this suit to recover the suit land on behalf of the estate of the deceased, then it is a prerequisite that they first obtain a grant of letters of administration.

In my view, the suit as drawn does seek to answer the question whether the defendant holds the suit land in trust for the plaintiffs. There are inferences to questions whether the deceased purchased the suit land and whether it belonged to him. However, there is no indication that the plaintiffs are seeking to recover the suit land for the Estate of their deceased father. It is their allegation that the defendant is holding the

suit land in trust for them. Indeed there is no question framed by the plaintiffs alleging that the defendant is holding the suit land in trust on behalf of the Estate of their deceased father.

The plaintiffs do not have to attempt to recover the suit land on behalf of the Estate of the Deceased to sustain this suit. It is enough that they allege that the defendant is holding the suit land in trust for them. In the case of *Limuli vs Marko Sabayi*, Cotran J, held for the plaintiff who was suing in his own capacity. The plaintiff was son of one Samuel, a brother of the defendant. Samuel died leaving behind the plaintiff and one sibling. According to the plaintiff the land Butsotso/Ngotse/298 was family land which their father Samuel, and the defendant, inherited from their father. The land was however registered in the name of the defendant, their uncle. The court held that the defendant held the suit land in trust for the plaintiff.

I think it would be improper for me at this stage to impute that this suit has been filed on behalf of the Estate of the deceased. I cannot therefore uphold the preliminary objection. It is hereby dismissed with costs.

DATED and DELIVERED at ELDORET this 19th day of December 2012.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of :-

Mr. G.K. Chemoiyai of M/S Chemoiyai & Co Advocates for the plaintiff.

Mr. J.K Mokuu holding brief for Mr. Buluma of Buluma & Co Advocates for the defendants.