



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 163 of 2006

SAMSON OLE RINKA 1ST PLAINTIFF

LEI OLE RINKA 2ND PLAINTIFF

VERSUS

MICHAEL OTUMA OLE RINKA 1ST DEFENDANT

JAZAN KIMANI MWANGI 2ND DEFENDANT

MARY MUMBI NGEETI 3RD DEFENDANT

MARY MARINE SIPARO 4TH DEFENDANT

TABITHA NJERI MICHAEL 5TH DEFENDANT

ISAAC MWANGI NGEETI 6TH DEFENDANT

JUDGMENT

The plaintiffs stated in their plaint that they are blood brothers of the 1st defendant and during the adjudication process at Ololchani Adjudication Section, it was agreed that the 1st defendant be registered as the proprietor of a family land known as **Ololchani Adjudication Section/110**, hereinafter referred to as “**the suit land**” to hold in trust for the plaintiffs. Thereafter the 1st defendant was so registered but he breached the trust and fraudulently started to subdivide the suit land and transferred portions thereof to the 2nd, 3rd, 4th, 5th and 6th defendants. Particulars of breach of trust and fraud were set out in the plaint. The suit land was subdivided to bring forth plots Nos. **Ololchani Adjudication Section/107, 226,240,683** and **684** registered in the names of the 2nd, 3rd, 4th, 5th, 6th and the 1st defendants respectively. The plaintiffs averred that the subdivision of the suit land was illegal and prayed that the subdivisions arising therefrom be nullified.

The suit was filed with consent of the District Land Adjudication and Settlement Officer, Transmara in terms of the provisions of **section 30 (1)** of the **Land Adjudication Act**. The

plaintiffs prayed for a declaration that the 1st defendant holds the entire of what was hitherto plot No. Ololchani Adjudication section/110 on trust for themselves and himself. They also prayed for nullification of all the resultant subdivisions aforesaid and rectification of the register. They further prayed for an order to compel the 1st defendant to subdivide the suit land and share it out equitably with them. They also sought a permanent injunction to restrain the defendants by themselves, their agents and/or servants from cultivating, grazing, interfering with or in any other manner dealing with the suit land. The plaintiffs further prayed for eviction of the 2nd to 6th defendants from the suit land and mesne profits.

The 1st defendant filed a statement of defence and denied that he was registered as proprietor of the suit land in trust for the plaintiffs. He denied all the other allegations made by the plaintiffs against them.

The 2nd, 3rd, 4th, 5th and 6th defendants filed a joint statement of defence and denied the plaintiffs' claims as far as they relate to them. They averred that the suit is frivolous, vexatious and an abuse of the court process.

The 1st plaintiff had granted authority to the 2nd plaintiff to appear and testify on his behalf. However, the 2nd plaintiff, because of serious hearing deficiency, gave Power of Attorney to his son, **Joseph Muiya Ole Rinka, PW1**, to testify on his behalf.

PW1 testified that the plaintiffs and the 1st defendant are brothers. The 2nd plaintiff is the oldest followed by the 1st defendant and then the 1st plaintiff. The suit land originally belonged to Kiptanai Ole Rinka, his grandfather, PW1 stated. He said that the plaintiffs and himself are living on the suit land. His deceased mother was buried on the suit land. He further testified that the suit land was adjudicated in the name of the 1st defendant to hold it in trust for the plaintiffs and himself. This is because the 1st defendant was educated while his brothers were not. It had been agreed that the land was to be divided equally amongst the three brothers. That notwithstanding, the 1st defendant subdivided the land without consent of his brothers and sold portions thereof to the other defendants as stated in the plaint. He added that the plaintiffs and himself had no other land apart from the suit land.

In cross-examination by Mr. Otieno for the 2nd to 6th defendants, PW1 said that there was no documentary evidence that the 1st defendant was holding the suit land in trust for himself and the plaintiffs. The adjudication was done in 1973 when PW1 was about six years old. The

land dispute had earlier been referred to the area Land Disputes Tribunal but the tribunal was unable to handle the same. There were also various cases before Kilgoris Senior Resident Magistrate's court in relation to the suit land.

The evidence of PW1 was corroborated in several material aspects by **Lepore Ole Maito, PW2** and **Wilson Kimei, PW3**. The two witnesses said that their parcels of land were neighbouring the suit land and were aware that the plaintiffs had all along lived on the suit land.

The 1st defendant is a retired Enrolled Nurse. He was 78 years old when he testified. He said that land demarcation in the area was started in 1978 and the exercise was completed some years thereafter and the records taken to Nairobi. The suit land was adjudicated in his name. In the year 2005 during the constitutional referendum the plaintiffs and their children decided to raise this claim. Some maasai men had told all the Kikuyus in the area to move out of the lands they occupied. The 1st defendant is married to a Kikuyu woman, the 5th defendant. The other defendants are his brothers and sisters in law. The plaintiffs and their children did not manage to evict the 2nd to 6th defendants but they forcibly entered into their parcels of land which he had lawfully transferred to them. The 1st defendant further stated that at the time of land adjudication, the plaintiffs were living at a place known as Shangoe. They had also been registered as land owners elsewhere.

In cross-examination, the 1st defendant clarified that before the land was registered the first plaintiff was living with him and their mother on the suit land. It is the second plaintiff who was living at shangoe. Their mother died in 1976 and was buried there. At that time he was working at Narok District Hospital and the 1st plaintiff was taking care of their mother's property. But thereafter the first plaintiff moved to Olalui area. At the time of land adjudication it was only him (the first defendant) who was living on the suit land. The first plaintiff is currently living on a different parcel of land that is next to the suit land. In between there is a river.

The 1st defendant further testified that after the plaintiffs moved into the disputed land, he instituted a criminal case against them. He had sold parcel No. 226 to Mary Mwangi, the mother of 2nd, 3rd and 5th defendants at a price of Kshs. 150,000/=.

The third defendant, DW2, who is living on parcel No. 226, denied that she was holding the land in question in trust for the plaintiffs. She said that her deceased mother, Mary Wairimu

Mwangi, bought the land from the 1st defendant. Her mother sub-divided the land in 1988. The 2nd defendant got parcel No. 683 and the 6th defendant parcel No. 684. She remained with the rest, which retained No. 226. They moved into the land in 1983 but the plaintiffs went there around 2004. They reported the trespass to the area Chief and the District Officer but no action was taken. Eventually the 1st plaintiff and Anna Rinka were arrested and charged in **Kilgoris SRM's Court, Criminal Case No. 743 of 2004** for the offence of forcible detainer contrary to **section 91** of the **Penal Code**. They were found guilty, convicted and sentenced to a fine of Kshs. 10,000/= in default 4 months' imprisonment. The court established that the 1st plaintiff and one Anna Lepishoi Rinka were in unlawful possession of land parcel number 226, Ololchani Adjudication Section.

In Criminal Case No. **474 of 2008** before the same court, the 1st plaintiff was warned against interfering with the suit land.

Jazan Kimani Mwangi, DW3, corroborated the evidence of DW2 in all material aspects. He produced copies of Adjudication records which showed that land parcel No. 683 was registered in his name as at 14th May, 1997. Land parcel No. 684 is registered in the name of the 6th defendant. He denied that they are holding the suit land in trust for the plaintiffs.

The 5th defendant testified that she got married to the 1st defendant in 1964. She stated that she was not holding any land in trust for the plaintiffs as alleged.

In cross examination, she stated that the 1st plaintiff was living with her husband when she got married. The second plaintiff was living elsewhere. The 1st plaintiff sold his part of the land to Wairimu Mwangi, she added.

The parties through their respective advocates filed written submissions which I have carefully perused. The issues for determination may be set out as hereunder:

(i) Whether the suit land was held by the 1st defendant in trust for the plaintiffs.

(ii) Whether the 1st defendant violated any trust.

(iii) Whether the plaintiffs are entitled to a share of the suit land.

(iv) Whether the plaintiffs are entitled to the orders sought.

From the evidence on record, the suit land was originally occupied

by the mother of the plaintiffs and the first defendant. She is now deceased.

At the time of land adjudication the land was registered in the name of the first defendant. PW1 said that there is no evidence that the first defendant was to hold the land in trust for himself and the plaintiffs. PW1 was 6 years old at the time of land adjudication in the area. PW1 and PW2 had no personal knowledge that the first defendant was registered as the owner of the suit land in trust for himself and the plaintiffs, they only relied on what the plaintiffs told them. The first defendant conceded that during the life time of their mother the first plaintiff was living with them on the suit land but the second plaintiff was living at an area known as Shangoe. But in 1978 the first plaintiff moved to an area known as Olalui. He said that the maasai used to move from place to place.

He said that the suit land was registered in his name as the absolute proprietor of the same and not in trust for the Ole Rinka family. At the time he was the only person who was in occupation of the same. The plaintiffs were living elsewhere. According to him, the plaintiffs and their family members came back to the land during the last Constitutional Referendum in 2005 and started to threaten the 2nd to 6th defendants demanding that they vacate the land because they were Kikuyus. As a result various complaints were made against the plaintiffs. The first plaintiff was even arrested, charged and convicted for forcible detainer in respect of land parcel number 226 which is a subdivision of the suit land.

That was in **criminal case No. 743 of 2004** in the SRM's court at Kilgoris.

From the evidence on record there is no sufficient proof that the first defendant was registered as the owner of the suit land in trust for the plaintiffs and himself. Trust is a question of fact and has to be proved appropriately, see **MUMO -VS- MAKAU** [2002] 1 E.A. 170. Ordinarily, since the suit land was originally occupied by the mother of the plaintiffs and the first defendant, I would have held that upon its demarcation the first defendant was to hold the land in trust for the entire family but I accept as a fact that the maasai used to migrate from place to place. This is a notorious fact which was alluded to by the first defendant and was not disproved by the plaintiffs. At the time of land adjudication in the area only the first defendant was living on the land. It was upon the plaintiffs to prove their case in terms of the provisions of **section 107** of the **Evidence Act**. It cannot therefore be said that the first defendant breached or violated any trust. It was also not proved that he committed any fraud.

The first defendant lawfully subdivided the suit land. He sold parcel No. 226 to Wairimu

Mwangi who in turn subdivided it into several portions which are currently owned by some of the defendants. As per the Adjudication record, parcel No. 683 is registered in the name of the 2nd defendant, parcel No. 684 in the name of the 6th defendant while parcel No. 226 is owned by the 3rd defendant together with one Evans Memusi Mukoma. The 4th defendant is the owner of parcel No. 236 and one Herman Stellan Ongingi owns parcel No. 240. They were so registered in 1997.

All the evidence on record shows that the plaintiffs and their family members started laying claim over the suit land and/or the resultant subdivisions thereof in 2004. If they had been in occupation of the suit land in 1983 when the first defendant sold a portion thereof to Wairimu Mwangi they would have raised their complaints at the time. Wairimu Mwangi and her relatives took possession of the land from 1983 or thereabout.

The first plaintiff, having been found guilty and convicted of forcible detainer in criminal case No. 743 of 2004 in the SRM's court at Kilgoris, did not prefer any appeal. The court established that he was in occupation of parcel No. 226 Ololchani Adjudication Section without any colour of right. The District Land Adjudication and Settlement Officer, Transmara, testified that parcel No. 226 belonged to Mary Mumbi and her son, Evans Memusi Mukoma. This was a judgment in **rem** and not having been appealed against is conclusive proof that the first plaintiff trespassed upon that parcel of land which did not belong to him. See **section 44** of the **Evidence Act**.

The plaintiffs did not prove their case against any of the defendants. Consequently, I dismiss all the prayers in the plaintiffs' suit and award costs thereof to the defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF JUNE, 2010.

**D. MUSINGA
JUDGE.**