



REPUBLIC OF KENYA



KENYA LAW
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**Mukufu & 2 others v Wangula (Cause 280 of 2017)
[2022] KEELC 4879 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
CAUSE 280 OF 2017
DO OHUNGO, J
SEPTEMBER 20, 2022**

BETWEEN

CHRISTOPHER INGOSI MUKUFU 1ST PLAINTIFF

PETER LUVASO MUJUMBE 2ND PLAINTIFF

SISKO SILA MUGOFU 3RD PLAINTIFF

AND

CHARLES LWABWUKHA WANGULA DEFENDANT

JUDGMENT

1. By plaint dated June 13, 2017, the plaintiffs averred that the defendant was registered as proprietor of the parcel of land known as Isukha/Mugomari/202 (the suit property), that the suit property is family land and that the defendant holds the suit property in trust for the plaintiffs' families. That the defendant promised to hand over the suit property to the families but has not honoured his promise. The plaintiffs therefore prayed for judgment against the defendant for:
 - a. A declaration that the defendant holds land parcel number Isukha/Mugomari/202 in trust for them.
 - b. An order transferring land parcel number Isukha/Mugomari/202 to the plaintiffs
 - c. Costs of the suit
 - d. Any other order.
2. The defendant entered appearance on September 7, 2017. On November 23, 2017, his advocates filed statement of defence dated October 30, 2017. The defendant averred that he was the sole and absolute registered proprietor of the suit property and denied the alleged trust. The defendant further



averred that the plaintiffs lack capacity to bring the suit and denied the plaintiffs' other allegations. The defendant prayed that the suit be struck out or dismissed with costs.

3. The defendant passed away on October 31, 2017 and pursuant to an order made on May 30, 2018, his son Timona Inyanya Wabukha substituted him. The plaint and defence were however not amended to reflect the substitution.
4. At the hearing, Christopher Ingosi Mugofu testified as PW1. He stated that the suit property has been family land over generations and that prior to registration it belonged to Muchenjene who was the plaintiffs' great grandfather. That Muchenjene gave the land to one Mr Ilamuka who was a brother to the plaintiffs' grandfather Mr Wangula. That the land was then used as communal land and when land adjudication started, Mr Ilamuka got land at Lumakanda settlement scheme. Consequently, Mr Ilamuka left the portion he had to Samuel Shimanyula, Barnabus Mukofu, Shem Chumbe, Charles Wabukwa Wangwe and Isaya Ilosi who were the children of Mr Wangula.
5. PW1 went on to state that in the year 1970 there were proceedings in Mugomari Adjudication Section Objection Case Number 8/70-73 whereby one Khasiani Tuka sued Charles Wabukwa, Barnaba Mukofu and Elamuka Muchenjene and others who were the plaintiffs' parents. That the case was dismissed after which their parents filed an appeal at the adjudication committee. He added that he is a son to Barnabus Mukofu who was one of the appellants and that Charles Wabukwa was his father's co-appellant. That the appeal was successful and that it was held that the land belonged to Barnaba Mukofu, Charles Wangula and Elamoka Muchenjene who had by then moved to Lumakanda. That, consequently, it was decided that the land be registered in the names of Charles Lwabukha and Mr Ilamuka. That the entire land was registered as Isukha/ Mugomari/202 and Isukha/ Mugomari/190. That Isukha/Mugomari/190 was registered in the name of Ilamuka Muchenjene while Isukha/ Mugomari/201 was registered in the name of Charles Lwabuka with a view to later having it for the family.
6. He further stated that Mr Muchenjene said that he had enough land at Lumakanda and therefore donated Isukha/Mugomari/190 to the other brothers. That although Isukha/Mugomari/190 is in Muchenjene's names, it is used by the family of Charles Lwabuka and for all purposes Charles Lwabuka is the beneficial owner. He added that later, Mr Elamuka Muchenjene withdrew his interest in Isukha/ Mugomari/190 and told the plaintiffs' fathers that they could share it. That the plaintiffs are not claiming Isukha/Mugomari/190 since their parents agreed that it should remain the property of Charles Lwabuka, the defendant.
7. PW1 further stated that his father did not attend the actual exercise of registering the land and that he represented his father at the exercise. That he and Charles Lwabuka went to the lands office and jointly decided to have the entire land registered in the name of Charles Lwabuka. That it was understood that the family of Mukofu, who was PW1's father was also a joint owner of the land and that their parents did not have time to get the land sub divided into individual shares. That the defendant was registered as a trustee for the family and hence the suit property should be shared amongst the plaintiffs.
8. PW1 added that his co-plaintiff Peter Luvaso Mujumbe, is a son to Shem Wangula who was a brother to his (PW1's) father while Sisko Sila Mukofu is his (PW1's) brother. That none of the parties have constructed on Isukha/Mugomari/202 and that each has different pieces of land which were also given to them. He also stated that two of his paternal uncles were still alive as at the date of his testimony and that his father died in 2008. He produced a certified copy of the register in respect of the suit property (PExb 1), copy proceedings of Mugomari Adjudication Section Objection Case Number 8/70-73 (PExb 2), grant of letters of administration intestate issued to Silas Sisiko Mukofu in respect of the estate of Barnaba Mukofu Wangulu Alias Mukofu Wangula (PExb 3), certificate of search in respect of



- Isukha/Mugomari/190 (PExb 4) and certificate of search in respect of Isukha/Mugomari/187 (PExb 5).
9. Sulumena Atema Shimanyula testified next as PW2. She stated that the plaintiffs and Timonah Inyanya Lwabukha are her nephews and that Charles Lwabukha Wangula was her brother-in-law. That the suit property belongs to both the plaintiffs and the defendant.
 10. The plaintiff's case was then closed.
 11. Timonah Inyanya Lwabukha (DW1) opened the defence case. He stated that Charles Lwabukha Wangula got the suit property from Luka Chimwani and that neither Luka Chimwani nor Charles Lwabukha Wangula held the suit property in trust for the plaintiffs or any other person. He added that the plaintiffs are his cousins and that the parties' grandfather gave each of his son's land. That in the judgment in Mugomari Adjudication Section Objection Case Number 8/70-73, the adjudication committee concluded that the suit property belonged to Charles Lwabukha Wangula. He further stated that the suit property is not community land and that when this case was filed, the second plaintiff's father was alive and was still alive as at the date of his testimony but did not make any claim over the suit property.
 12. DW1 further testified that the plaintiffs' parents never filed any case against the defendant claiming the suit property and there was never any dispute between the plaintiffs' parents and the defendant over the suit property. That the dispute in Mugomari Adjudication Section Objection Case Number 8/70-73 was between Jeremiah Khasiami s/o Luka Chimwani who was claiming land from Wangula and that the Wangula family got plot numbers 188, 189, 190, 201 and 203 after the appeal on the adjudication process. That Isukha/Mugomari/202 was not affected by the adjudication dispute.
 13. John Litunda Ngaira (DW2) stated that the parties to this case are his neighbours. That there was a meeting on January 6, 1994 whose minutes he recorded and at which it was decided that the suit property belonged to Charles Wangula. He produced a copy of the minutes (DExb. 1) and added that the attendees did not sign the minutes.
 14. Next, Cosma Juma Mate (DW3) stated that the plaintiffs' father never laid any claim over the suit property and that the plaintiffs' family has never used it. That Charles Wangula got the land from his cousin and never held the land in trust for anyone. That Ilamoka Muchenjene got land from his father but did not reside on it. That Ilamoka gave Charles Lwabukha the land and in addition Charles Lwabukha also got his own share, so he ended up with two plots.
 15. Lastly, Joel Litiolo (DW4) testified that the plaintiffs are his uncles, that the second plaintiff's father is still alive and that Ilamuka Muchenjene was his maternal grandfather. That he was raised by Ilamuka Muchenjene who told him that he gave the suit property to Charles Lwabukha and that Charles Lwabukha gave him (Ilamuka Muchenjene) money.
 16. The defence case was then closed.
 17. Parties thereafter filed and exchanged written submissions. I have considered the parties' respective pleadings, evidence and submissions. The issues that arise for determination are whether the defendant held the suit property in trust for the plaintiffs and whether the reliefs sought should issue.



18. Whether or not trust exists is a question of fact that must be established through evidence. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court stated as follows:

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

19. From the material on record, it is apparent that the plaintiffs and the defendant are members of one extended family. The plaintiffs therefore meet the requirement of belonging to the same family or clan as well as the test of the relationship not being so remote or tenuous as to make the claim idle or adventurous. Equally, there is no dispute that the deceased defendant was and remains the registered proprietor of the parcel of land known as Isukha/Mugomari/202 (the suit property), as is indeed confirmed by the certified copy of the register that was produced in evidence. The said register shows at entry number 4 in its proprietorship section that the deceased defendant was registered as proprietor on March 22, 1991 and that on August 28, 2014, a caution was registered in favour of the first plaintiff herein claiming a beneficiary interest.
20. In an effort to prove trust, the plaintiffs relied extensively on proceedings of the adjudication committee, the arbitration board as well as the resultant objection proceedings. I note however that in the proceedings in Mugomari Adjudication Section Objection Case Number 8/70-73, it is stated in the findings dated February 8, 1973 that the suit property herein was free from any adjudication dispute. My own reading of the proceedings produced by the plaintiffs has not yielded anything to show that any claim was made in respect of the suit property.
21. Did the deceased defendant hold the suit property for the benefit of the plaintiffs? I am afraid that the plaintiffs have not demonstrated so. The second plaintiff's father who is still alive neither filed any case claiming the suit property nor testified in support of the plaintiffs' case. The first and third plaintiffs' father who passed away in the year 2008 never filed any case during his lifetime claiming the suit property. The first plaintiff confirmed in his testimony that the plaintiffs' great grandfather gave land to all his grandsons and that they (the plaintiffs) all have land which they are in occupation of and which they inherited from their fathers who in turn had inherited from the plaintiffs' grandfathers. Further, the first plaintiff confirmed in his testimony that they have never had possession or occupation of the suit property.



22. In view of the foregoing, the plaintiffs have failed to demonstrate that the deceased defendant held the suit property in trust for them. That being the case, the reliefs sought cannot issue. In the result, I dismiss the plaintiffs' case. Considering the relationship between the parties, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF SEPTEMBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiffs

No appearance for the defendant

Court Assistant: E. Juma

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