



REPUBLIC OF KENYA
HIGH COURT AT NYERI
CIVIL SUIT 46 OF 2006

MARTHA S. KOMBO.....1ST PLAINTIFF
PETER K. KOMBO.....2ND PLAINTIFF
LEAH N. KOMBO.....3RD PLAINTIFF
LUCY W. KOMBO.....4TH PLAINTIFF
HANNAH N. KOMBO.....5TH PLAINTIFF

Versus

HEZEKIAH KOMBO NDOLO.....DEFENDANT

JUDGMENT

This case came before me for formal proof on 23rd April 2007. I confirm that I have looked at the proceedings of this matter and I note that although there is a minute for the entry of interlocutory judgment against the Defendant in default of an appearance, the same was never signed by the Deputy Registrar. I do however confirm that there is on record, an affidavit of service filed in court on 3rd November 2006. This affidavit confirms that the Defendant was served with Summons and Complaint and that the Defendant acknowledged that service by signing at the back of the Summons and dating his signature, that is, 25th September 2006. Despite that service the Defendant did not enter and appearance within the prescribed time. Accordingly I do hereby enter interlocutory judgment against the Defendant in default of an appearance.

The Plaintiffs in this case are children of the Defendant and their mother, Priscilla Kombo now deceased, was the second wife of the Defendant. It is pleaded that the Defendant and Priscilla Kombo deceased, married under the Kikuyu customary law. The Plaintiffs in their plaint aver that the Defendant is the registered proprietor of three properties namely Title Number **LOC. 6/GIKARANGU/342**, Title Number **LOC. 6/GIKARANGU/2784** and Title Number **LOC. 6/GIKARANGU/3641**, which shall hereinafter be referred to as the suit property. The Plaintiffs further averred that the Defendant was also the registered proprietor of three other properties which the Defendant illegally or arbitrarily and without the Plaintiffs'

consent transferred to strangers and also distributed to children of the first marriage on different dates between 1979 and 1993. That in so distributing to children of the first marriage the Defendant left out the Plaintiffs out of the scheme of distribution despite the fact that they are entitled to the said property as the Defendant's children. The Plaintiffs further averred that the Defendant was embarking on distributing the suit property without including the Plaintiffs despite the fact that that property is the Plaintiffs' ancestral home. The Plaintiffs are aggrieved by the manner of Defendant's distribution of the property which they allege that the Defendant held in trust and therefore seek orders for mandatory injunction to compel the Defendant to include the Plaintiffs in the scheme of distribution of the suit property. Further the Plaintiffs pray for an order for permanent injunction to restrain the Defendant, his servants or agents from selling, disposing, transferring or pledging the suit property on the ground that the same are held in customary law for the Plaintiffs.

P. W. 1 was Lucy Wairimu Kombo. She stated that the Defendant is her father and that they are six siblings of the union between the Defendant and the late Priscilla Kombo. That one of the siblings has since died. She stated that the Defendant has a first wife by the name of Esther Kombo who also has six children. P.W. 1 said that her late mother was buried on the suit property in particular property No. 2784. She stated that their homestead is also located on that property. In her evidence she said the Defendant, her father, had other properties which he gave her step brothers whilst others he sold. She enumerated the properties given to her step brothers, namely John Kimani Kombo who was given Title Number 2783. Further her step brother James Kombo was given Title Number 3654. That the Defendant sold Title Number 2785 and Title Number 2866. She produced certificate of searches in respect of all these properties. The witness continued to give evidence of sale by the Defendant of four other titles. P. W. 1 stated that all those properties that were either given to her step brothers or sold to third parties, were inherited by the Defendant from their grandfather. In respect of the suit property, P.W.1 stated that at present no one lives on the same but that after the death of their mother, their late brother lived upon and cultivated the same but after his death the Defendant chased away the Plaintiffs. P. W. 1 herself stated that she resides and works in Nairobi. She however, stated that her brother Peter Kimani, 2nd Plaintiff, who is unemployed, wanted to cultivate that land, but was refused by the Defendant. This prompted this dispute to be taken to the Chief and at the Chief's meeting the Defendant gave a condition to the Plaintiffs using the land that they should slaughter a goat for him. P.W.1 stated that the Defendant, however, later on, changed his mind. P.W.1 in evidence stated that she and the other Plaintiffs were born on the suit property and that her late brother was cultivating on the same land. She stated that the three properties forming the suit property are all together and that that is where their late mother cultivated. The witness confirmed that she had carried out searches on the suit property and was able to confirm the same are in the name of the Defendant. She stated that they proceeded to the Chief's office and the Chief gave them a letter which letter they used to be able to lodge cautions on the suit property.

P. W.2 was Hannah Njeri Kombo. She confirmed that they were six siblings but that her brother Henry Kombo had passed away. She stated that she is a business lady but that she is not married. She further stated that the Defendant, her father, had two wives, one of them being their mother Priscilla Kombo who died in 1996. She further confirmed that their mother was buried on the suit property. Further she stated that they had a lot of land but that the Defendant had sold some of the land and had given other to her step brothers. That their late brother Henry was cultivating on the suit property and when he died Peter Kombo, the 2nd Defendant remained on the property. That the Defendant refused the said Peter Kombo to continue to stay on the property and proceeded to chase him away. This witness also confirmed that on taking their dispute with the Defendant to the Chief that the Defendant agreed to give the Plaintiffs the suit property on condition that the Plaintiffs would slaughter a goat. However, he later changed his mind and threatened to sell the suit property. That these properties together with those given to her step brothers and the ones that were sold were all inherited from their grandfather. She therefore concluded her evidence by saying that is the reason why they seek the orders in their claim.

P. W. 3 Peter Kimani Kombo stated that he lives in Nairobi. He was once married but is now estranged from his wife. He does casual labour but he presently is unemployed. That his late brother Henry Kombo lived on the suit property and was cultivating maize, beans and greens and he used to help him in the said cultivation. After the death of Henry the Defendant told him that they did not have any property there. The Defendant chased away the Plaintiffs from the suit property. This witness also confirmed that the

suit property and other properties that were registered in the Defendant's name had been inherited from their grandfather. He also confirmed that he, together with his siblings, were born and brought up on that property. That their mother was also buried on that property.

In submission, the Plaintiffs' counsel stated that the Plaintiffs were seeking orders of this court on the ground that the Defendant had inherited the suit property from the Plaintiff's grandparents and that accordingly the suit properties are ancestral land. Further that the Plaintiffs were born and raised there and that their mother and their brother are buried on the suit property. Accordingly she concluded that the suit property is held in trust for the Plaintiffs and the Defendant. Further that prior to the death of the Plaintiffs' brother, the Plaintiffs had unlimited access to the suit property with the full knowledge and consent of the Defendant. That they were cultivating the land and that accordingly, it is only equitable that the Plaintiffs be allowed to access the suit premises and that the Defendant be restrained from disposing the same. And that also although the Defendant is an absolute proprietor, he holds the land in customary trust for the Plaintiffs and such a trust is recognizable in law. Further since the Defendant had began to distribute and dispose off the properties, that the Plaintiffs ought therefore to be included in the scheme of distribution of the suit premises as this is their ancestral land. That if the Plaintiffs are not granted the prayers they seek they will suffer irreparable loss, which cannot be compensated by damages. The Plaintiffs relied on the case of **PHILICERY NDUKU MUMO -V- NZUKI MAKAU CIVIL APPEAL NO. 58 OF 2001** where the Court of Appeal held that *Section 28* of the Registered Land Act contemplates the holding of land in trust. In that case the Court of Appeal approved the holding of the High Court which awarded the Respondent a parcel of land on the basis that that land was occupied by the Respondent and his mother and that they had constructed houses on it. The Court of Appeal found such holding to be equitable in the circumstances. The Plaintiffs further relied on the case of **GITUANJA V GITUANJA KLR (E&L) 1** where it was held that under the Kikuyu Customary Law of inheritance of land, upon the death of the father, the eldest son assumed title as trustee over the land and his rights were no more than that of the other family members. That such a son had no power to sell land. *Section 25* of The Registered Land Act provides as follows:

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenance belonging thereto, free from all other interests and claims whatsoever but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interest as affected the same and are declared by Section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee.” (underlining mine)

The Plaintiff in evidence sufficiently proved that the suit properties and the properties the Defendant has transferred to others are ancestral property inherited by the Defendant from their grand parents. The Plaintiff in so proving also proved that the Defendant in having those properties registered in his name stood in the place of a trustee. The Court of Appeal in the case of **MBUI MUKANGU AND GERALD MUTWIRI MBUI CIVIL APPEAL NO. 281 OF 2000** described such holding of property as:

“It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generation.”

In that same case in regards to *Section 28* the Court of Appeal stated:

“.....we think it cannot be argued too strongly that the proper view of the qualification or proviso to Section 28 is that trust arising from Customary Law claims are not excluded in the proviso. Such claims may stem from the possession and occupation of part of the registered land which although

strictly it may not be an overriding interest under Section 30(g), it nevertheless give rise to a trust which is capable of protection under the Act.”

The Plaintiffs proved that the suit property was cultivated by their late mother, and later by their late brother and further that they have a house there where they all were born. The Defendant was man of two wives. The first wife and the Plaintiffs’ late mother. The Defendant has transferred land to the children of the first wife but has failed to transfer any land to the second house of the Plaintiffs. I find and hold that the Plaintiffs have proved on a balance of probability that the suit properties are held by the Defendant on trust for them and they are therefore entitled to the prayers they seek. Under the African Customary Law, the land upon which a family member is buried holds special significance. That, together with the facts proved by the Plaintiff this court is moved to give judgment for the Plaintiffs. The judgment of this court is:

1. Order for mandatory injunction compelling the Defendant to include the Plaintiffs in the scheme of distribution of the suit premises known as Title No. **LOC. 6/GIKARANGU 3642, 2784 and 3641.**
2. An order of permanent injunction restraining the Defendant from selling, disposing, transferring, pledging or leasing the Titled No. **LOC. 6/GIKARANGU 3642, 2784 and 3641.**
3. There shall be no orders as to costs.

Dated and delivered at Nyeri this 6th day of July 2007.

MARY KASANGO

JUDGE