



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 30 OF 2019

STEPHEN MUGO KIMUNYI.....PLAINTIFF

VERSUS

BERNARD MUTHIKE.....DEFENDANT

JUDGMENT

Introduction

The plaintiff vide a plaint dated 10th July 2019 and Amended on 18th September 2019 sought the following orders:-

(1) A declaration that the defendant is registered owner of rice holding No. 3177 Unit 1 Wamumu Section in trust of all the three houses of KIMUNYI GAKUYA and an order for cancellation registration tenancy for all three houses to get a share of the said land.

(2) Costs of the suit and interest.

The defendant filed a defence to the plaintiff's claim dated 10th September 2019 and sought to have the suit dismissed with costs.

PLAINTIFF'S CASE

The plaintiff testified alone and stated that the defendant is his step brother. He also stated that their father was one Kimunyi Gakuya who was married to three (3) wives namely JANET WANJIKU KIMUNYI (deceased), mother to the defendant, CECILY MUTHONI KAMUNYI (deceased) and GRACE MICHERE KIMUNYI who is his mother.

He stated that his father was given rice holding No. 3177 Unit 1 Wamumu Section measuring 5 acres in the National Irrigation Board but because he had another rice holding within Mwea Irrigation Scheme, being rice holding No. 2160, he registered the said land in the name of BERNARD MUTHIKE his son. He stated that the said BERNARD MUTHIKE was registered as a trustee for the three houses of his father. The plaintiff further stated that contrary to the wishes of their father, the defendant held the land solely to himself and disallowed any other member of the three house to utilize the suit land. The plaintiff also stated that surprisingly, the defendant' brother one Stanley Kimunyi has got share in rice holding No. 2160 another property of KIMUNYI GAKUYA since it was the wish of his father that each house was entitled to a share of his estate. The plaintiff referred to his list of documents dated 10th July 2019 which he produced as Plaintiff's Exhibits 1, 2, and 3 respectively.

Defendant's Case

The defendant also testified alone and stated that the suit property belongs to him having been given to him on 12th May 1969. He stated that he applied to be given the land as he was by then 22 years of age. He said that he was not given the land to hold in trust on behalf of his family. He stated that rice holding No. 2160 belonged to his late father KIMUNYI GAKUYA (deceased). He stated that Rice Holding No. 3177 exclusively belongs to him as a licensee and that he has no obligation to share or utilize the same with strangers. The defendant further stated that the issue of Rice Holding No. 2160 was determined on 31st August 1994 in Wang'uru DMCC No. 39 of 1993 and PMCC No. 6 of 2013 (Wang'uru) and that the said rice holding was subsequently distributed between the three households of his late father vide a decision by the Advisory Committee Mwea Irrigation Settlement Scheme on 26th June 2016 in the following terms:-

- (i) JANET WANJIKU KIMUNYI - No. 2160 A
- (ii) CECILY MUTHONI KIMUNYI - No. 2160 B
- (iii) GRACE MICHERE KIMUNYI - No. 2160 C.

He stated that the respective holdings were issued with licences and tenant cards for their respective portions. He argued that the issues of trust raised by the plaintiff at this stage are a mere afterthought with no basis and that the plaintiff actively participated in the proceedings of 29th June 2016 before the Advisory Committee and has never raised the same since then till now.

Analysis and Decision

I have considered the viva voce evidence and the documentary evidence produced by both parties. I have also considered the submissions by the counsels appearing for the plaintiff and the defendant and the applicable law. The issues for determination in this case are as follows:-

(1) *Whether the plaintiff has established the registration of the defendant as a trustee in rice holding No. 3177 Unit 1 Wamumu Section?*

(2) *Who will bear the costs of this suit?*

(1) Whether the plaintiff has established the registration of the defendant as a trustee in rice holding No. 3177 Unit 1 Wamumu Section?

On this first issue, the plaintiff stated that his father one KIMUNYI GAKUYA was given rice holding No. 3177 Unit 1 Wamumu Section measuring 5 acres by the National Irrigation Board and since he had been given another rice holding No. 2160, he caused the same to be registered in the name of the defendant herein to hold in trust for the rest of his family.

It is trite law that the suit property which is a rice holding No. 3177 Unit 1 Wamumu Section is a property belonging to Mwea Irrigation Settlement Scheme. **Section 3 (1) of the Irrigation (Chapter 347) Laws of Kenya** (now repealed) provided as follows:-

“3 (1) There is hereby established a board to be known as the National Irrigation Board, which shall be a body corporate having perpetual succession and a common seal, with power to sue and be sued, and capable of providing or otherwise acquiring, holding, managing and disposing of any property moveable or immovable, entering into contracts, and doing all things necessary for the proper performance of its duties, and discharge of its functions under this Act and any subsidiary legislation made thereunder”.

As indicated under **Section 3 of the Irrigation Act (Cap 347)** which is the applicable law, the Board has powers to inter alia acquire manage and dispose any property in the performance of their duties. The plaintiff has not enjoined the National Irrigation Board or the Committee which gave the defendant the licence and tenant card in respect of the suit land rice holding No. 3177 Unit 1 Wamumu Section. Where a party is challenging the decision by the Irrigation Board or its Committee, such a challenge can only be done by way of appeal provided in accordance with the law or by a Judicial Review to the High Court and/or Courts of equal status. Any land acquired in accordance with the law and designed as an Irrigation Scheme belongs to the Board who are mandated to determine the persons to be accommodated as licencees and tenant cards given. The Board is also empowered to delegate their duties through Advisory Committees for each Irrigation Scheme. Regulations have also been provided under the Act for the proper management and utilization of the rice holdings and the Board has absolute power to issue licences and to terminate the same for the proper management of the Scheme as the food basket of the country.

This suit is not challenging the decision by the said Board. The plaintiff's claim is based on a right which his father KIMUNYI GAKUYA (deceased) held and which he alleges is being held by the defendant. A rice holding in my view is a property of the National Irrigation Board under the Irrigation Act (repealed). The said National Irrigation Board is mandated to issue licences to persons to occupy and work in the various rice holdings and such persons are only licencees whose occupation can be terminated in accordance with the regulations. Such rice holdings cannot by any stretch of imagination be regarded as personal properties of licencees and do not therefore form part of their estate to be distributed under the law of succession. If indeed the suit property was part of the Estate of the plaintiff's father, then the same could have been subject of distribution in PMCC Succession Cause No. 6 of 2013 (Wang'uru) and Misc. Application in DMCC No. 39 of 1993 (Wang'uru).

The upshot of my findings is that the plaintiff's claim is not proved to the required standard. The same fails and is therefore dismissed. On the issue of costs, the general rule is that costs follow the event. However, the plaintiff and the defendant are close relation. I therefore exercise the Court's discretion and order each party to bear his own costs. It is so ordered.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 12th day of February, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Mr. Igati Mwai holding brief for Ann Thungu*

2. *Defendant/Advocate – absent*