



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 58 OF 2016

LOISE KANYOKORA WARUI.....1ST PLAINTIFF

JACKLINE WAMWIRUA.....2ND PLAINTIFF

VERSUS

GLADYS NJERI MURIUKI.....DEFENDANT

JUDGMENT

Introduction

By a plaint dated 28th April 2016, the plaintiff sought the following orders:-

- (a) A declaration that the defendant held land parcel Number MWERUA/BARICHO/208, now subdivided in trust for herself and the plaintiff herein.***
- (b) An order for determination of trust and registration of land parcel Nos. MWERUA/BARICHO/1408, 1412, 1413, and 1418 in the names of the plaintiff herein.***
- (c) Costs of the suit with interest.***

The defendant filed her defence dated 19th January 2016 denying the plaintiffs claim. The parties filed their compliance documents pursuant to Order 3, 7 and 11 of the Civil Procedure Rules and thereafter the matter was set down for hearing.

Summary of Facts

The 1st plaintiff testified on his behalf and that of the 2nd plaintiff. In his sworn testimony, the 1st defendant referred to her witness statement dated 28th April 2016 which she adopted in her evidence. According to her evidence, the 1st plaintiff stated that she is the second wife of one Kennedy Warui (deceased) and that they were blessed with five (5) children who are all girls and that the 2nd plaintiff is one of her daughters. The plaintiff also stated that her co-wife was one Bertha Muthoni (deceased) who had four children (three girls and one son namely Christopher Warui Muriuki who has since passed on. She further stated that the defendant is the wife (widow) of her co-wife's son - Christopher Warui Muriuki who passed on. The 1st plaintiff also stated that land parcel No. MWERUA/KAGIOINI/504 was given to her husband, the late Kennedy Warui by the clan where it was agreed that it be registered in the name of his only son Christopher Warui Muriuki who was not even born at the time. According to the 1st plaintiff, her late husband exchanged land parcel No. MWERUA/KAGIOINI/504 with land parcel No. MWERUA/BARICHO/208 and settled there. She further stated that since the said Christopher Warui Muriuki held clan land parcel No. MWERUA/BARICHO/504 in trust for the family, the same meant that he was not relieved of his obligation in respect of the land he exchanged being land parcel No. MWERUA/BARICHO/208. She testified that the said Christopher Warui was to hold 4 acres on behalf of the 1st house while the plaintiffs were entitled to 2 acres for the 2nd house. The plaintiffs called one witness namely Charles Mugo Gachura who comes from the same clan as Kennedy Warui Kabutu.

The witness testified on oath and stated that the clan gave Kennedy Warui (deceased) land parcel No. MWERUA/KAGIOINI/504 but he chose to have it registered in the name of his only son Christopher Warui who by then was only 10 years old. He explained that if the land was to be registered under his name Kennedy Warui, he could have lost the rice holding that was given to him by the National Irrigation Board. He stated that subsequently, the said land parcel No. MWERUA/KAGIOINI/504 was exchanged with land parcel No. MWERUA/BARICHO /208 after the family experienced bad omen as they would frequently get ill. However, he stated that he was not in the land allocating Committee of the clan.

The defendant on the other hand testified and stated that she got married to one Christopher Warui Muriuki around 1974 and that her late husband was given land parcel No. MWERUA/KAGIOINI/504 as an absolute owner in 1961. She further stated that in 1968 or thereabouts,

her late husband was approached by one Njikari Kiringio Maria who proposed that they exchange land parcel No. MWERUA/KAGIOINI/504 measuring 3.7 acres with land parcel No. MWERUA/BARICHO/208 measuring 6 acres. The defendant also stated that in 1981, her husband died before the exchange was complete for the payments of the extra two (2) acres and that she had to pay the balance of the purchase price after the demise of her husband. Upon the demise of her husband, the defendant filed succession proceedings in respect of land parcel No. MWERUA/KAGIOINI/504 through the Public Trustee Administration Cause No. 383 of 1982. The defendant further stated that on 9th November 1988, she was registered as a trustee for her children Annsylivia Nyawira Muriuki, Evangelina Wambui Muriuki and Michael Muriuki. On 13th December 1988, she completed the land exchange with Njikari and got registered as a trustee for her children on land parcel No. MWERUA/BARICHO/208 in equal shares. The defendant also stated that the family of the plaintiff never settled on land parcel No. MWERUA/KAGIOINI/504 but lived on another parcel of land in Baricho where her father in law (Kennedy Warui) intended to buy a piece of land but that the land was acquired by the County Government for expansion of Baricho town and the money was refunded to her father-in-law and he moved out. The defendant testified that her father in law requested her late husband to allow them settle temporarily on land parcel No. MWERUA/BARICHO/208 as he looked for another land to settle in Mwea Rice Holding No. 2508 and a village plot in Mbui Njeru area where he had constructed a house. She stated that the plaintiffs are still living on the land as licencees to date. She testified that Bertha Muthoni (deceased), her father in law and her husband are all buried on land parcel No. MWERUA/BARICHO/208 and denied that her father in law had indicated how the land would be subdivided. In conclusion, the defendant stated that she later subdivided the land around the year 2011 and her children sold their portions and that the plaintiffs were all aware of the said transactions but raised no objection.

Legal Analysis and Decision

From the pleadings and evidence, the following facts are not in dispute:-

- (1) Land parcel No. MWERUA/KAGIOINI/504 was clan land given in 1961 and registered in the name of Kabutu Warui.
- (2) The original registered proprietor Kabutu warui changed his name on 20th April 1979 to Christopher Muriuki Warui and on 30th April 1979, a new title was issued in the new name.
- (3) The suit land parcel No. MWERUA/KAGIOINI/504 was exchanged with land parcel No. MWERUA/BARICHO/208.
- (4) Kennedy Warui Kabuta had two wives. The first wife was blessed with four children, three girls and one boy namely Kabutu Warui alias Christopher Muriuki Warui (deceased) who was husband to Gladys Njeri Muriuki, the defendant herein.
- (5) The two houses/ families of Kennedy Warui Kabutu (deceased) settled on land parcel No. MWERUA/BARICHO/208 and those members who died were buried in the said land parcel No. MWERUA/BARICHO/208.
- (6) On 9/11/1988, the defendant caused land parcel No. MWERUA/BARICHO/208 measuring approximately 6.4 acres to be subdivided into 25 portions being parcel No. MWERUA/BARICHO/1408 to 1432. Thereafter, she sold 20 portions leaving only five (5) portions being MWERUA/BARICHO/1408, 1412, 1413, 1416 and 1418 which cumulatively measure approximately 1.6 acres.
- (7) The plaintiffs have lived on the suit land parcel No. MWERUA/BARICHO/208 from 1968 to-date.
- (8) Kennedy Warui and Christopher Muriuki Warui were buried in the suit land No. MWERUA/BARICHO/208.

Issues for Determination

The following are the issues for determination:-

- (a) **Whether the plaintiffs have established the existence of trust?**
- (b) **What appropriate orders to issue?**
- (c) **Who will bear the costs of this suit?**

(a) Whether the plaintiffs have established the existence of trust?

The existence or otherwise of trust is a matter of fact. The plaintiff or any person seeking the Courts to make a declaration in his favour as to the existence of trust lies on him.

The Supreme Court Justices in the case of *Isack Kieba M'Inanga Vs Isaaya Theuri M'Lintari & Another SCOK No. 10 of 2015* held 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 Vs 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 of the family, 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:-

- (a) *The land in question was before registration, family, clan, or group land.*

(b) The claimant belongs to such family, clan or group;

(c) The relationship of the claimant to such family, clan or group is not remote or tenuous as to make his claim idle or adventurous.

(d) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and

(e) The clan is directed against the registered proprietor who is a member of the family, clan or group”.

The **Land Registration Act No. 3 of 2012** also recognizes overriding interests in land including customary trust. **Section 28 (b)** of the said Act provides thus:-

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:-

(a)

(b) trusts including customary trust;”

The 1st plaintiff in her testimony stated that during land demarcation and consolidation, her husband Kennedy Warui was given land by the clan being parcel No. MWERUA/KAGIOINI/504 but he proposed that it be registered in the name of his son who by then was unborn and whom he named in anticipation as Kabutu Warui to hold in trust for himself and the entire family of Kennedy Warui Kabutu. Her evidence was corroborated by Charles Mugo Gachura (PW2) who explained that at the time of land demarcation and consolidation, Kennedy Warui had been given some rice field by the National Irrigation Board which was meant for the landless and that if Kennedy Warui was registered as the owner of another land, he could have lost the Mwea land. I find that explanation credible and believable. The explanation is even more persuasive considering that the said Patriarch (Kennedy Warui) and his family members cultivated and lived on the suit land but would fall sick and he agreed with one Njikari Kiringo who was the registered owner of land parcel No. MWERUA/BARICHO/208 to exchange the two parcels of land. It was further agreed between Kennedy Warui and the said Njikari Kiringo that Kennedy Warui would pay for the extra two acres since his land was more than his. The plaintiffs also explained that it was the wish of the family of Patriarch Kennedy Warui that his two families would settle on the exchanged land parcel No. MWERUA/BARICHO/208 whereby 2 acres were to be utilized by the 2nd house represented by the 1st plaintiff while the bigger chunk of 4 acres would be utilized by the 1st house represented by the defendant.

The defendant in her testimony stated that she got married to Christopher Muriuki in 1974 and that her husband received the land as an absolute owner. Her evidence was not corroborated by any member of the clan who was present during the land demarcation and consolidation. The defendant also stated that her late husband Christopher Muriuki acquired the suit land when he was only 10 years of age. In that regard, she cannot testify that the suit land was given to him to hold absolutely since she was not present at the time. I find the testimony given by the 1st plaintiff and her witness Charles Mugo Gachura credible and tenable. The evidence by the defendant is untenable as the same is uncorroborated and based on hearsay. After Kennedy Warui and his first wife died, they were buried on the suit land parcel No. MWERUA/BARICHO/208 which is a clear testimony that the suit land was registered in the name of Christopher Muriuki Warui to hold in trust for himself and the entire Warui family.

(b) What appropriate orders to issue?

In view of the matters aforesaid, I find that the plaintiffs have proved their case against the defendant on a balance of probabilities. I therefore find the plaintiffs claim merited and the same therefore succeeds.

(c) Who will bear the costs of this suit?

Section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya is instructive on the party liable to pay costs. The section provides as follows:-

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order”.

The plaintiffs and the defendant in this suit are close family relations. In order to foster the relationship between the parties, I shall order each party to bear her own costs.

Disposition

Following my analysis herein above, I enter judgment for the plaintiffs against the defendant as follows:-

(1) A declaration that the defendant held land parcel Number MWERUA/BARICHO/205, now sub-divided, in trust for herself

and the plaintiffs herein.

(2) An order for determination of trust and registration of land parcel Numbers MWERUA/BARICHO/1408, 1412, 1413, 1416 and 1418 in the names of the plaintiffs herein is hereby made.

(3) Each party to bear her own costs of this suit.

READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 12TH DAY OF MARCH, 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:-

- 1. Ms Wambui holding brief for Maina Kagio for Plaintiff***
- 2. Ms Makworo for the Defendant***
- 3. Kabuta, Court clerk – present.***