



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 42. OF 2019

ONESMUS MUTUA WAMBUA.....PLAINTIFF

VERSUS

DANIEL MAKENZI WAMBUA.....1ST DEFENDANT

MUTUA IVUTI.....2ND DEFENDANT

TITUS NZOMO TONDE.....3RD DEFENDANT

JUDGMENT

1. The plaintiff filed a plaint dated 17th June, 2019 seeking the following prayers: -

- 1. An order of declaration of trust i.e the land is held in trust by the 1st defendant on his own behalf and on behalf of the plaintiff and their late brother Samuel Masila.**
- 2. An order of subdivision of the land number Makueni/Kwakavisi/539 to three (3) equal proportions to be registered in the name of the three brothers respectively.**
- 3. An order that the executive office of this court to execute transfer instruments.**
- 4. Costs of this suit plus interest thereon.**

2. The plaintiff stated that he is the biological brother to the 1st defendant and that at all material times, the 1st defendant is the registered owner of land parcel number Makueni/Kwakavisi/539 hereinafter referred to as the suit land. The plaintiff further avers that he is the beneficial owner of the suit land by virtue that the land was owned by his late mother, Rebecca Mukina Wambua, and that they are the rightful heirs of the same together with the 1st defendant and his late brother, Samuel Musila Wambua, in equal shares.

3. The plaintiff avers that together with his late brothers, they purchased land elsewhere where they settled. That during adjudication in the early nineties, the 1st defendant had the suit land registered in his name and he became aware when the 1st defendant started subdividing the suit land into portions in the year 2018. In addition, the 1st defendant went ahead and sold portions of the suit land to the 2nd and 3rd defendant without his input.

4. That the registration and the subsequent sale of the suit land was illegal for the following reasons:-

- a) Colluding to deprive the plaintiff his piece of the land**
- b) Causing to be registered the portion of the land in the name of the 1st defendant without the plaintiff's input.**
- c) Purporting to subdivide the land without the plaintiff's input.**
- d) Selling the portions of land.**

5. The defendants filed their amended statement of defence dated 9th January, 2020. The 1st defendant stated that he bought the suit land and had it registered in his name and that their mother was living in the suit land in the early nineties as a caretaker while he was living in Kilala where he was teaching at Kinyuani Primary School. That the suit land was surveyed around 1985 and the plaintiff ought to have complained

to the Adjudication Board at that time.

6. The 1st defendant also stated that he did not require permission from the plaintiff nor consideration since the suit land was not ancestral but one which he had bought and that the 2nd and 3rd defendants bought the suit land as innocent purchasers for value.
7. The plaintiff filed a reply to amended defence dated 1st September, 2020 in which he reiterated the contents of the plaint and denied the amended statement of defence.
8. The hearing of the main suit took place on 4th February, 2021, the plaintiff stated that the suit revolves around land parcel number Makueni/Kwakavisi/539 which was owned by their late mother who settled there in the year 1964. That later in life their mother subdivided the suit land into three portions as they are three brothers following which each one of them started cultivating on their portion. Years later, he learnt that the 1st defendant who was left on the land had subdivided it and sold some portion. That the 1st defendant upon survey of the suit land, had it registered in his name.
9. On cross examination, the plaintiff stated that their mother was buried in his land in Ngwata which is not ancestral land but which he acquired through sale. That their mother subdivided the land sometime in the year 1997 in the presence of all his brothers and sisters. He disputed that his brother settled him on the suit land before he moved to Ngwata. The reasons why he moved from the suit land together with his late brother was because the land was small. He also stated that during his stay, he did not construct any structure on the land.
10. The plaintiff's witness one, Jones Kiio Muia (PW1), stated that the area was surveyed in the year 1957. He stated that although he was not present when the plaintiff's deceased mother subdivided the land, the sub division amongst her children in the year 1964. He recalled that the plaintiff's mother bought the suit land at KShs. 60/- from his uncle who was the owner and that no contribution was made by the 1st defendant.
11. The plaintiff's witness number two, Alice Mulewa Kitata (PW2) stated that she recalls that in the year 1948, their mother informed them that she would go to look for land as the land in which they were living in was small. She stated that she never lived on the suit land as at that time she was already married. It was her prayer that the suit land should be subdivided amongst her brothers since their mother purchased it sometime in the year 1958 or 1959 thereabout.
12. The 1st defendant, Daniel Makenzi Wambua, stated that he acquired the suit land after purchase from Mwangali Mbuvi (deceased) in the year 1968. That the suit land was part of a game reserve. He stated that he constructed on the suit land and cultivated on it as well. He produced DEX 1(a) and (b) being copies of the sale agreement written in Kamba language and the translation thereof respectively. He also produced title deed marked as DEX Number 2.
13. On cross examination, the 1st defendant stated that he bought the suit land in 1964 from Mwangali Mbuvi's wife by the name Syombulo. That at the time of purchase, Mwangali Mbuvi was deceased. He also stated that he bought the suit land for KShs. 120/= and he paid KShs. 30/= to the elders. He stated that he moved to Kwa kavisi in the year 1958 and at the time, his mother was hosted by Kiio Muia. He further stated that the suit land was subdivided in the year 2003 and that the land was registered in his name because Mwangali Mbuvi was deceased. He admitted that his mother used to cultivate on the suit land while he was away teaching and that indeed his mother asked him to write to the plaintiff to come home so that he could also buy land. Finally, he stated that his mother never summoned his brother so that she could subdivide the land.
14. Defence witness one, Beth Wavinya Wambua (DW1), stated that she lived with her mother while she was a student at Kitonyoni Primary School and when she became pregnant in 1967, she left school to become a primary school teacher. She doesn't recall when she moved from the suit land but that at the time of leaving, she had three children. She further stated that her mother never subdivided the land to anyone and that the suit land was left to the 1st defendant by Syombulo and that the 1st defendant refunded Syombulo and her husband the expenses they had incurred.
15. On cross examination, she stated that the suit land was bequeathed to the 1st defendant by Syombulo and that she is the one who paid KSh. 90/=. Finally, that her mother did not own any land and thus did not subdivide amongst her children.
16. The defence hearing proceeded on 29th April, 2021 during which the 2nd Defendant, Raphael Mutiso, gave his testimony in place of Mutua Ivuti whose whereabouts were unknown and could not be traced.
17. The 2nd defendant, Raphael Mutua Mutiso, stated that he knew the 1st Defendant when he went looking for land to purchase since he was served with a notice to vacate from where he had been living-Thwake to pave way for the construction of the dam. The 1st defendant informed him that he had a parcel of land that was for sale. He stated that he conducted due diligence and entered into negotiations with the 1st defendant for the sale of land in the year 2018.
18. On cross examination, he stated that he entered the suit land in the year 2018 but could not tell when the land was surveyed and the history of the land.
19. The 3rd defendant, Titus Nzomo Tonde, stated that he bought the land from the 1st defendant. However, he does not recall when he bought it but he took possession after purchase. He stated that he has never seen any other person on the suit land except the 1st defendant despite his occupation which has been for a period of about three years.
20. The plaintiff filed written submissions dated 13th July, 2021. The plaintiff submits that the suit land was customary land as per the

evidence of the 1st plaintiff's witness. The plaintiff relied on the case of **Isack M'inanga Kiebia versus Issaya Theuri M'Lintari & Another [2018] eKLR** and the case of **Kanyi versus Muthiora(1984)**.

21. It is also the plaintiff's submission that the 2nd and 3rd defendants are not bona fide purchasers of the suit land for the reason that they entered into a sale agreement unaware of the fraud. Also, that the 2nd and 3rd defendants do not have certificate of title and cannot be classified as bona fide purchasers. They relied on the case of **Kitende versus Haridar & Company Limited [2008] 2 E.A 173** and **Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura versus Attorney General & 4 Others [2017]eKLR**.

22. The respondents filed their written submissions dated 23rd August, 2021. It is the respondents' submission that the plaintiff's mother was not employed at the time and therefore did not have money to purchase the suit land. It is their submission that there has never been an issue with the suit land and that their mother was buried in the plaintiff's land. That if at all the suit land was ancestral land, their mother would have been buried on the same. The respondents cited the case of **Mwasi Kitheka versus Munyu Kitheka & Another [2017] eKLR** in which the court observed that it would be a fallacy for the court to interfere with a decision of 62 members of a clan who are well versed with the customs of the Kamba and more so who knew the history of the suit land.

23. It is also their submission that **Section 3(2)** of the Judicature Act guides the court in the manner the African customary law is to be applied. That the Kamba customary law dictates that a married woman should be buried where she is married and if the suit land was ancestral, then she ought to have been buried there and not on the plaintiff's land.

24. It is the respondents' submission that **Section 26** of the Land Registration Act provides that a certificate of title shall be taken as prima facie evidence of absolute and indefeasible ownership. The respondents relied on the case of **Isack M'inanga Kiebia and Issaya Theuri M'litri & Another [2018] eKLR**.

25. It is also the respondents' submission that the 2nd and 3rd defendants are bonafide purchasers of the suit land without any notice of any defect in title and they rely on the case of **Consolata Pande & Another versus Ashish Bhuupendra Patel & 4 Others [2019]**.

26. I have read and carefully analysed the pleadings and the submissions filed by both parties. The issues for determination at this stage are as follows:-

- a) Whether the suit land was ancestral land.
- b) Whether the 2nd and 3rd defendants are bona fide purchasers.
- c) Who is to bear the costs of this suit.

27. **Section 28 of the Land Registration Act** provides that; -

“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 trusts;”

28. Trust including customary trust must however be proved. In the court of appeal decision **Mumo vs. Makau (2002)1EA.170**, it was stated that **“trust was a question of fact to be proved by evidence.....”**. Also see **Kanyi Muthiora vs. Maritha Nyokabi Muthiora Nairobi Court of Appeal No.19 of 1982, Elijah Ouko Matagaro & another v Roselyne Dola Ouko & 4 others [2017] eKLR, David Murimi Muriuki & another vs Mwathi Kaba & another, Kerugoya ELC No. 208/2013**.

26. Section 107 of the Evidence Act further provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

27. Section 108 of the evidence act provides as follows;

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.

28. Section 109 of the aforementioned act again provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

29. Thus the burden of proof falls upon the plaintiff to prove the existence of a customary trust. The plaintiff testified that his late mother

acquired the suit land through purchase in the year 1964, the plaintiff and his siblings settled thereon. The plaintiff's first witness (PW1) stated that the plaintiff's late mother bought the suit land from his late uncle at Kshs. 60/-. However, no evidence has been produced to confirm these allegations. The 1st defendant stated that he bought the suit land from Syombulo (deceased) who was the wife of the previous owner, Mwangali Mbuvi (deceased), for a consideration of Kshs. 120/= and that he also paid Kshs. 30/= to the elders. The first defendant's witness stated that the 1st defendant bought the land from the late Syombulo for a sum of Kshs. 90/=. Neither party has adduced tangible evidence to prove how the suit land was acquired. The history of the registration of the suit land has not been availed either.

30. In the case of Susan Mumbi Waititu –VS-Mukuru Ndata & 4 others (19 of 2007) eKLR Justice M.S.A Makhandia (as he then was) stated that:-

“As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. The 1st defendant has deponed that he purchased the suit premises for value. Accordingly it is not family land passed over through the ages. I have no reason to cast doubts over this averment. The plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1st defendant in favour of the plaintiffs”

31. In the SCOK Petition No. 10 Of 2015 Isack M'inanga Kiebia Vs Isaaya Theuri M'lintari and Another, the court while declaring that customary trust subsists to bide a registered proprietor held that ***“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.”***

32. It was not enough for the plaintiff to claim that the suit was ancestral land. He needed to avail tangible evidence to show that the suit land was actually ancestral land.

33. On whether the 2nd and 3rd defendants are bona fide purchasers of the suit land, the 2nd and 3rd defendants stated that they bought portions of the suit land from the 1st defendant. the 2nd defendant stated that he conducted due diligence before purchase and thereafter entered into negotiations for the sale of land. However, no evidence was produced to confirm these allegations. The 3rd defendant stated that he purchased a portion of the suit land from the 1st defendant but could not recall when he bought it. He stated that he has been in occupation for a period of around three years. The document relied upon is a copy of a 'sale agreement' in Kamba language with a translation attached to it.

34. In conclusion, I find that the suit dated 17th June, 2019 lacks merit and the same is dismissed. Each party shall bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 8TH DAY OF FEBRUARY, 2022.

MBOGO C.G

JUDGE

8/2/2022

IN THE PRESENCE OF: -

CA:T.CHUMA