



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 348 OF 2017

SAMSON MBINDI KIVINDYO (*Substituted as*

***the Plaintiff in place of Simon Kibindyo Kituku -Deceased*).....PLAINTIFF**

-VERSUS-

DUNCAN KIVINDYO KANYELE.....1ST DEFENDANT

JULIUS KILUVA KANYELE.....2ND DEFENDANT

KASIVA KAMAMI.....3RD DEFENDANT

KATHOKI TITO.....4TH DEFENDANT

MWOLOLO KIVINDYO.....5TH DEFENDANT

SWALLEH KIVINDYO.....6TH DEFENDANT

JUDGMENT

1. This suit was commenced by way of a Plaintiff dated 4th October, 2017 and filed in court on 5th October, 2017. The Plaintiff prays for judgment against the Defendants for:

a) A declaration that the Plaintiff legally owns and holds half of all that parcel of land otherwise known as Makueni/Maiyani/335 measuring approximately 3.58 Ha.

b) An order directed to the Defendants to cause land parcel No. Makueni/Maiyani/335 to be subdivided and half thereof transferred and registered under the names of the Plaintiff OR ALTERNATIVELY; an order directed to the Land Registrar, Makueni County to cause land parcel No. Makueni/Maiyani/335 to be subdivided and half thereof transferred and registered under the name of the Plaintiff.

c) A perpetual order of injunction against the Defendant b himself, relatives or agents from evicting or in any way interfering with the Plaintiff's occupation of half portion of the land otherwise known as Makueni/Maiyani/335.

d) Costs and interest of the suit.

2. The claim is opposed by the Defendants vide their joint amended Statement of Defence and Counterclaim filed in court on 2nd November, 2018. The following orders were sought: -

a) The Plaintiff's suit be dismissed with costs.

b) A declaration that land parcel Makueni/Maiyani/335 was originally owned by Kivindyo Thathi.

c) A declaration that Makueni/Maiyani/335 registered in the names of the Plaintiff and the 1st and 2nd Defendants is held in trust for the other beneficiaries to the estate of the late Kivindyo Thathi.

d) An order directing the Plaintiff to cause land parcel number Makueni/Maiyani/335 be subdivided in 7 equal portions and

each child of the late Kivindyo Thati (or their beneficiaries) get a share OR ALTERNATIVELY an order directed to the Land Registrar Makeni County to cause land parcel Makeni/Maiyani/335 to be subdivided in 7 equal shares and each child of the late Kivindyo Thati (or their beneficiaries) have their share registered under their name.

e) Costs and interest of the counterclaim.

3. The Plaintiff filed a Defence to the amended Counterclaim on 24th April, 2019 and vide a Reply to the Defence to the amended counterclaim filed in court on 20th May, 2019, the Defendant countered the allegations levelled thereinbefore by the Plaintiff.

4. The matter came up for prosecution hearing on 14th October, 2019. In his examination in chief, the Plaintiff, Simon Kibindyo Kituku (now deceased) adopted his statement dated 10th July, 2017. He stated that land adjudication in Maiyani was declared in or about 1983/84. That his brother, Kang'ele Kibindyo and him acquired land parcel number Makeni/Maiyani/335 (the suit property). That they resided in the suit property together with their parents. That both him and his brother were co-registered owners of half a share of the suit property. That a caution was registered in respect of the suit property by the two sons of his brother but he couldn't tell why. That his two sisters, the 3rd and 4th Defendants were already married by the time the suit property was being acquired. That in the premises, his prayer was that half of the suit property be registered to him and the other half to his brother. He produced his list of documents dated 26th September, 2017 together with an additional list of documents dated 26th April, 2019 as part of his evidence in chief. Lastly, he stated that the Defendants never raised any objection during the adjudication process and that together with his brother, they were the first registered owners.

5. In cross-examination, the Plaintiff denied that the suit property was ancestral land inherited by his late father from his late grandfather. He also denied that his grandfather was buried in the suit property. Again, he denied that his brother and him had secretly registered the suit property behind their sisters' back nor had he been summoned by the clan over the suit property.

6. The defence called the 4th Defendant, Priscila Kathoki Musyoka, as their first witness. She adopted her two statements dated 14th May, 2018 and 30th October, 2018 respectively as her sworn evidence in chief. She stated that the suit property belonged to her late father who inherited it from her late grandfather. That land adjudication officers visited the suit property in 1950 when both her and her brothers were minors. That her brothers were registered as owners to the suit property to hold it in trust for the rest of the family. She stated that her prayer was for peace to prevail in the family and that she did not want a piece of the suit property though she was aware that she was entitled to it. Lastly, she produced three sets of documents separately dated 2nd November, 2017, 16th May, 2018 and 18th December, 2019.

7. The 4th Defendant stated that she was brought up in the suit property. That she had never heard her brothers quarrel over the suit property. She added that the Plaintiff had built his house in one half of the suit property but when quizzed as to whether the 1st Defendant chased away the Plaintiff when he came back to claim his share of the suit property, the witness refused to answer.

8. The 2nd Defendant, Julius Kiluva Kanyeke, was the next defence witness to take the stand. He adopted his statements dated 14th May, 2018 and 30th October, 2018 as his sworn evidence in chief.

9. In cross-examination, the witness confirmed that the Plaintiff was his uncle. That the land dispute herein began after the passing of his father, Kanyeke Kivindyo on 12th May, 2008. That indeed the suit property is jointly registered in equal shares in the names of the Plaintiff and his late father. That the Plaintiff has built a home in the suit property but also lives in Athi River. That he was opposed to the idea of the suit property being divided into two because other than the two registered owners, there were other beneficiaries such as his aunts (the 3rd and 4th Defendants) plus some other relatives who ought to get their share of the suit property. He also reiterated that the suit property was ancestral land after it was inherited from his grandfather. Again, he confirmed that he had registered a caution on the suit property in 2017 because the Plaintiff and his late father had their disagreements over the suit property.

10. Last to take the stand was the 3rd Defendant, Alice Kasiva Kamami. She adopted her statements dated 14th May, 2018 and 30th October, 2018. She reiterated that the suit property is ancestral land being initially her father's. That she prays for her share of the suit property.

11. In cross-examination, the witness stated that after she got married in 1971, she never went back to the suit property. That before then, she had planted mango trees thereon but she could not explain whether the land had been surveyed. That she had never heard her brother Kanyeke and the Plaintiff ever quarrel over the suit property.

12. The Plaintiff filed his submissions on 18th January, 2021. It was submitted on his behalf that the 1st, 5th and 6th Defendants had abandoned their claims after failing to appear in court to prosecute their counterclaim. That when the land was being adjudicated in 1983/84, the 3rd, 4th, 5th and 6th Defendants, who were adults by then, didn't show up before the demarcation officer to register their claims in the suit property. That no evidence was presented to indicate that the land was to be registered in the name of the Plaintiff and his late brother in trust for the Defendants. On the submission that no trust had been demonstrated by the Defendants, the Plaintiff relied on two cases namely: -

i) **Francis Kaagu Karichu v Lucy Nyambura Mburu [2019] eKLR**; and

ii) **Mbui Mukanga v Gerald Mutwiri Mbui Civil Appeal No. 281 of 2000**

13. The Defendants filed their submissions on 20th April, 2021. Therein, it was submitted that the suit property is ancestral land and that the registered owners were holding it in trust for the other beneficiaries. That the ensuing trust is in the nature of a customary trust which need not be noted down in the land register. That by virtue of the consent and authority filed in court on 18th February, 2019, the 1st, 5th and 6th Defendants had given the 2nd Defendant authority to defend their individual claims at the hearing. The Defendants relied on the following

authorities: -

i) **Julius Maina Muruku v Jane Waithira Mwangi [2018] eKLR**; and

ii) **Isack M'inanga Kiebia v Theuri M'lintari & another [2018] eKLR**

14. In my assessment, the issues for determination are as follows:-

i) *whether a customary trust exists in the suit property?*

ii) *whether the 1st, 5th and 6th Defendants abandoned their claims due to their absence at the hearing of the suit?*

15. It is common ground from the pleadings and the evidence that when land adjudication was done in the suit property in or about 1983/84, the suit property was occupied by the Plaintiff and his late brother Kanyeke Kivindyo together with their families. That the Plaintiff's other siblings who are his sisters, the 3rd and 4th Defendants, were brought up in the suit property before they got married and hence moved out. Other households in the suit property comprised that of the Plaintiff's late parents and his late sister Rael Kaswii, who are now buried in the suit property. That other than the 3rd and 4th Defendants, the 1st and 2nd Defendants reside and cultivate the suit property.

16. What failed to come out clearly from the evidence of the Plaintiff was when and how he acquired the suit property or in other words, if he purchased it together with his late brother, from whom. Suffice it to say that the effect of registration under Section 24 of the Land Registration Act, 2012 is to vest in the registered proprietor all the rights and privileges appurtenant thereto, I find that the exception has been proved. Under Section 25 (1) (b) of the Land Registration Act, the law recognizes that the title of the registered proprietor may be encumbered by many other rights and overriding interests which may not require noting in the land register. The claim against the defendants must therefore fail.

17. In this instance, the Defendants claim that they have acquired a customary trust in the suit property being ancestral land and by virtue of being the descendants of the late Kivindyo Thathi. A customary trust is one of the overriding interests recognized under Section 28 of the Land Registration Act, 2012. Nonetheless, for the Defendants to succeed on the basis of their counterclaim, as rightly submitted, the following essentials outlined by the Supreme Court in **Isack M'inanga Kiebia v Theuri M'lintari & another [2018] eKLR** ought to be demonstrated: -

"[52]...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.

18. It is not lost on me that at the time land adjudication was done in 1983/84, the patriarch of the family one Kivindyo Thathi had passed away which as per the evidence of the 3rd Defendant, was in 1979. I do also appreciate that under the Kamba Customs, land is vested in the male children of the family and as this case portrays, the land of Kivindyo Thathi could only be registered in the names of his only adult male children after his demise. This is so because, even though the 3rd and 4th Defendants were adults as at 1983/84, they could not be registered as proprietors because customary law forbade it.

19. It is, therefore, my finding in respect to the first question that the Defendants have demonstrated a customary trust in the suit property. In respect of the second issue for determination this Court is guided by **Order 12 Rule 5** of the **Civil Procedure Rules, 2010**. It outlines as follows: -

"If only some of the defendants attend, the court may proceed with the suit and may give such judgment as is just in respect of the defendants who have not attended."

20. A perusal of the amended statement of defence and counterclaim reveals that the cause of action is similar for the joint defendants. I have also seen the consent and authority filed in court on 18th February, 2019 granting the 2nd Defendant authority to plead and defend the suit on behalf of all the Defendants. I have also taken note of the fact that none of the prayers in the counterclaim have been made for the individual reward of any of the Defendants. To the extent that the 1st, 5th and 6th did not give their testimony at the hearing, the notion that their claim

ought to be dismissed has not been substantiated.

21. The irresistible finding in these proceedings, is that the counterclaim partially succeeds. In the premises, this Court grants the following orders: -

i) A declaration is hereby made that all that Land Parcel Makueni/Maiyani/335 registered in the names of the Plaintiff and the 1st and 2nd Defendants, is held in trust for the beneficiaries of the Estate of the late Kivindyo Thati.

ii) Each party shall bear its own costs of the suit.

SIGNED, DATED AND DELIVERED VIA EMAIL THIS 9TH DAY OF MARCH, 2022

MBOGO C.G.

JUDGE

9/3/2022

Court Assistant: Mr. T.Chuma