



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 44 OF 2012

PK.....PLAINTIFF

VERSUS

DKDEFENDANT

JUDGMENT

Introduction

1. The parties here in are close relatives, whereby plaintiff is a son of defendant. The defendant is the registered owner of the parcel of land L.R No. Ntima/Igoki/[...](the suit land). The said defendant was apparently married to a man called K many years ago with whom they sired 4 children including the plaintiff and plaintiffs sister (PW4 – EK). The marriage did not last and the defendant left with her children. She sired 5 more children who include DW 2, EMW and DW 3, PMN. Both DW 2 and DW 3 aver that their father is one W and therefore they are half siblings of the plaintiff and PW 4. Defendant is not married. The suit land is one acre and the plaintiff is claiming entitlement to user rights and occupation of 0.40 acres out of the suit land, on the basis of customary trust.

Case for the plaintiff

2. The initial plaint was filed on 16th March 2012, while the amended one was filed on 8th May 2012 where the following orders have been sought;

a. A permanent injunction restraining the defendant and her servants, agents, employees, representatives and/or anyone else acting at her behest, direction and/or instructions, from evicting the plaintiff from and/or whatsoever interfering with the plaintiff's occupation and cultivation of 0.40 of an acre out of L.R No. NTIMA/IGOKI/[...], measuring about 0.40 hectares.

b. A declaration that the plaintiff is entitled to cultivate on and occupy 0.40 of an acre out of L.R No. NTIMA/IGOKI/[...], measuring about 0.40 hectares, which the defendant holds as an ancestral/family land, in trust for the plaintiff; and that the defendant should not charge, sell, transfer or alienate the same, to the detriment of the plaintiff.

c. Costs of the suit and interest at court's rates.

3. Plaintiff avers that his mother's proprietorship to the suit land is subject to customary trust. The Plaintiff, **PK** testified as **PW1** and he **adopted** his statement dated 16th March 2012 as his evidence. He averred that the defendant is his mother who separated from his father. The defendant owns the suit property which she holds in trust for herself and himself having inherited it from his grandfather. Since 1991 the plaintiff has been living on the suit land, occupying approximately 0.40 acres. His developments includes a dwelling house, three piped water systems, electricity installation, a barbed wire/live fence, grevillea trees, pawpaw, passion fruits, mangoes, avocados, poultry and over 300 mature stems of bananas for export.

4. **PW1**, further stated that he lives on the suit land with his wife NA and their two children. In 1996 he built 3 semi-permanent rental houses for the respondent in Nubian Mjini area from which she gets rental income of 1,400 each. Also in 1996 he assisted defendant to build 2 semi-permanent houses in the same area by buying cement, locks, nails and paying the labour. Additionally he helped the defendant to educate and feed his siblings especially MW up to form four and he also bought for her some goats and sheep since he is the first born. Moreover, he pays for the water and electricity bills for the respondent and often buys her shopping in addition to the Ksh. 3,000 he gives her per month for upkeep.

5. **PW1** added that on 10th August 2011 the defendant demanded that he vacates the suit land and when he declined, she brought 2 potential buyers one being Sharifa Kassim to view and buy the same, so that they could forcibly evict him. PW1 took the step of cautioning the property to protect his interest but on 1st March 2012 the District Land Registrar lifted the caution and the defendant vowed to effectuate her threats. PW1 attaches profound economic and sentimental value to the suit land which is ancestral land.

6. During cross-examination, PW1 stated that if evicted from the suit property, he will have nowhere else to go.

7. **PW2 M'MUKIRA M'IBERE** adopted his statement dated 3.5.2019 as his evidence. He is a neighbor of the plaintiff and was once the area manager, so he knows the plaintiff well. He stated that the defendant holds the suit land in trust for herself and her children having inherited the same from her father M'Muronga M'Amakia. PW2 confirmed that the plaintiff has been living on the suit land since 1991 to date with his wife and two children, and that plaintiff has extensively developed the land and continues to cultivate it.

8. **Pw2** further stated that PW1 has greatly helped the defendant as he built semi-permanent houses for her in 1996 for collection of rent which the defendant solely collects rent each month. Finally that the plaintiff is entitled to live and cultivate the suit land on the portion that he occupies since the defendant did not buy the land as she acquired it through inheritance and she should be fair enough to bequeath the same to her children including the plaintiff.

9. **PW3 NK** is a cousin of defendant and she adopted her statement recorded on 21.1.2013 as her evidence. Her evidence is similar to that of PW2 save the introductory part.

10. **PW4 EK** adopted her statement dated 21st January 2013 as her evidence and she reiterated what PW1 stated in his statement. She added that she is a sister of the plaintiff born of the same mother and father. She added that their father is known as JKK and from her father's side they were four children but one passed on. Then when their mother left their fathers home, she got five more children so in total, their mother had 9 children of which 8 are alive. During cross-examination PW4 stated that plaintiff has assisted their mother a lot as he acted as the man of the house and educated her siblings and also paid water and electricity bills. Pw4 emphasized that the suit land is family land and all their siblings should be allowed to use it.

11. In support of plaintiffs case, the following documents were produced as exhibits:

- (i) A certificate of search for L.R No. Ntima/Igoki/[...].
- (ii) Photographs showing various developments.
- (iii) Proceedings on an objection for removal of a caution over L.R No. Ntima/Igoki/[...].
- (iv) A letter dated 7.3.2012, demanding the plaintiff to vacate the suit land.
- (v) A letter before action issued to the defendant.

Defendants Case

12. **DW1 DK** testified and adopted her statement dated 2nd May 2012 as her evidence. She stated that plaintiff is her second born child, who only moved into the suit land on 31st December 2010 with her express permission. The allegation that he developed the land is a lie as the developments were hers which she nurtured for many years. She built the house on the suit land for her deceased son who had special need and that is where the plaintiff is currently living. DW1 further stated that she bought the suit land and she did not inherit it from anyone.

13. **DW1** further stated that the plaintiff is the only educated child and does not support her or any of his siblings and that the claims that he helped her build and that he gives her a monthly stipend are a false.

14. **DW1** also stated that the plaintiff is the son of one JK and like any other Mmeru son, he should ask his father for land. This is because according to Kimeru customs, land belongs to the clan and a son of a different clan cannot inherit another clans land even if that land belongs to the claimant's mother.

15. DW1 averred that she is an old woman over 70 years educating children left behind by her deceased daughter and the suit land is her only source of livelihood. That she has a total of 8 children and if they all demand for a share of her land, she will be rendered destitute and miserable in her old age. **DW1** believes that since the plaintiff is a secondary school teacher, he should be able to use his salary to buy his own land and not fight for this little family land owned by defendant. Finally, DW1 states that the allegations that plaintiff's father has no land is not true since his father has land in Gachanka and Mailisaba.

16. **DW2 EM** is another sibling of the plaintiff through their mother, (the defendant) but from a different father whose name is W. She adopted her statement dated 2nd May 2012 as her evidence where she stated that the plaintiff lied when he said that he has been supporting their mother. That the truth of the matter is that plaintiff and his wife have been insulting and harassing defendant. DW2 further stated that plaintiff only entered the suit land in 2010, that it is the defendant who made the developments on the land and that the land belongs to the defendant who bought the same and had it recorded in their late grandfather's name.

17. **DW3 PM** adopted his statement dated 2nd May 2012 as his evidence. He is also a half sibling of the plaintiff and his father too is one Wahome. DW3's evidence is similar to that of his sister, DW2. He added that plaintiff is the only educated child in the family and ought to be supporting their old and feeble mother but he doesn't. He further stated that it is unrealistic if all the children started demanding land from their mother.

18. In support of defence case, the following documents in the list dated 2.5.2012 were produced as exhibits.

- (i) Certificate of official search

(ii) Objection proceedings before the land registrar Meru.

(iii) (Demand notice dated 7.3.2012

Plaintiffs Submissions

19. It was argued for the plaintiff that the defendant had confessed that she allowed the plaintiff to build and live on the suit land and cannot therefore be allowed to evict the plaintiff from the land having lived there since 1991. Secondly that the testimonies of the plaintiffs witnesses confirm that the suit land was inherited by the defendant from her father and though the defendant claims that she bought the land, she did not disclose the seller, purchase price, date of the purchase, eye witnesses nor sale agreement to prove her claim. It was further submitted that defendant did not prove that the plaintiff has built on the land which he was allegedly given by his father.

20. While claiming the land on basis of TRUST, the plaintiff relied on the case of **Elijah Ouko Matagaro & another v Roselyne Dola Ouko & 4 others [2017] eKLR** where the court cited decision in **Richard Nyamemba Auka & 2 Others –vs- Josephine Motarohi & 2 Others** at page 7 where Okong’o J held;

“The existence or not of a customary trust is a matter of fact. The alleged trust must be pleaded particularized and proved.Customary trust is classified as an overriding interest which means that it may affect registered land although it does not appear in the register.....”

21. Other cases cited by the plaintiff are; -**Samson Emuru Vs Ol Suswa Farm Ltd (2006) eKLR, Stephen Kungutia & 2 others Vs Severina Nchulubi, Nyeri court of appeal Civil Appeal no, 221 of 2010, Meru H.C.C.no.62 of 2010 Mary Kaburo M’njuki vs M’Chabari Mitaru.**

Defendants Submissions

22. It was submitted for the defendant that under Meru customary law property ownership is patrilineal and that the plaintiff can only claim land from his father JK. Additionally the Meru customary law has not envisaged a situation where one could claim land from his mother. It was further submitted that no law allows a child to demand for land during the lifetime of his parent and that in any event, plaintiff is a teacher who can afford to buy land elsewhere. The defence relied on the following authorities to buttress their case: **Naomi Mwari Stanley & 3 others v Stanley M’Mugambi [2017] eKLR, John Ndung’u Murithi vs Gideon Karegwa Ndungu & 5 others (2006) eKLR, Eunice Gathoni Wang’ombe vs Hellen Wacera (2016) eKLR.**

Analysis and Determination

23. I have carefully perused through the pleadings , the record and the submissions and the issue for determination is;

Whether the defendant holds the suit property in trust of herself and her children?

24. **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;”

25. 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 befalls upon the plaintiff to prove the existence of a customary trust. Going through the record there are many conflicting statements as to how the defendant came to own the property. On the one hand the plaintiff claims that the defendant inherited the land while on the other hand the defendant claims that she bought it. 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. The averments by the plaintiff that defendant has not availed any evidence to show that she bought the land does not hold since the burden of proof still lies on the plaintiff.

30. In the case of **Jemutai Tanui vs Juliana Jeptepkeny & 5 others ELC No. 44 of 2013 (formerly HCC No. 60 of 2012) Eldoret**, Munyao J. was dealing with the question as to whether a proprietor who inherited her land from her father automatically held the said land in trust for her children. The court held that there was no automatic trust arising from that inheritance, and the proprietor was not bound to consult her children when she wanted to sub-divide the land and sell it.

31. In the case of **Susan Mumbi Waititu –VS-Mukuru Ndata & 4 others (19 of 2007) eKLR** Justice M.S.A Makhandia 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”

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. There is another twist to this dispute in that defendant has averred that under Kimeru customary law, land was acquired through patrilineal lineage. Defendant states that under Kimeru customary law, land belongs to the clan and a son of a different clan cannot inherit another clans land.

34. **Eugine Cotran** in his restatement of African law has stated that; ***“inheritance under Meru law is patrilineal....”***. None of the parties have clarified as to how property through matrilineal lineage in Kimeru customs is claimed. However, the case belongs to the parties and hence it was up to plaintiff to prove that customary trust in Kimeru customs can arise through matrilineal lineage, of which he has failed to prove. Thus unless and until defendant voluntarily gives plaintiff the land in question, then plaintiff cannot stake a claim on the suit land on the basis of Kimeru customary trust.

35. Of paramount concern is the fact that the suit land is **ONE ACRE**, where by plaintiff is claiming use and occupation of almost half of that land (0.4 acres). The plaintiff has a total of 9 siblings including himself, the one who passed on and his step siblings. The plaintiff is being supported by his full sibling EK, while his half siblings EM and PM are on the side of their mother. It therefore appears that the dispute has also taken the angle of sibling rivalry/power, the children of K versus the children of W.

36. Even if a customary trust somehow could arise in scenarios as in the instant matter, the circumstances of this case are unique in that the land is too small to be economically alienated by any one of the children. It is therefore unrealistic for plaintiff to claim rights and interests in respect of a portion of the suit land.

37. The plaintiff already has his own two children. What would happen if all plaintiff’s siblings and half siblings (and their off-springs) also claimed a portion of the suit land which is one acre? Indeed DW3 raised this issue on page 162 of the hand written record where he stated that; ***“the disputed land is only one acre and he wants 0.4 acres. So if all of us demand such a portion, it would not be enough”***.

38. I do agree with plaintiff’s contention that the principles of inter-generational equity are applicable in customary land claims, but this applies in so far as the circumstances of each particular case permits. 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.”***

39. It doesn’t follow that each and every person must have some piece of ancestral land. Some are lucky to have it others have to toil in order to get property of their own.

40. This is a situation whereby defendant is an elderly lady, while plaintiff is a working class secondary school teacher. No one else is occupying the suit land save the plaintiff a pointer to the manifestation of greed on the part of the plaintiff. It is not tenable that plaintiff should be clinging on this small piece of land yet he has a salary while his mother is eking out a living in places being referred to as mjini.

41. Plaintiff avers that he is the one who took care of his siblings, paying their school fees that he built structures for his mother and that he pays for her bills and even gives her monthly stipend. My question is, isn’t this what is expected of children, to take care of their parents. This is a moral obligation. However, such social commitments, however great do not mature to legal rights. Plaintiff cannot therefore claim the suit land on the basis of having helped his mother and his siblings.

42. The national values enshrined in our constitution include; ***human dignity, equity, social justice***. The orders sought by the plaintiff certainly do not embrace these values. Defendant deserves peace and tranquility in her sun set years and she has the right to use her small piece of land in the manner she pleases. Borrowing the words of **Judge D. Musinga** (as he then was) in the case cited by defence – **John**

Ndungu Muriithi versus Gideon Karegwa Ndungu and 5 Others H.C.C.NO. 94 of 2004, I find that plaintiff has displayed unmitigated greed and utter selfishness by haranguing his septuagenarian mother over a one acre piece of land, yet he (plaintiff) has 8 other siblings!

43. Final orders

1) This case has no merits and the same is dismissed with costs to defendant.

2) The orders of inhibition given herein on 27.9.2012 are hereby discharged.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 10TH DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Maranya holding brief for C.P Mbaabu for plaintiff

Muthomi K. for defendant

Plaintiff

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE