



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 138 OF 2017

AMBROSE KIMANI MWANGI & 30 OTHERS.....PLAINTIFFS

VS

STEPHEN IRUNGU.....1ST DEFENDANT

EDWARD MWANGI.....2ND DEFENDANT

JUDGMENT

1. The claim of the Plaintiffs by a Plaint dated 8/2/17 relates to a parcel of Land situated in Kangema Sub County in Murang'a County being Plot No. Loc.12/Sub-Loc.1/1221/19 (suit land).
2. It is common ground that the suit land though initially allocated to Mwangi Ngari, Mr. Zabron Mwangi Gaga was later entered on the Register as joint owners.
3. It is alleged by the Plaintiffs that the Plaintiffs and the Defendants and or their forefathers made contributions to the construction of buildings/developments thereon.
4. It is alleged by the Plaintiffs that the suit land is a partnership between the fore parents of the Plaintiffs and the Defendants and that the late Mwangi Ngari & Zabron Mwangi Gaga were by mutual agreement of the partners then registered as owners of the suit land or held the same in trust in that behalf . The Plaintiffs therefore contend that it was wrong for the Succession Court to determine that the suit land is to be shared equally between the Mwangi Ngari and Zabron Mwangi Gaga.
5. By a statement of defence dated 18/3/17 the Defendants denied the Plaintiffs' claim and asserted that the Plaintiffs claim is bad in law on the following grounds;
 - a) The suit land was owned by Mwangi Ngari and Zabron Mwangi Gaga in equal shares.
 - b) There was no partnership in respect to the suit land on Account of the part of the suit land relating to the share of Zabron Mwangi Gaga.
 - c) In view of the decision made by the Court in Nairobi HCCC No. 98/1989 & Nyeri ELC 46 of 2011, the present suit is barred by Limitation of Actions Act.
6. The parties proceeded to the hearing of the suit by oral evidence. The 1st Plaintiff Ambrose Kimani Mwangi and the 1st Defendant Stephen Irungu gave evidence for the Plaintiffs and the Defendants respectively.

7. The 1st Plaintiff reiterated the contents of the Complaint and his statement in respect of the same on record. During Cross-examination of the 1st Plaintiff the Defendants introduced a matter not pleaded in the defence being that the Plaintiffs did not have a grant of representation in respect of the estate of the persons whom they claim under being their forefathers.

8. In their evidence the Plaintiffs produced a register of members (PEX No. 7), Receipts of payment made to Murang'a County Government by the Plaintiff & Marked PEX No.8. Under Cross-examination the Plaintiff stated that he was not aware of when and by whom the Register was prepared. He added that he could not vouch for the correctness or otherwise of the Register. The Receipts produced bear the names, of Mwangi Ngari & Zabron Mwangi and in some other receipts bear the names of one or both partners.

9. The 1st Defendant reiterated the contents of the Defence and asserted that the persons being alleged by the Plaintiffs to be partners of the suit land are those called in and participated in assisting Mwangi Ngari in raising funds for construction of the suit land and not in any way connected to Zabron Mwangi Gaga under whom the Defendants are claiming.

10. The parties further determined to prosecute their case by written submissions. The Plaintiffs filed their written submission on 9/3/18 whereas the Defendants filed on 5/4/18.

11. In their submissions the Plaintiff largely relied on constructive trust as the basis for which they would challenge the Defendants claim of ½ share of the suit land. The Plaintiffs cited various case law which the Court has considered. The Plaintiffs did not set out any issues for determination.

12. The Defendants in their written submissions largely relied on the statement of Defence and the evidence of the 1st Defendant. They also relied on the challenge they brought up in cross-examination on the evidence of the 1st Plaintiff. They cited case law and referred the Court to the **Halsbury Laws of England 4th Edition** quoted by the Plaintiffs. The Defendants set out 5 issues for determination;

These are;

- a) Whether the Plaintiffs have locus standi to sue?
- b) Whether the action is time barred?
- c) Whether the omission of Mwangi Ngari from this suit is fatal to the Plaintiff's case especially considering the issue of trust?
- d) Whether the book produced by the Plaintiffs discloses a partnership and whether those partners are before the Court and whether in law what has been pleaded by the Plaintiff is a partnership?

13. Upon considering the pleadings filed by the parties, the evidence on record and the submissions, the Court finds that the following issues would effectively dispose of the suit;

- a) Whether there is a constructive trust for the Plaintiffs in respect of the suit land?
- b) Whether there was a partnership in respect for the suit land for the Plaintiffs?
- c) Whether the claim of the Plaintiffs is barred by Limitation of Actions Act?
- d) Whether the Plaintiffs have any legal standing in respect of the suit land?
- e) Costs.

A: Whether there is a constructive trust for the Plaintiffs in respect of the suit land?

14. In the Plaintiffs submissions they correctly quoted from **Halsbury Laws of England 4th Edition Vol 48 @ Para 69** where a constructive trust is defined as follows;

“ A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable(emphasis mine) to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where;

- i. There was a common intention that both parties should have a beneficial interest;
- ii. The claimant has acted to his detriment in the belief that by so doing, he was acquiring a beneficial interest.

The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that other party's words of conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.”

The Court concurs with this definition. In the circumstances of the suit land, a constructive trust would arise where with respect to Zabron Mwangi Gaga he made any representations by way of agreement or act for which the Plaintiffs and/or their forefathers or dependants undertook such action as alleged in making contributions for construction of the suit land in the belief that they were doing so as co-owners jointly with Mwangi Ngari & Zabron Mwangi Gaga. Where it is a matter of agreement, then the document relied ought to be produced and if it is representations made by contacts or verbally the particulars relied in that behalf ought to be itemized and produced by way of evidence in Court.

15. By reason of the Plaintiffs having relied in their claim on constructive trust, the burden of proof of the matters set out in the preceding paragraph fell on them. The Plaintiffs failed to bring forth any evidence by way of documents orally or by way of conduct by Zabron Mwangi Gaga which may have been relied by the Plaintiffs or any person claiming or they claiming under.

The Court does not find that any constructive trust existed in respect of the suit land more so relating to any conduct or behaviour by Zabron Mwangi Gaga in favour of the Plaintiffs or any person from whom they are claiming or claiming under.

B: Whether there was a partnership in respect for the suit land for the Plaintiffs?

16. The Plaintiffs claim that there was a partnership in respect to the suit land is anchored on the members Register (PEX No. 7). As stated in the evidence of the Plaintiff the witness cannot vouch for the contents of the Register. The foregoing notwithstanding, however, formation of a partnership requires statutory compliance which includes registration of the partnership. So much so that the Register produced as PEX No. 7 could only bear validity of the partnership is registered pursuant to the Partnership Act. The Plaintiffs did not produce evidence of any such formation of a partnership specifically by a deed of partnership or registration as required by the law. The Court does not find that there was any partnership in respect of the suit land.

C: Whether the claim of the Plaintiffs is barred by limitation?

17. The cause of action in relation to the suit land appears to have commenced in the year 1958. The claim being in respect of contract (partnership) in land Section 4 of the Limitation of Actions Act places the limitation to be 6 years. The Plaintiff filed a case in 1988 which was dismissed on 24/2/89 by the Court. If this suit is taken to have been a revival of a cause of action by them laying claim to the suit land then Limitation applies from 1995. Even if section 7 of Limitation of Actions Act would apply, then limitation would apply by 1997. Therefore going by the above limbs, it is clear that the present suit is barred by Limitation in so far as it relates to a claim in land.

D: Whether the Plaintiffs have any legal standing in respect of the suit land?

18. The Plaintiffs by their claim state that they are entitled to the suit land by reason of their forefathers being interested or having purchased an interest in the suit land. It is noteworthy that the persons registered as owners of the suit land, namely Mwangi Ngori & Zabron Mwangi Gaga have both died. In respect of Zabron Mwangi Gaga, the Defendants became registered as owners by way of transfer following orders of the Court in Kangema Resident Magistrate Court Succession Cause No. 77/2009. In that case a grant of representation was issued and confirmed in favour of Jemimah Thuita, the daughter in law to Zabron Mwangi Gaga. In such a case any suit or claim in respect of the suit land in so far as it relates to estate of Zabron Mwangi Gaga, would properly be filed against the said administrator namely Jemimah Thuita. Such suit can only legitimately be extended to include the Defendants as persons claiming under the said administrator. With respect to the Plaintiffs there are individual claims under rights in favour of their forefathers it would by dint of Section 47 of the Law of Succession Act be incompetent. In their evidence the Plaintiffs or any of them did not produce any grant of representation in respect of any of the persons they are claiming under. In the circumstances, the Court finds the claim of the Plaintiff to be incompetent.

E: Costs

19. Ideally costs would follow the event. But there is an important factor raised by the Defendants to the effect that the Plaintiffs did not give or serve a letter of demand on the Defendants before filing suit. The Plaintiffs explained the omission in the sense that the suit was urgent. Such statements appear inconsistent on the facts on the ground and the law. This is so because there is no indication that the Defendants at any time intended or threatened the Plaintiffs occupation of the suit land. Indeed, the Plaintiffs by way of their evidence have stated that they are in occupation of the suit land and did not tender any evidence of a threat in that respect by the Defendants. In this case therefore the Court will make an appropriate order for costs.

20. Having analysed the case of the parties as above and reached conclusions in respect to every relevant issue the Court makes the following orders;

- a) The Plaintiffs suit be and is hereby dismissed.
- b) The Plaintiffs jointly and severally shall pay the Defendants costs of the suit on higher scale.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 2ND DAY OF JULY 2018.

J G KEMEI

JUDGE