



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC NO. 84 OF 2017

BENJAMIN MWANZIA WAMBUA

(suing as legal representative to the estate of

Mukui Wambua Maingi).....PLAINTIFF

VERSUS

STEPHEN KIMEU KIMANGA.....DEFENDANT

JUDGEMENT

1) The plaintiff is a Pastor with Good News Church of Africa (GNCA) and he hails from Ngiluni in Kiteta.

2) By his plaint dated 7th April, 2017 and filed in court on the 12th April, 2017 the plaintiff prays for judgement against the defendant for :-

1. A declaration that the defendant holds ½ land No. Kiteta/Ngiluni/1610 on trust for the plaintiff and all beneficiaries to the Estate of Mukui Wambua Maingi.

2. An order directed to the Land Registrar, Makueni County to cause land parcel No. Kiteta/Ngiluni/1610 subdivided and ½ thereof registered under the names of the plaintiff on trust of the other beneficiaries.

3. A perpetual order of injunction against the defendant by himself, his relatives or agents from evicting or in any way interfering with the plaintiffs use and occupation of ½ portion of the land otherwise known as Kiteta/Nguluni/1610.

4. Costs and interest of the suit.

3) Essentially, this matter proceeded as undefended suit after the defendant failed to enter appearance and to file his defence despite having been served with summons on the 16th May, 2017 as can be seen from the affidavit of service sworn at Machakos on the 8th June, 2017 and filed in court on the 27th June, 2017.

4) During the hearing which took place on the 29th January, 2018 the plaintiff adopted his statement that he recorded on the 12th April, 2017 as his evidence. He told the court that land parcel number Kiteta/Ngiluni/1610 measuring approximately 8.63 hectares was initially owned by his grandfather who had two(2) sons. According to him, the two were supposed to subdivide the suit land which he termed as family land in equal shares

5) The plaintiff added that the two sons of his grandfather were Ithau Nyeete and Maingi Nyeete. The plaintiff pointed out that his father's name was Maingi Nyeete while Ithau Nyeete had two sons by the name of Mbuvi Mutie Ithau and Mwaniki Mutie Ithau. He went on to say that Mbuvi Mutie had 2 sons whose names were Votoi Mbuvi and Mutua Mbuvi.

6) According to the plaintiff, Votoi sold half of their land without their consent and that when Votoi passed on, one Kimanga who had bought the land from Votoi claimed to have purchased the whole parcel of land.

7) The plaintiff went on to tell the court that his parent are deceased and he produced a copy of limited grant dated 25th October, 2012 as PEX No. 1. The plaintiff added that the defendant thereafter registered the entire parcel of land in his name while there was appeal

number 1778/96 that was still pending before the minister. The plaintiff produced a copy of the appeal as PEX No. 2.

8) It was also the plaintiff's case that there were several cases pending in court such as L.47 of 1974 which was at Tawa Law Courts then known as Uani District Court and proceeded to produce a copy of the judgment as PEX No. 3. The parties in the aforementioned suit were Samuel Votoi Versus Mutua Mwaniki. He revealed that when Uani Court ruled in favour of Samuel Votoi, they appealed in Machakos Civil Appeal number 56 of 1980 (PEX No.4). He said that the outcome of the appeal was that the suit land was to be subdivided into two (2) equal parts but this was not done. The plaintiff went on to say that the chief wrote to the defendant (PEX No. 5) to stop him from developing the suitland. He produced a second letter dated 15th February, 1975(PEX No. 6) barring the defendant from purchasing the land.

9) It was the plaintiffs evidence that he and others filed objection proceedings before the Senior Land Adjudication Officer Machakos on 2nd March, 1984(PEX No.8). The plaintiff further produced another letter dated 14th December, 2004 and demand letter as PEX Nos. 7 and 9 respectively.

10) His prayer was that judgement be entered as per the plaint. When the court prodded the plaintiff to disclose the outcome of the appeal before the minister, he said that it was held that they had no power to deal with a registered land.

11) The plaintiff called Charles Mwanja Mukuu (PW1) and Katuvali Muindi(PW2) as his witnesses.

12) Mukuu's (PW1) in his evidence adopted a statement which he recorded on the 19th September, 2017 as his evidence. He told the court that land parcel number Kiteta/Ngiluni.1610 is family land and that it was sold by Votoi Mbuvi without the consent of the rest of the family. According to him, Votoi sold his share of the suit land before he left for Shimba Hills. He went on to say that the defendant claimed to have purchased the entire parcel of land which according to him was not true.

13) He said that the suit land ought to be subdivided between the families of Maingi and Mutie Ithao.

14) Muindi's (PW1) in his evidence adopted his statement that he recorded on the 13th September, 2017. He said that he does not know the registration number of the suit land and that all what he knows is that it was owned by Mutie and Maingi. According to him, the suit land was sold by Votoi Mbuvi but clarified that the latter only sold his portion to Kimeu Kimanga the defendant herein.

15) The plaintiff's counsel filed her submissions dated 19th February, 2018. In her submissions the counsel submitted that the defendant knowingly bought a portion of the suit land without the consent of the plaintiff's family members and caused it to be registered in his name, that the defendant holds the suit property as a trustee and on behalf of the plaintiff to the extent of a half the property and urged the court to find for the plaintiff and grant the prayers sought.

16) I have read the evidence on record and the submissions filed. In the Civil Appeal Number L 56 of 1980 where the appellant was one Mukui Wambua Mangi Vs Samuel Votoi and 2 others, the appeal was allowed and parties agreed to share the land between themselves.

17) The appeal does not identify the land in question but presumably the land in question is the one that was eventually registered as Kiteta/Ngiluni/1610.

18) From the evidence of the plaintiff, the suit land was never subdivided as per the consent order signed in civil appeal number L 56 of 1980 as one Votoi appears to have sold the entire parcel of land to the defendant herein. According to the plaintiff, the defendant only purchased half of the suit property. The plaintiff further maintains that when Votoi passed on, the defendant claimed to have bought the entire suit property which the plaintiff disputes. There is no evidence contrary to that of the plaintiff and his two witnesses. In the case of **Jutabi African Adventure Ltd and Another Vs Christopher Michael Lockiley [2017] eKLR**, the Court of Appeal cited the case of **Gichuki Vs Gichuki [1982] KLR 285 and Mbothu & 8 others Vs Waititu and 11 others [1986] KLR 171** and stated thus;

“ The law never implies, the court never presumes, a trust , but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

19) In this case before me, the plaintiff states that what he is claiming is the half that ought to have gone to his father pursuant to the consent order recorded in civil appeal number L 56 of 1980. He further says that Votoi only sold half of land parcel number Kiteta/Ngiluni 1610 to the defendant.

20) From the above, I am of the view that the circumstances of this case connote an implied trust in favour of the plaintiff. I hold that the plaintiff has satisfied this court that he has a cause of action against the defendant. I do, therefore, proceed to enter judgement for him and against the defendant in terms of prayers 1,2, 3,and 4 of the plaint. It is so ordered.

Signed, dated and delivered at Makueni on 4th day of July, 2018.

MBOGO C.G,

JUDGE

In the presence of

Mr. Oleli holding brief for Mr. Kilonzo for the plaintiff

Plaintiff

Defendant `

Mr. Kwemboi court clerk.

MBOGO C.G, JUDGE

4/7/2018