



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 395 OF 2017

ALEXANDER MWANGI KIHARA.....PLAINTIFF

VS

WAMBUI KIHARA MBURU.....DEFENDANT

CONSOLIDATED WITH

ELC NO 23 OF 2019

WAMBUI KIHARA MBURU.....PLAINTIFF

VS

DAVID WAHUGA KUBORIGA.....1ST DEFENDANT

ALEXANDER MWANGI KIHARA.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed his plaint dated 08/06/2017 against the Defendant for orders that; -

a) A declaration that the Defendant holds the property known as Title no. LR No. LOC 3/GITURU /223 in trust and that the Plaintiff is entitled to 6.85 acres to be excised from the said parcel of land.

b) An order for a permanent injunction restraining the Defendant from evicting, selling, offering for sale, bequeathing, transferring and/or in any other manner interfering with the Plaintiff's quiet occupation and possession of the 6.85 acres forming part of Title No. LR LOC 3/GITURU /223.

c) In the alternative an order directing the Defendant to refund the Plaintiff the total sum expended by the Plaintiff in carrying out he development on the land known as Title No. LR LOC 3/GITURU 223 to be assessed by the Court.

d) General damages.

e) Costs of the suit and interest thereon.

2. The Plaintiff claims that his mother, the Defendant, is the registered owner of Title No. LR LOC 3/GITURU /223 (hereinafter referred to as the suit land) measuring 10.7 acres and holds 6.85 acres thereof in trust for him. That he was born and raised on the suit land and settled his own family upon constructing his house thereon in the year 2000 with the consent of his mother, the Defendant.

3. The suit is opposed by the Defendant vide her defence and counter claim dated 7/11/2019. She denied holding the suit land in trust or bequeathing the Plaintiff as alleged. She faulted the Plaintiff for forcefully encroaching on her land and constructing his house. In her counterclaim, she blamed the Plaintiff for illegally placing a caution on the suit land and prayed for its immediate removal and a declaration that the suit land is exclusively hers.

4. The claim of the Plaintiff and the 1st Defendant in ELC 23 OF 2019 was settled vide the consent order of the 20/3/2017. In the said

consent the 1st Defendant agreed to remove the caution lodged on the suit land in return of being given 1.5 acres out of suit land.

5. It is not disputed that the Defendant and Plaintiff are mother and son respectively. It is common ground also that the Defendant's husband, one Kihara died in 1953 almost four years before the Plaintiff was born.

6. The Plaintiff solely testified as PW1 and adopted his statement dated 08/06/2017. He testified that in 1982, the Defendant subdivided the family land parcel LOC 3 GITURU/182 into two parcels of land; parcel LOC.3 GITURU/223 and 224 measuring 10.7 and 4 acres each. That parcel 224 was sold and she remained with the suit land, parcel 223 LOC 3 GITURU/ 182 measuring 14.7 acres and parcel 290 measuring 5 acres. That parcel 290 was wholly bequeathed to his brother who also got 1.85 acres from parcel LOC 3 GITURU/182 thus totaling 6.85 acres while he got a similar acreage in parcel LOC 3 GITURU/223.

7. On cross-examination, he admitted that the green card for parcel LOC 3 GITURU/182 was opened on 26/3/62 when he was 4 years old and closed on 3/9/1965. He went ahead to state; -

“I am in Court because of parcel LOC 3 GITURU/223...

Parcel 223 was subdivided and I was given 6.85 acres. There was no agreement. No minutes. There were witnesses (my sisters) because they have a bad relationship with my mother ...they cannot come to testify in Court unless they are given protection by the Court...”

8. Further, the Plaintiff admitted that they are six siblings in the family but denied their entitlement to the suit land. He also admitted registering a caution on the suit land on 26/08/2007 to protect his licensee interests. He insisted he has a good relationship with the Defendant except that his siblings are perpetuating hostility against him through their mother.

9. The Defendant testified as DW1 and adopted her statement dated 5/2/2015 as her evidence in chief. She stated that she wanted the Plaintiff's caution removed to enable her distribute the land among her children. She denied giving the Plaintiff 6.85 acres of the suit land and accused her son of lying. She highlighted the frosty relationship between the Plaintiff and herself that necessitated an elders meeting to resolve their differences. She maintained that the suit land is solely hers and does not hold it in trust for the Plaintiff.

10. On Cross-examination, DW1 was adamant that she had sold 1 acre of the suit land to David Kuboriga (1st Defendant in ELC No. 90 of 2015) and was willing to share the property among all her children including the Plaintiff. This is despite acknowledging that he was not the son of her late husband, Kihara.

11. Parties agreed to file their respective written submissions. The Plaintiff filed his submissions dated 17/2/2021 whilst the Defendant filed his dated 16/2/2021 on 26/2/2021.

12. The Plaintiff urged the Court that the Defendant is the registered owner of the suit land which according to him, she received from his late father to hold in trust under the Kikuyu Customary Law. That further the Defendant has not demonstrated that she purchased the suit land thus it is subject to the doctrine of trust. Reliance was placed on the cases **Peter Thuo v Githinji Waweru [2019] eKLR** and **Peter Ndung'u Njenga v Sophia Watiri [2000] eKLR**.

13. On behalf of the Defendant, it was submitted that the sour relationship between the disputants can be inferred from the records and pleadings in Court. She faulted the Plaintiff for shaky and uncorroborated evidence and urged the removal of the Plaintiff's caution on her land. That the entire spirit and intention of the Plaintiff's case is not about existence of a trust or not; but the 6.85 acreage he is claiming. That no evidence was led to show how the Plaintiff arrived at the said acreage for instance a surveyor's or valuer's report for the alleged special damages. The Defendant prayed for an injunction to stop the Plaintiff from further encroachment and harassment.

14. The Defendant went ahead and distinguished the authorities cited by the Plaintiff.

15. From the pleadings and submissions on record, the issues for determination are; -

- a) Whether the Plaintiff has proved his case that the Defendant holds the suit in trust for him.
- b) Whether the Plaintiff has proved his case for an order for permanent injunction, general and special damages.
- c) Whether the Defendant has proved her Counterclaim.

16. The Plaintiff based his claim on Customary Trust as an overriding interest over the suit land as provided under Section 28(b) of the Land Registration Act. The Section states; -

28. Overriding interests 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—

- (b) trusts including customary trusts;

17. In addressing the first issue, the Plaintiff faulted the Defendant for failing to disclose the genesis of her title and on that basis, urged the Court to conclude that the suit land is ancestral land. In my view this amounted to shifting the legal burden placed on the Plaintiff to prove

his case on a balance of probabilities.

18. Further, the Plaintiff rightly cited the Supreme Court determination in the case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another [2018] eKLR** which set out the parameters for determining a trust 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. 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:

- a. The land in question was before registration, family, clan or group land
- b. The claimant belongs to such family, clan, or group
- c. 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.
- d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- e. The claim is directed against the registered proprietor who is a member of the family, clan or group”

19. The Supreme Court also stated that it is for the Court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

20. The Plaintiff without proffering cogent evidence, claimed that the suit land was transferred from the late Kihara to the Defendant for the benefit of their children. He did not table any evidence to establish the intention of the parties to create a trust. The Plaintiff produced a green card that only showed the Defendant as the registered owner without any references of the late Kihara.

21. In the case of **Susan Mumbi Waititu & 2 Others V Mukuru Ndata & 4 others [2008] eKLR** the Court was categorical that a claimant must prove with cogent evidence that the suit premises was ancestral land and thus family land. Hence a trust cannot be imputed. Without any evidence as to how the suit land was held or utilized before the Defendant's registration, the Court cannot infer an intention to create a trust in his favour.

22. To this end I agree with the Defendant's submissions that a claim for customary trust cannot be in respect to the Plaintiff only in detriment to the rest of the siblings.

23. Recently, in the case of **Paul Kirinya v Delfina Kathiri [2019] eKLR** the Court cited with approval the decision of **Munyao J in Jemutai Tanui vs Juliana Jeptepkeny & 5 Others ELC No. 44 of 2013 (formerly Eldoret HCCC No. 60 of 2012)**, who dealt 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.

24. In view of the foregoing, the Plaintiff's claim for customary trust therefore fails. The Plaintiff failed to lay any cogent evidence before the Court to support his claim on half the share of the suit land.

25. On the second issue, the Plaintiff sought a permanent injunction against the Defendant. The Defendant has demonstrated that she is the registered owner of the suit land having purchased it from the interested party. Article 40 (1) of the Constitution provides for protection of the right to own property of any description individually or in association in any part of the country. The Defendant's certificate of title is held as conclusive evidence of proprietorship in line with Section 26 of the Land Registration Act.

26. Having determined the first two issues in the negative, an order for permanent injunction has no basis now. The same outcome applies for the prayer for general and special damages. There is no sufficient cause to warrant an award for general damages herein. Similarly, special damages, must be pleaded and strictly proven. These awards do not arise.

27. Lastly, the Defendant raised a counter claim seeking removal of caution and permanent injunction against the Plaintiff from further interference and harassment. The Defendant is in her sunset years and her sole wish is to divide her property. On 29/09/2014, the Defendant had sought removal of the caution by the Land Registrar vide the Notice of Intention to attached to her List of Documents in Nairobi ELC No. 90 of 2015.

28. The applicable law is set out in Sections 73 and 78 of the Land Registration Act, 2012 which provides in part: -

“73. Withdrawal and removal of caution

(1) A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar.

(2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

78. Removal and variation of restrictions

(1) The Registrar may, at any time and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.

(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the Court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.

29. I am in agreement with the Defendant's submissions that the continued existence of the caution is a hindrance to the Defendant's rightful enjoyment of her property. The Plaintiff has not convinced the Court that the caution should be left to persist on the land.

30. Before I pen off I must observe that the Defendant is in her sunset years and the Plaintiff concedes that she raised him up, paid school fees and got him a job at Kenya Tea Development Authority. Clearly the Plaintiff who is an able adult should seek to acquire his own properties. He cannot force the Defendant to give him a share of the land, in this case a bigger share. In this case the Defendant was categorical that she wants to subdivide her land and distribute to her children, the Plaintiff included. The old lady must be allowed to deal with her land as she desires and have a free hand to settle her earthly affairs.

31. In the end, the final orders are as follows;

a) Plaintiff's suit fails and is dismissed.

b) The Defendants counterclaim succeeds.

c) It is hereby declared that the suit land belongs to the Defendant.

d) The caution registered on the suit land on the 26/8/2007 be and is hereby removed.

e) An order be and is hereby issued compelling the Plaintiff to desist from encroaching on the Defendants property and further desist from harassing abusing and in any way being vexatious and hostile to the Defendant.

f) The costs of the suit and the counterclaim shall be in favour of the Defendant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH DAY OF MAY 2021

J.G. KEMEI

JUDGE

Delivered in the presence of:

Muiru HB for Ms. Mokaya for the Plaintiff

1st & 2nd Defendants – Absent

Kuiyaki, Court Assistant