REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 20 OF 2020

1. RACHEL OKUMU

2. KENNETH OUNDO MBOYA

(Suing as the administrators of the Estate of MICHAEL OKUMU ACHOKA).....PLAINTIFFS

VERSUS

ESTHER KAHAYI MUJUMBA

(Sued as an Administrator of the Estate of MARCO MUJUMBA BUSOLO).....DEFENDANT

JUDGMENT

INTRODUCTION

1. By a plaint dated **17/3/2020** and filed in court on the same date the plaintiffs seek for judgment against the defendant for the following orders

(a) A declaration that the registration of the defendant as a sole proprietor of Land Parcel No. KAKAMEGA/NZOIA/51 is unlawful and illegal.

(b) An order that the defendant holds Land Parcel No. KAKAMEGA/NZOIA/51 in trust for the plaintiffs and an order terminating the said trust.

(c) An order directing the Land Registrar, Kakamega County to cancel the registration of the defendant as a sole proprietor and issue two titles in favour of the plaintiffs and the defendant in equal shares.

(d) A permanent injunction restraining the defendant, her servants and/or agents from interfering with the plaintiffs' peaceful use and possession of Land Parcel No. KAKAMEGA/NZOIA/51.

(e) Costs of the suit.

(f) Any other relief the court deems fit and just to grant.

PLEADINGS

The Plaint

2. The plaintiffs' claim is that the defendant's action of registering herself as the sole proprietor of **Land Parcel No. KAKAMEGA/NZOIA/51** was unprocedural and illegal and that thus her title over the suit land ought to be cancelled. They aver that the defendant's husband named Marco Mujumba Busolo and their father Michael Okumu Achoka were brothers born of the same mother, Mary Minayo Busolo; that Marco filed for succession and had the land registered in his name after the demise of his mother; that Marco also met his demise whereupon the defendant who is his widow secretly filed succession proceedings in respect of his estate and fraudulently caused the suit land to be registered in her sole name with the full knowledge that her late husband and the plaintiff's father were both beneficiaries to the suit land and that the suit land was to be shared equally between them. The plaintiffs state that they resided on the suit property with their father during his lifetime and that they continue to reside thereon to date hence the suit for inter alia a permanent injunction.

The Defence and Counterclaim

3. The defendant filed her defence and counterclaim on **28/5/2020** denying the claim that she holds the land in trust. She however admitted that she obtained the land through succession proceedings filed in respect of the late Marco's estate. She further avers that since the land was as at the time of the filing of the suit not in the name of the deceased Marco the suit was fatally flawed. Further she states that the plaintiffs had no interest in and were not beneficiaries of the estate of the late Marco and that distribution of the said estate was never challenged by any person; that marco obtained the suit land through transmission by virtue of succession proceedings in respect of Mary Minayo's estate; that the plaintiff's father one Achoka of Busia (who is said to have died in 1957) and Mary Minayo had separated after which Mary Minayo married one Wilson Busolo with whom she bore Marco Busolo in **1946** and Susan Busolo in **1947** or thereabouts; that Wilson Busolo and mary minayo purchased the suit land in **1968**; that Wilson busolo paid for the plot but the allotment was made out in the name of Mary; that both were interred on the suit land upon demise; that the plaintiffs' father's inheritance is in Busia; that the plaintiff's father challenged the grant of letters of administration in respect to Mary Minayo's estate but died before the entire application was heard; that the transmission of the suit land to Marco therefore has remained valid to date; that at one time the ELC court in 2014 restrained the plaintiffs from interring the remains of their father on the suit land but they defied the order; that the transmission of land to Marco was no as a result of any fraudulent succession proceedings; that the plaintiffs' father was residing on the suit land with the permission of the registered owner. In the counterclaim the defendant prays that the court do declare that she is the registered owner of the suit land to the exclusion of the plaintiffs or anybody claiming under them and eviction of the plaintiffs and a permanent injunction restraining them from interference with the suit land.

Reply to Defence and Defence to Counterclaim

4. On **3/6/2020** the plaintiffs filed reply to defence and defence to counterclaim denying the contents of the defence and counterclaim. They aver that the registration of Marco as the owner of the land was tainted with fraud and was challenged by their father in the succession cause. They state that upon the re-marriage of Mary Minayo to Wilson Busolo the children born between Mary and Michael legally became the children of Wilson Busolo. They deny that the inheritance of their father was in Busia and maintain that he was a beneficiary of Mary Minayo's estate. They insist that the defendant obtained a grant to the estate of Marco surreptitiously to enable her obtain registration of the land in her name and that she holds the land in trust for them.

THE EVIDENCE OF THE PARTIES

The Plaintiffs' Case

5. The hearing of the suit commenced on **9/12/2020** when **PW1, Rachel Nanteza Okumu** testified. Her evidence is closely follows what is contained in the plaint save that the 1st plaintiff turned around to state that Michael Okumu was her husband and not father and that he died in **2015**; that the 2nd plaintiff is her son; in the same vein she stated that the defendant's husband was brother to her husband.

6. PW 1 produced a Grant of letters of administration to her late husband's estate as **PExh 1**; that her husband had **3** other wives whose names she gave; that at first the family lived at Nairobi after which her husband took them to the suit land and built for them a house on it; that she had lived on the suit land since **1991**; that her family utilizes half of the land and the defendant's family the other half; that the two portions were demarcated by village elders; that her husband and the defendant's husband jointly used to lease out the land to third parties; that in the announcement of the death of Mary Minayo, her husband was listed as one of her children; that the suit land was allocated to Mary Minayo; that the defendant should have involved the entire family including the plaintiffs in the succession cause; that her registration as owner of the land was fraudulent; that each family ought to have obtained its own title deed; that Mary Minayo never asked them to leave the land for Busia; that they are not trespassers and that the counterclaim should be dismissed and the defendant's title cancelled. Upon cross examination she stated that she had never seen the other children born between Achoka and Mary Minayo living on the suit land. that her husband had bought land at Bikeke where one of his wives called Agnes lived; that one other widow to her deceased husband has been living on the suit land for about **10** years and that the family was evicted and stayed out of the suit land for about three years and then returned to it.

7. PW2, Kenneth Mboya Oundo, the 2nd defendant testified on the same date as **PW1**. His evidence matched that of PW1 save that he added that the demarcation of the suit land into two portions was authorized by Mary Minayo and that there is a boundary on the ground. On cross examination he averred that it was Mary Minayo who allocated his father the lower portion of the suit land.

8. PW3, Erastus Muyieku Shaita testified on the same date as **PW1**. He stated that he is a retired chief in the locality in which the land is situate; that though by then he was not a chief, he is aware that Mary Minayo came to take possession of the suit land in **1968**; that Mary brought Michael with her to the land when she came; that she was then living in Nairobi but those members of her family whom she brought into the land built houses on the land; that later Wilson Busolo retired and came to live on the suit land; that Mary Minayo lived on the land with all their families; that Mary died before Wilson Busolo; that Marco was preventing Michael from utilizing the suit land; that the dispute was brought to **PW3's** office by Michael; that Michael complained that the land was charged to **AFC** and Marco was not paying the loan and was also preventing Michael from utilizing the land; that **AFC** soon gave notice to auction the land over the debt and **PW3** helped the two brothers to lease out the land in order to repay the debt; that he prepared the lease agreements; that in **1988** Mary Minayo had told **PW3** that all her children were entitled to the land and it ought to be split into **2** portions; that **PW3** sent village elders to subdivide the land into two portions and they reported back to him that they had done so; that the defendant's family utilizes half of the land and the 1st plaintiff's family the other half; that there are graves on the side occupied by Michael's family where the deceased in his family were buried; that the boundary that **PW3** caused to be erected is still in existence and that he retired from duty in **1998**. Upon cross examination he was not sure whether the debt securing the land was an **AFC** loan or an **SFT** loan. However he was positive that the said loan had been repaid. He also stated that the land was purchased before Wilson and Mary lived together, but by the time the land was demarcated into 2 portions, the two parents were still alive. He stated that he could not involve Wilson because the plot belonged to Mary. He also added that Michael had 2 wives.

9. PW4, Rufus Mushasha Wamarika testified on the same date as **PW1**. His evidence is that he was chairman of the about 8 elders at the chief's office as at **1999** whom the chief sent to Mary's home where Marco stated that he wanted the land subdivided and he be issued with a bigger portion. However the chief had informed the elders that he had subdivided the land before and the elders only advised the quarrelling brothers to keep that boundary. He stated that the elders saw a trench that separated the two portions of land and that the two brothers agreed

to respect the elders' decision.

10. PW5, Samita Buchungu testified **3/6/2021**. He adopted his statement dated **5/8/2020** as his evidence-in-chief in this matter. He stated that Marco and Michael lived on the suit land until their mother died and that their respective families still utilize the land.

11. With the above evidence the plaintiffs closed their case.

The Defendant's Defence

12. DW1, Estherah Kahayi Mujumba, the defendant in this suit testified on **3/6/2021**. She adopted her witness statement dated **21/9/2020** as her evidence-in-chief. Her evidence is that she got married to Marco in **1965** and they were then living in Nairobi; that Marcos parents were marry Minayo and Wilson Busolo; that they had no other child save a daughter called Susan; that at the time Marco was born Mary and Wilson had already married; that Mary owned plot **no 51** which is the suit land; that Wilson sold land in Maragoli to one timothy band bought the suit land which was registered in Mary's name; that Michael lived in Bungoma but later came to the suit land; that no other child of Patrick Achoka ever settled on the suit land; that Mary and Wilson lived in Nairobi then; that Susan also lived on the suit land; that Mary also came and lived on the suit land before she died, followed by Wilson; that **5** of **DW1's** children are male; that Marco took out a grant in respect of Mary's estate; that Michael opposed the grant to Marco; that Michael was evicted from the suit land but had the eviction set aside; that he later file an objection in the succession but both died before the succession issue was finalised; that Marco's registration as owner of the suit land was however not set aside and she obtained a grant and a certificate of confirmation of grant over his estate which was not opposed and the suit land came into her name by way of transmission. According to her only **DW1** and her children were entitled to inherit the suit land while Michael's inheritance is at Busia.

13. Upon cross-examination **DW1** stated that it was not the chief who fixed the boundary but the 1st plaintiff, but admitted that every family utilizes their own portion. She dismissed the evidence of **PW3** as lies. She could also not give the particulars of the land that the 1st plaintiff's husband was allegedly supposed to inherit in Busia. She stated that she followed the proper process in the succession proceedings.

14. With her only evidence the defendant's case was marked closed.

SUBMISSIONS OF THE PARTIES

15. The plaintiffs filed their written submissions on **30/6/2021** while the defendant filed his submissions on **14/7/2021**.

DETERMINATION

Issues for determination

16. I have considered the plaint, the defence and counterclaim, the evidence of the parties and the filed submissions.

17. It is not in dispute that the 1st plaintiff's husband and the defendant's husband were born of different fathers but of the same mother; that their mother owned the suit land and that they and their respective families lived on the suit land; that they had a dispute between themselves over the suit land and that the suit land is utilized by the plaintiffs and the defendant in a **50:50** ratio.

18. The main issues for determination in this matter are:

> ***(a) Whether the registration of the defendant as proprietor of the suit land was procured by way of fraud;***
>
> ***(b) Whether the defendant holds title to the suit land in trust for the plaintiffs or the plaintiffs are trespassers who should be evicted from the suit land;***
>
> ***(c) Whether the said registration should be cancelled and two titles of equal size issued to the plaintiffs and the defendants respectively;***
>
> ***(d) Who ought to bear the costs of this suit?***
>
> **19.** The issues are addressed as hereunder:-
>
> ***(a) Whether the registration of the defendant as proprietor of the suit land was procured by way of fraud;***

20. Fraud connotes a willful intention to do wrong, to obtain gain at the expense of another person.

21. I have considered that the defendant knew that the plaintiffs are resident on the suit land and that her husband and the 1st plaintiff's husband were embroiled in a succession battle over the validity of the grant issued to the defendant's husband and that the case was not yet decided on the merits. Instead of becoming her late husband's substitute in the succession case to prove to the succession court that her late husband had obtained the grant to his mother's estate legally and without material non-disclosure she opted to take out the grant in respect of her late husband's estate and since he was the registered owner of the suit land she was able to obtain registration of the suit land in her name by way of transmission. In this court's view her action n could be taken as innocent if she had lived alone on the suit land. However she had prior knowledge of the dispute and the possessory rights of the plaintiffs' family and she can not be taken to have been acting in good faith.

Therefore while taking out a grant of letters in the estate of her husband was legal, her subsequent act of confirming the grant in respect of property that was under dispute and which was occupied by the plaintiffs can be taken as attempting to steal a march on the plaintiffs. I find that the registration of the defendant as proprietor of the suit land to the exclusion of the plaintiffs was irregular, illegal and fraudulent.

(b) Whether the defendant holds title to the suit land in trust for the plaintiffs or the plaintiffs are trespassers who should be evicted from the suit land;

22. This is an issue that threatens to take this court into the realms of family law and this court must steer clear of that course and restrict itself to matters that are as far as possible relevant for the determination of whether the defendant holds the title to the suit land in trust for the plaintiffs.

23. As this court maneuvres through the labyrinth of family issues involved to arrive at a decision regarding trust **Sections 34** and **35** of **The Law Of Succession Act Cap 160** are relevant. They state as follows:

> **"34. Meaning of intestacy**
>
> **A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.**
>
> **35. Where intestate has left one surviving spouse and child or children**
>
> **(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—**
>
> **(a) the personal and household effects of the deceased absolutely; and**
>
> **(b) a life interest in the whole residue of the net intestate estate:**
>
> **Provided that, if the surviving spouse is a widow that interest shall determine upon her re-marriage to any person.**
>
> **(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.**
>
> **(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.**
>
> **(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—**
>
> > **(a) the nature and amount of the deceased's property;**
> >
> > **(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;**
> >
> > **(c) the existing and future means and needs of the applicant and the surviving spouse;**
> >
> > **(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;**
> >
> > **(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;**
> >
> > **(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and**
> >
> > **(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.**
>
> **(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children." (Emphasis mine).**

24. It is clear that both the parents of the 1st plaintiff's husband and the defendant's husband died intestate. The owner of the property, the mother, died first. The surviving spouse appears to have not elected to administer the property of the deceased. Their son Marco took out a grant of letters of representation to her estate. However, the 1st plaintiff's husband was also a son to the owner of the suit property. It mattered not that the two were borne of different fathers. The common denominator that binds them as brothers in this matter is that they

were born of the same mother who owned the suit property and that she died intestate. In this court's view, from the provisions of **Section 35** of **Cap 160** cited earlier, the very fact that they were born of the same mother is proof that they were beneficiaries to her estate which their father never dealt with before he also died. Marco, by obtaining a grant to his mother's estate excluded Michael from benefitting from the estate. This despite the fact that the latter had lived with his family on the suit land for many years. I find that by virtue of the admission by the defendant that her husband and the 1st plaintiff's husband were borne of the same mother, then the persons legally next placed to inherit include the 1st plaintiff's husband, and that is the 1st plaintiff and her children stood to benefit from the distribution of Mary Minayo's property. Anyone who therefore became registered as proprietor of land belonging to the estate of the late Mary Minayo after the demise of both Marco and Michael could not hold the land otherwise than as a trustee of all who were in law the beneficiaries of the late Marco's and Michael respective estates. However, disclosure has been made before court in evidence by both sides that there is possibility that other descendants of the late Minayo and the late Michael and the late Marco may be in existence. Following the above discourse this court has no difficulty in arriving at the conclusion that the defendant holds the title to the suit land in trust not only for the plaintiffs, but for all persons who have legal right to be the beneficiaries of Mary Minayo, deceased. Consequently this court finds that the plaintiffs are not trespassers on the suit land and that an eviction order can not in those circumstances issue against them.

(c) Whether the said registration should be cancelled and two titles of equal size issued to the plaintiffs and the defendants respectively;

25. The only appropriate course of action arising from the finding that the defendant holds the title in trust for other persons is that the interest of the plaintiffs and any other interested beneficiary should be safeguarded. Since there is a succession cause that was not completed and in which the grant of letters of administration to the late Mary Minayo's estate had been challenged, I only find it proper to nullify the title in the name of the defendant and order that it shall revert not to the name of her husband but to the name of Mary Minayo so that the parties may in the succession cause apply for proper distribution of the estate in the succession court.

d. Who Should Bear The Costs Of This Suit?

26. As parties possess familial bonds between them, I find that to preserve amity between them it is only proper that each bears their own costs.

CONCLUSION.

27. The upshot of the foregoing is that the plaintiffs have established their claim on a balance of probabilities while the defendant has failed to prove her counterclaim on a balance of probabilities as required by law. Consequently I issue the following final orders:

a. The defendant's counterclaim is hereby dismissed;

b. The plaintiff's suit has merit it is allowed on the following terms:

i. It is hereby declared that the defendant holds title to Land Parcel No. KAKAMEGA/NZOIA/51 in trust for all the beneficiaries of the Estate of the late Mary Minayo, deceased;

ii. The title in the name of the defendant is hereby cancelled and it is hereby ordered that the title to the suit land shall be registered in the name of the estate of Mary Minayo.

iii. The parties herein in conjunction with other beneficiaries of the estate of Mary Minayo, deceased, shall pursue the necessary proceedings before the appropriate Succession Court for distribution of the estate as the court may deem appropriate.

iv. Each party shall bear their own costs of the suit and the counterclaim.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2021.

MWANGI NJOROGE

JUDGE, ELC.