



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 588 OF 2014

JOHN THUO KIRAGU (*Suing on behalf of JONATHAN KIAMBATI, DAVID CHEGE and*

MERCY EMILY WANJIRU as DONORS.....PLAINTIFF

=VERSUS=

STEPHEN CHIIRA KARANJA.....DEFENDANT

JUDGEMENT

1. By a Plaint dated 14th May 2014, the Plaintiff prays for judgement against the Defendants for:

a) A permanent injunction against the Defendant, his agents/servants restraining them from interfering with the Plaintiffs' quiet enjoyment of Limuru/Kamirithu/380.

b) A permanent injunction against the Defendant, his agents, servants restraining them from committing acts of trespass on Limuru/Kamirithu/380 and interfering with Plaintiffs' use of the subject property.

c) General damages.

d) Costs of the suit.

The Plaintiff's Case

2. The Plaintiff holds a registered power of Attorney dated 5th May 2010 which authorizes him to file this suit on behalf of his donors namely Jonathan Njuguna Kiambati, David Chege and Mercy Wanjiru who are referred to as the donors herein and who are the registered owners of a portion of land hived from L. R. Number **Limuru/Kamirithu/380** located in Kiambu hereinafter referred to as ("the suit property"). The Plaintiff contends that the donors' interest is pursuant to an order of the court issued in **HCCC No.2797 of 1995** Milimani, that provided for the subdivision of the suit property between themselves and Salome Wangui, James Kiambati, Joseph Mbaria and Stephen Karanja.

3. They contend further that on or about 24th May 2014, the Defendant without any lawful reason entered the suit property, destroyed a boundary that had been erected pursuant to the aforementioned orders in **HCCC No. 2797 of 1995** and commenced to plant trees in a clear sign of aggression and trespass and threatened tenants of the suit property to refrain from growing anything on the land.

The Defendant's Case

4. The defendant filed a statement of defence and counterclaim dated 14th November 2018. The Defendant denied all the allegations contained in the plaint and averred that neither the administrator nor the beneficiaries of the suit premises have ever resided in the suit land and that they both had no interest on the suit land prior until 1985.

5. The Defendant further averred that the suit land was as at 1972 registered in the name of one Stephen Karanja Kiambati but upon his demise in 1971, his brother Joseph Mbaria Kiambati disinherited the deceased's 2 widows and caused the suit land to be registered in his name. He averred that the same was challenged by the deceased's wife in 1983 and the court ordered on 25th November 1983 in the Senior Resident Magistrate's Court in Kiambu **Civil Appeal No.15 of 1983** that the suit land reverts to its state of ownership as at August 1972 but the said court order was not extracted/and or implemented.

6. His case is that being a son of Stephen Karanja Kiambati (deceased) he is a beneficiary entitled to the suit property thus his entry into the suit property was lawful and it does not amount to trespass as alleged.

7. The Defendant has a counterclaim against John Thuo Kiragu, Jonathan Kiambati (alias Jonathan Njuguna Wanjiru), David Chege and Mercy Emily Wanjiru who are the 1st to 4th Defendants respectively. The counterclaim dated 14th November 2018 seeks as follows:

a) The suit by the Plaintiffs in the plaint be dismissed.

b) A declaration that the 2nd, 3rd and 4th Defendants hold those parcels of land known as Limuru /Kamirithu/380 and Limuru/Kamirithu T.92 in trust for the estate of Stephen Karanja Kiambati to the extent of 1/3 and the whole respectively.

c) An order do issue that the 2nd, 3rd and 4th Defendants do excise 1/3 of that parcel of land known as Limuru/Kamirithu/380 and the whole of that portion known as Limuru T.92 and that the excised portions be registered in the name of the estate of Stephen Karanja Kiambati.

d) A perpetual injunction restraining the 2nd, 3rd and 4th Defendants from interfering with the occupation, possession or user of the Plaintiff or beneficiaries of the estate of Stephen Karanja Kiambati of those parcels of land known as Limuru/Kamirithu/380 and Limuru/Kamirithu T.92.

e) Costs of the suit and counterclaim be awarded to the Plaintiff in the Counterclaim.

8. The Defendant in his counterclaim states that he holds a limited grant of the Estate of his father, Stephen Karanja Kiambati referred to (“as the deceased herein”). The said grant was issued in **Kiambu Succession Cause No.187 of 2002**. The Plaintiff contends that the deceased was the registered proprietor of land known as **Limuru/Kamirithu/380 and Limuru/Kamirithu /T.92** referred to as the suit land and that he was proprietor in trust for himself, the Plaintiff and his siblings namely Joseph Mbaria Kiambati and Salome Wangui Kiambati.

9. He further contends that upon the deceased’s demise in 1971, his brother Joseph Mbaria Kiambati illegally caused the suit land to be registered in his name. He further states that upon Joseph Mbaria Kiambati’s demise in 1985, Doris Wanjiru and Peter Karanja were appointed administrators of his estate and the suit land together with title No.Limuru /Kamirithu/T.92 were transferred to them to hold as trustees for themselves and 3 others and it so remains but that the said transfer was unlawful since the initial transfer to Joseph Mbaria Kiambati was cancelled by the court in Senior Resident Magistrate’s Court in Kiambu **Civil Appeal No.15 of 1983**.

10. He averred that his sibling Salome Wangui Kiambati on whose behalf the suit land was also held in trust filed **HCCC No. 2797 of 1995** with her children as co-Plaintiffs and sought for an order that the 2nd to 4th Defendants herein held 4 acres out of **Limuru/Kamirithu/380** in trust for herself and the court granted orders that four (4) acres be excised out of the said parcel and she be registered as having a life interest in the same.

11. He contends that the 2nd, 3rd and 4th Defendants also hold 4 acres of that parcel of land in trust for him and all that portion of **Limuru/Kamirithu /T.92** in trust for the estate of Stephen Karanja Kiambati who was fraudulently disinherited of the said portion by Joseph Mbaria Kiambati (Deceased).

The Evidence of the Plaintiff

12. PW1, John Thuo Kiragu the donee, adopted his witness statement dated 14th May 2014. He told the court that the suit properties being Limuru/Kamirithu/380 and Limuru/Kamirithu/T,92 belong to Jonathan Kiambati, David Chege and Emily Wanjiru (the “donors”). He produced the power of attorney dated 5th May 2010 as exhibit P1 in this case. He also relied on the list of documents dated 14th May 2014 in the list of documents. They were produced as exhibits in this case.

13. He told the court that the defendant has trespassed on the suit properties. He relied on the plaintiff’s further list of documents dated 22nd January 2020. They were also produced as exhibits in this case.

14. He told the court that the defendant no longer goes to the suit properties but has filed a counterclaim seeking the same. When cross examined by Mr. Maina for the defendant, he told the court that Salome Wangui Kiambati was given 4 acres out of land parcel No Limuru/Kamirithu/380. He admitted that the defendant’s father was a brother to Joseph Kiambati.

The evidence of the Defendant

15. DW1 Stephen Chiira Karanja, the defendant testified on 8th February 2020. He adopted his witness statement dated 22nd February 2019. He also relied on the bundle of documents dated 14th November 2018. The documents in the bundle were produced and marked exhibit D1.

16. He stated that he is related to the plaintiff and that the suit properties belonged to his paternal grandfather. He further stated that the land was first registered in his father’s name as the elder brother was in India.

17. That later the said brother gifted his father this land hence between 1970 – 1972 his father (defendant’s) and Salome Wangui were on the suit property. It is his case that his father passed on in 1971. That his uncle who had come back from India obtained registration in his name. He stated that his mother appealed and succeeded. That, despite the appeal the land did not revert to his father’s name.

18. It is his case that the court in HCCC 2195 of 1995 recognised that the suit property was family land. That Limuru/Kamirithu/T.92 was registered in his father's name and it was not family land. He prays that the plaintiff's suit be dismissed and the prayers in the counterclaim be allowed.

19. When cross examined by Mrs. Kerio for the plaintiff, he stated that his name is not on the title to the suit properties and that there is no Confirmation of Grant in his father's name. He also admitted that the suit against him is for trespass. When he was reexamined by his counsel he stated that he has an interest on the land.

20. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

21. They are dated 23rd April 2021. Counsel for the Plaintiff identified the following issues for determination: -

a) Whether the donors are the registered proprietors of the suit property.

b) Whether the Defendant has an interest in the suit property.

c) Whether the Defendant trespassed on the suit property.

d) Whether the Plaintiff is entitled to the reliefs sought.

22. On whether the donors are the registered proprietors of the suit property, the Plaintiff submitted that proprietorship of the suit property is not denied as the Green Card and Certificate of official search attached to the Defendant's list of documents shows that the suit property is registered in the names of Peter Richard Karanja Kiambati and Doris Wanjiru Chege (all deceased) as trustees of the Plaintiffs. They submitted further that the said trust terminated upon the trustees' death thus the suit property reverted to the Plaintiffs who are beneficiaries and therefore lawful proprietors of the suit property entitled to the rights and privileges set out under Sections 27 and 28 of The Registered Land Act(now repealed) under whose regime the suit property is registered. Counsel for the Plaintiff relied on the case of **Estate of Salome Mukami Kariuki (Deceased) [2016] eKLR** and **HK &JWK v WEWK & Others [2014] eKLR** where it was held that trust terminated automatically upon death of the trustee.

23. On whether the Defendant has an interest in the suit property, the Plaintiff submitted that the Defendant has no proprietary interest known in law that can justify his illegal intrusion upon the suit property since his claim over the suit land is hinged on a disputed allegation that his late father had a share over the suit property and as such, the appropriate forum to adjudicate matters revolving around the distribution of a deceased's estate is a court exercising probate jurisdiction.

24. He submitted further that without revocation of the grant that transmitted the suit property to the donors, the counterclaim by the Defendant is an attempt to circumvent existing lawful orders issued by the probate court in respect of the rightful beneficiaries of the suit property. He also submitted further that this suit is res judicata and the Defendant is therefore barred by Section 7 of The Civil Procedure Act since the suit property was the subject of litigation between the registered trustees of the suit property (now deceased) who are proxies of the donors herein and the Defendant herein in **Nairobi High Court Succession Cause No.375 of 1983**. He submitted that the Defendant herein had sought to have the grant transmitting the suit property to the said trustees annulled on grounds of fraud alleging that the suit property belonged to his father. He relied on the case of **Mary Nyongesa Aloka V. Lazarus Sirengo Mukoyani [2018] eKLR** and **Joshua Alumasi Aboyi vs Alfred Ivusa Laban & Another [2017] eKLR** where the Environment and Land Court, refused to entertain issues that had been determined in succession cases holding that the doctrine of Res Judicata was applicable.

25. He also submitted that customary trust is deemed to have been a matter directly and substantially in issue in **Nairobi High Court Succession Cause No. 375 of 1983** yet similarly, the Defendant's cause of action in the instant case is based on customary trust thus it is not a new cause of action and the court cannot be called upon to determine once again whether the suit property was owned by Joseph Mbaria Kiambati (deceased) or was held by him in trust for the Estate of Stephen Karanja Kiambati. He further submitted that *res judicata* also applies to any matter which might and ought to have been made ground of defence or attack in the former suit. He relied on the Court of Appeal decision in **Pop-In (Kenya) Ltd & 3 Others V. Habib Bank AG Zurich [1990] eKLR** where the court stated that a party is required to bring their whole case in a given matter and in **Samuel Njau Wainaina V. Commissioner of Lands & 6 Others [2012] e KLR** where the court cautioned against introducing a new cause of action while seeking the same remedy.

26. On whether the Defendant trespassed on the suit property, he submitted that the Defendant did not deny trespassing in the suit property in his defence and counterclaim and further that he admitted in his witness statement to being in occupation of the suit property which is unjustified and illegal and constitutes an express admission of the Plaintiff's claim. He also submitted that the Plaintiff produced photographic evidence showing the extent of the Defendant's invasion and destruction of boundary on the suit property and the Defendant did not dispute the photographs.

27. Counsel also submitted that despite the existing injunctive orders issued against the Defendant, he acted contemptuously and buried his kin on the suit property after hearing of the suit. Counsel relied on **Park Towers Ltd vs John Mithamo Njika and 7 Others [2014] e KLR** and on **Duncan Nderitu Ndegwa vs KP& LC Limited & Another (2013) e KLR** to submit that trespass is actionable *per se* thus an amount of Kshs.500, 000/= will be reasonable compensation to the donors for infringement of their right to enjoy the suit property as well as loss and damage occasioned by the Defendant's wastage and destruction of the suit property. He urged the court to dismiss the counterclaim.

The Defendant's Submissions

28. Counsel for the Defendant submitted that ownership of the suit land had already been determined in **HCCC No.2797 of 1995(Salome Kiambati & 3 Others V. Doris Wanjiru& 3 Others)** thus the judgement in that suit corroborates the evidence of the Defendant/Plaintiff in the Counterclaim in that it confirms that Joseph Mbaria the registered proprietor of **Limuru/Kamirithu/380** held the said land in trust for himself and for his siblings namely Stephen Karanja who is the Defendant's father and Salome Wangui Kiambati thus the Defendant is entitled to his father's portion. He further submitted that the said land is 4.6 hectares which is approximately 12 acres hence each of the three siblings are to share approximately 4 acres each. He added that further evidence of the Estate of Stephen Karanja Chira's claim appears in the ruling in Senior Resident Magistrate's Court in Kiambu **Civil Appeal No.15 of 1983** in which the court ordered that the title to the suit property reverts as it was on 1st August 1972 before Joseph Kiambati (deceased) became a proprietor and the ruling in the divorce cause between Joseph Mbaria (deceased) and his estranged wife Doris Wanjiru Kiambati where the divorce court recognized that the suit land, was inherited land.

29. He submitted that upon Joseph Kiambati's death, Doris Wanjiru and Peter Richard Kariuki obtained a grant thus any interest they hold, they hold in trust to the extent of 1/3 of the estate of Stephen Karanja Chiira whose estate is represented by the Defendant. He relied on decisions in Kitale **ELC No 45 of 2019; Selly Jepchumba Samoei & Others vs Kimwei Arap Samoei**.

30. In answer to the Plaintiff's claim for trespass. He stated that, it cannot lie as the Defendant cannot trespass over that which he owns.

Analysis and Determination

31. I have considered the pleadings, the evidence on record, the written submissions on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the donors are the registered owners of the suit property.

(ii) Whether the defendant has a claim in the suit property.

(iii) Has the defendant trespassed on the suit property?

(iv) Are the plaintiffs entitled to the reliefs sought?

(v) Who should bear costs of this suit?

32. It is not in doubt that the donors are the registered proprietors of the suit property. From the Green Card and the Certificate of Official Search, the suit property is in the names of Peter Richard Karanja Kiambati and Doris Wanjiru Chege, as trustees of the donors herein.

33. The suit property did not belong to the trustees. I agree with the plaintiff's submissions that the trust terminated upon the death of the trustees. In the case of **Estate of Salome Mukami Kariuki (deceased) [2016] eKLR**, the court stated thus:-

"... Property held in trust does not belong absolutely to the trustee; although in law he is the legal owner therefore. He deals with such property subject to the trust. He holds the same for the benefits of others, and he cannot legally deal with it in a manner adverse to the interests of the beneficiaries. The property does not belong to him, so he cannot sell it or gift it in any manner to anybody. He can only deal with it in ways that advance the interests of the beneficiaries. Property held in trust for others, does not belong to the trustee, therefore the same is not free property, and it cannot be disposed of by will....if the said asset was not available for willing away by the deceased and the interest she held in it terminated upon her death. It follows that the same is not available for disposal in succession proceedings, whether testate or intestate. The property was subject to trust. The said trust terminated upon the death of the trustee, meaning therefore that the property thereafter reverted to the children of the marriage...."

Similarly, in the case of **H. K. & J. W. K vs W. E. W. K & Others [2014] eKLR** it was held that the trust terminated automatically upon the death of the trustee.

34. The defendant did not rebutt this evidence. I find that the donors are the registered proprietors of the suit property.

35. It is the defendant's case that his father was entitled to a share of the suit property. He relies on the Judgment in HCCC 2797 of 1997 which he states confirms that Joseph Mbaria, the registered proprietor of Limuru/Kamurithu/380 held the said land in trust for himself and for his siblings namely Stephen Karanja who is the defendant's father and Salome Wangui. I have gone through the said judgment and the same does not mention Stephen Karanja. In any case this would not be the right court to ventilate issues touching on distribution of a deceased's estate or matters of probate and administration.

36. I have gone through the prayers sought in the counterclaim and I find that they cannot be granted by this court. The defendant ought to ventilate these issues in the succession cause as this court lacks jurisdiction to entertain the same.

37. The defendant's cause of action is based on customary trust. As earlier stated the issues ought to have been ventilated in the High Court Succession Cause No. 375 of 1983. I agree the plaintiff's submissions that the issues which had been laid to rest in succession cause cannot be relitigated in a fresh suit.

38. In the case of **Pon-In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich [1990] eKLR**, the Court of Appeal held thus:-

“The locus classicus of that aspect of res judicata is the judgment of Wigram VC in Henderson v Henderson (1843) Hare 100, 115, where the judge says: Where a given matter becomes the subject of litigation in, and or adjudication by, a court of competent jurisdiction, the court requires he parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect to matters which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject to litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”.

I am guided by the above authority in finding that the issues raised herein are res judicata. I find that the defendant has no claim to the suit property and his counter claim is dismissed with no orders to costs as the defendant did not file a defence thereto.

39. There is evidence that the defendant trespassed on the suit property. The plaintiff annexed photographs showing the acts of destruction and wastage of the suit property. The evidence was not controverted by the defendant. **Clerk & Lindsell on Torts 18th Edition page 923, paragraph 1801** defines ‘trespass’ as any unjustifiable intrusion by one person upon land in possession of another.

40. I find that the plaintiffs have proved that the defendant trespassed on the suit property.

41. The plaintiffs are therefore entitled to the reliefs sought. Trespass is actionable per se. The plaintiffs are entitled to damages for trespass. In the case of **Park Towers Ltd vs John Mithomo Njika & 7 Others [2014] eKLR**, the court stated as follows:-

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case”.

42. I award Kshs.100,000 which I think is adequate. Costs follow the event. The plaintiffs are entitled to costs of the suit.

43. In conclusion, I find that the plaintiffs have proved their case against the defendant on a balance of probabilities. Accordingly, I enter judgment in favour of the plaintiffs as follows:-

(a) That an order of permanent injunction is hereby issued restraining the defendant, his agents, servants, from interfering with the plaintiff’s quiet enjoyment of the suit property.

(b) That an order is hereby issued restraining the defendant, his agents, servants from continued acts of trespass on the suit property and from interfering with the plaintiffs’ use of the suit property.

(c) General damages for trespass Kshs.100,000/-

(d) Costs of the suit and interest.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 28TH DAY OF OCTOBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Kerio for the Plaintiff

Mr. Maina for the Defendant

Steve - Court Assistant