



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

ELC MISC NO. 1 OF 2017

LAWRENCE MURIITHI M'THIKA.....1ST PLAINTIFF

FRANCIS NMUTURI M'THIKA.....2ND PLAINTIFF

PETER MURIUKI MGUU.....3RD PLAINTIFF

NJAGU NGUU.....4TH PLAINTIFF

VERSUS

MUNYI MURWATHIKA.....1ST DEFENDANT (DECEASED)

JOHN NJERU MURATHO.....2ND DEFENDANT

JUDGEMENT

1. This suit was originally filed in Kerugoya as ELC NO. 405 of 2013 and later transferred to this court. It was instituted by way of plaint dated 27/3/2013 – filed on even date. The plaintiffs – LAWRENCE MURIITHI M'THIKA, FRANCIS NMUTURI M'THIKA, PETER MURIUKI MGUU, and NJAGU NGUU – sought a declaration that parcel of land Ngandori/Ngovio/838 is family land and further that registration in the name of the 2nd defendant – JOHN NJERU MURATHO -be nullified and the title to the land be reverted back to them for distribution as per Embu Land Disputes Tribunal Case No. 136 of 2007. The suit is filed against two defendants - Munyi Murwathika and John Njeru Muratho. JOHN NJERU MURATHO is the current registered owner of the land.

2. The 1st defendant is brother to the 1st, 2nd, 3rd and 4th Plaintiffs, who are all members of the Igandu clan and M'Thika family. It is said that the parcel of land Ngandori/Ngovio/838 was allocated to the family during demarcation and since their father was deceased it was registered in the name of the 1st defendant who was the eldest son in the year 1960, to hold in trust for the family members. The plaintiffs claim to have been born and raised on the land prior to demarcation and allege to have continued to occupy it together with members of their respective families. It is their position that they have developed the land extensively and further that their mother was buried on the said land.

3. According to the plaintiffs, they lived in harmony until the year 2007 when the 1st defendant is said to have attempted to evict them from the suit land which prompted them to lodge a claim against the 1st defendant before the Land dispute Tribunal vide Embu Land Disputes Tribunal No. 136 of 2007. The tribunal is said to have ruled in favour of the plaintiffs and ordered that the suit land be subdivided into seven (7) equal portions of 0.23Ha amongst the plaintiffs. The award was adopted in Embu Award no. 7 of 2008. It is alleged that the 1st defendant failed to comply with the court order and instead exchanged the suit parcel of land with the 2nd defendant. According to the plaintiffs the transfer was fraudulent, illegal, and unlawful and was done without their knowledge.

4. The 1st defendant died during the pendency of the suit sometime in 2016 and the suit was therefore defended by the 2nd defendant. He admitted that the suit parcel of land was transferred to him by the 1st defendant but denied that the transfer was fraudulent or illegal. According to him he exchanged his parcel of land Embu/Iriatune/1810 measuring 10 acres with the suit parcel of land Ngandori/Ngovio/838 measuring 4 acres, with the 1st defendant. The exchange is said to have been done after negotiations in the presence of the 1st defendants' sons, the defendant's sister and a cousin.

5. The 2nd defendant claims to have undertaken due diligence on his part prior to the exchange and ascertained that the land belonged to the 1st defendant. He subsequently entered into an exchange agreement in which he agreed to give a consideration of Kshs. 2,340,000/= to the 1st defendant. According to the 2nd defendant, the 1st defendant took over possession of land parcel Embu/Iriatune/1810 and he is therefore seeking that the court orders the plaintiffs to vacate his parcel of land that he purchased.

6. Hearing of the suit commenced on 19.1.2021. PW1 was the 1st plaintiff. He confirmed the suit parcel of land was occupied by the family prior to demarcation and upon demarcation it was allocated to their family and registered in the name of the 1st defendant being the eldest son. There are six sons in the family and it is claimed that they reside with their respective families. They have grown crops, kept animals on the land, and have even buried their mother on the land.
7. The 1st defendant is said to have left the land in 1996, because of a disagreement that arose when he sought to evict them from the land. They sued him in Land Dispute No. 136 of 2007 and the court ordered that the land be subdivided into 7 portions for the six sons and their mother. The award is said to have been adopted in SPM No. 7 of 2008. According to PW1, they advertised the subdivision in the Kenya gazette on 28.11.2008 but failed to carry out the actual subdivision due to lack of money.
8. PW1 stated that in the year 2012 they learnt that the 1st defendant had sold the land to the 2nd defendant. As a result they filed a suit in Kerugoya - ELC No. 405 of 2013 - which was later transferred to this court and became the present suit. The 1st plaintiff confirmed being aware of the suit where the 1st defendant sued the 2nd defendant in ELC 183/2012. According to him, that suit was on grounds that the 2nd defendant had transferred the suit parcel of land to himself illegally.
9. PW1 alleges not to be aware of the location of the land acquired by the 1st defendant and further claims that the 2nd defendant has never occupied the suit land. If anything he states to only have seen him in court. He reiterated that the suit land was held in trust for them by the 1st defendant and the 1st defendant therefore lacked authority to exchange the said land.
10. During cross examination he alleged to have been informed by the clan and their mother that the land was registered in the name of the 1st defendant in trust for the family. According to him, their mother could not be registered as she could have been married elsewhere. Further, their brother had been registered on the land as he was the eldest son in the family. He confirmed not having any documents to evidence that the land was given to them by the clan. He further disputed that their mother was party to the sale. With regard to the case in ELC 183/2012 between the 1st and 2nd defendants he stated that the court had made an order for the 1st defendant to refund the money paid by the 2nd defendant in the suit.
11. PW2, PW3 AND PW4 all testified and confirmed that they were in agreement with the testimony of PW1 and wished to rely on it.
12. The defence hearing was done on 18.5.2021. DW1 was the 2nd defendant, he stated he exchanged his land with the 1st defendant and acquired the suit parcel of land. According to him the exchange was done in the presence of the 1st defendant and his sons. He confirms having entered into an agreement for the exchange of land which required him to also give a consideration of Kshs. 3,800,000/= on top of the exchange. The land he acquired is said to be smaller than his original parcel of 10 acres as that land is in a prime area. Due diligence is said to have been conducted which established that the 1st defendant was the owner of the land.
13. DW1 further stated that both parties obtained consent from the land control board. He confirmed that upon registration of respective parcels of land by both parties the 1st defendant took possession of his land. However, on his part he did not take possession of the land he had acquired. He alleges that when he visited the land the 1st plaintiff demanded that he pays him Kshs. 1,300,000/= as balance of the purchase price, which he refused as PW1 was not the vendor of the land. Further, he said that the sons of the 1st defendant demanded a share of the purchase price.
14. He confirmed having been sued before the court which prompted both parties to deposit their titles with their advocate. He reiterated that the plaintiffs had failed to give vacant possession and he expressed his willingness to pay the balance of the purchase price.
15. In cross examination, he acknowledged that prior to the purchase of the land, he visited it and found houses on it and mature tea bushes. He confirmed that the 1st defendant together with the plaintiffs were in possession of the land. According to him the plaintiffs were party to the negotiations for the exchange of land but he confirmed not stating this in his witness statement. Payment of Kshs. 1,000,000/= is said to have been made in the presence of the plaintiff's mother who, according to him, was representing the plaintiffs. DW1 confirmed that the exchange agreement verified the presence of the plaintiffs on the land and further that the 1st defendant would relocate the plaintiffs to an alternative land. He remained adamant to pay the balance of the purchase price and states that such payment could only be done to the 1st defendant's family. DW1 disputed any conspiracy between him and the 1st defendant to deprive the plaintiffs of the land. He reiterated that the suit between him and the 1st defendant was on payment of balance of the purchase price.
16. DW2 was the 2nd witness in favour of the defence. He reiterated the evidence of DW1. According to him the amount paid as deposit for the land was Kshs. 1,300,000 with a balance of Kshs. 1,000,000/=. He however confirmed to only have seen an amount of Kshs. 130,000/= being paid in cash. He testified that he had visited the suit land prior to the sale and confirmed that the plaintiffs were residing on the land together with the 1st defendant. He said that upon exchange of the Land, the 1st defendant vacated that land.
17. He gave evidence that the transaction was done in the presence of the 1st defendant's mother but confirmed the plaintiffs were not party to the exchange negotiations. According to him, the 1st defendant sought the exchange of land in order to settle his family and his brothers who resided on the land.
18. The suit was canvassed by way of written submissions. The plaintiffs' submissions were filed on 5.8.2021. They reiterated the averments in their witness statements and the testimony during hearing. They submitted that they were entitled to the land and that the 1st defendant was registered as proprietor in trust for them, their mother and one of their brother who is not a party to the suit. They relied on the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* [2018] eKLR which outlined the elements to prove a claim on customary trust.

19. They further relied on the provisions of Section 28 of the Land Registration Act on trust being an overriding interest. According to them, they have an overriding, equitable and unregistered interest on the land. They submitted that the 2nd defendant was aware of their occupation and development on the land but was unconcerned about their rights over the suit property. It is their assertion that the 2nd defendant can only pursue a claim against the estate of the 1st defendant.

20. The 2nd defendant submissions were filed on 4.10.2021. He too gave a history of the case. According to him, the land was registered solely in the name of the deceased 1st defendant. He submitted that there was no proof of fraud and that the burden to prove fraud lies with one alleging. To support this, reliance was made on Section 71 of the Evidence Act and the case of Jennifer Nyambura Kamau Vs Humpherey Nandi (2013).

21. The 2nd defendant is of the view that the issue of fraud cannot succeed in the plaintiffs' case by virtue of section 4(2) of the Limitation of Actions Act on the three year statutory limit. In support of this he placed reliance on the case of Javed Iqbal Abdul Rahma & Another Vs Bernard Alfred Wekesa Sambu & Another. Civil Appeal No. 11 of 2001.

22. The court was further called upon to consider that a party alleging that a property was obtained and registered fraudulently has an equitable remedy under a constructive trust and not under a customary law. To support this reliance was made on the case of Elijah Njeru Mugo & Another Vs Njeru Samwel M'ringo ELC No. 6 of 2019.

23. I have had a look at the court record generally. I have also considered the suit, the response, the testimony by the parties, and rival submissions. The parties herein have been in a protracted litigation, with the plaintiffs first suing the deceased 1st defendant and the 1st defendant in turn instituting a suit against the 2nd defendant. The first suit to be instituted by the plaintiffs herein was Land dispute Tribunal in Embu Land Disputes Tribunal No. 136 against the 1st defendant where the plaintiffs sought for the suit parcel of land which was registered in the name of the 1st defendant to be recognized as being trust land held by the 1st defendant on his behalf and that of his family.

24. Consequently, the tribunal heard the matter and made a determination that the land was held by the 1st defendant in trust for the plaintiffs and the rest of the members of the family. The award was upheld by the court in Embu Award No. 7 of 2008. The plaintiffs have argued that the 1st defendant failed to comply with the court order and proceeded to exchange the parcel of land with the 2nd defendant.

25. It is upon such discovery of exchange of the land, that the plaintiffs instituted the present suit before the court in which they are seeking orders for the court to hold that the 1st defendant held the land in trust for them and further for the cancellation of title in the name of the 2nd defendant. The suit was instituted in the year 2013 at the Kerugoya Law Courts and subsequently transferred to Embu.

26. If the plaintiffs had taken their case against the deceased 1st defendant to the end, there are many issues that the court would have looked into. But the matter was left to end at the abatement stage. This changed the whole trajectory of the case. As things stand now, abatement is the single most important issue in the determination of the case. This is the issue I will dwell on. It is startling that none of the parties or even counsel on record sought for substitution upon the death of the 1st defendant. This was a grave error especially on the part of the plaintiffs who have instituted this suit as such death has serious implications on the suit filed. I also note that the effect of such death has not been addressed by the parties in the submissions or otherwise.

27. As stated above the 1st defendant died in the year 2016. The legal framework on death of a defendant and the effect of such death on a suit is provided for under Order 24 rule 4 of the Civil Procedure Rules which states as follows;

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

28. From the court record, pleadings, and submissions by the parties, it is evident that no application was made for substitution of the 1st defendant within the prescribed period of one year or at all.

29. The issue of abatement of suit on failure to file for substitution within a year of death of a party was discussed in the case of **Wallace Kinuthia vs Anthony Nd'ung'u Muongi & 3 Others [2013] eKLR** where the court stated

“a suit abates by operation of law where no substitution is made within one year on the death of the defendant.”

As stated the 1st defendant death during the pendency of the suit without substitution resulted in abatement of the suit against him and there was no need for a specific order dismissing the suit. It therefore follows that the suit as against the 1st defendant automatically abated in the year 2017. The effect of an abatement of suit is that no action can be sustained or pursued against the deceased. The court is shown to have endorsed such abatement on 28/7/2020.

30. The suit herein has been brought against two defendants and with the abatement of the suit against the 1st defendant, there is need to

determine whether the claim by the plaintiffs can be sustained against the 2nd defendant.

31. The plaintiffs claim is that the suit parcel of land is trust land. They allege to have been born on the land and were occupying it prior to the demarcation process in the year 1960. It is their case that the land was allocated to them by the clan as family land and they were informed by the clan elders and their mother that the land was trust land. According to them the land was only registered in the name of the 1st defendant as he was the eldest son in the family. Their mother could not be registered as owner of the land as she could have been married elsewhere.

32. The 2nd defendant has disputed that the land was held in trust by the 1st defendant on behalf of his family. According to him the 1st defendant was the absolute owner of the land. He confirmed having conducted a search on the land which evidenced ownership of the 1st defendant. The plaintiffs as well during cross examination all concur that the trust was not registered against the title but were unsure whether the issue of trust was reflected in the green card. The plaintiffs have alleged that the transfer to the 2nd defendant was done fraudulently and have sought for his title to be cancelled on that basis.

33. From the pleadings and evidence by the plaintiffs, their suit is founded on proof of trust against the 1st defendant. The plaintiffs base their claim on the fact that the 1st defendant was holding customary land in trust for them. I have looked at the claim against both defendants. From the 1st defendant the plaintiffs' are seeking dissolution of trust for them to have their share of the land and from the 2nd defendant they are seeking cancellation of his title. The plaintiffs have also alleged that the land was fraudulently transferred to the 2nd defendant. I note that they have specified the particulars of fraud alleged or but they did not offer proof during hearing.

34. In my view, trust and fraud are the gravamen and/or kernel of this suit. The plaintiff's claim against the 2nd defendant is that based on the fact that the land was held in trust for them then the title the 2nd defendant holds ought to be cancelled. I have looked at the orders sought against the 2nd defendant and I have not seen any prayer that arises from trust. The prayer for cancellation of title can only be granted if the plaintiffs prove that the 1st defendant held the land in trust for them. As for fraud, the deceased 1st defendant is said to have perpetrated fraud when he transferred the land to 2nd defendant.

35. As stated herein the suit against the 1st defendant has abated and it's effect is that the suit is non-existent unless revived. The Court of Appeal in the case of **Said Sweilen Gheitan Saanum –v- Commissioner of Lands & 5 Others (supra)**, stated that, *the effect of an abated suit is that it ceases to exist in the eye of the law*. Further in the case of **Jacob Githinji Kamau v Patrick Rerimoi & another [2019] eKLR**

“When a case abates because of death, it simply means that the other party can no longer sustain an action against the person who has died”

During hearing, there were things said against 1st defendant. It would be wrong to treat such things as good evidence. At the time of hearing the case against 1st defendant had abated and therefore ceased to exist in the eye of the law. Any evidence given amounted to no more than a sweet story. No competent court of law would assign any value to such evidence against the deceased first defendant.

36. In the suit, the plaintiffs set out to prove that the deceased 1st defendant held the land in trust for them. He allegedly breached that trust. The plaintiffs however did not bother to give particulars of that breach and they therefore failed to comply with the requirements of Order 2 rule 10 of Civil Procedure Rules, 2010. The plaintiffs also alleged fraud. They gave particulars of fraud and as regards this, they were in compliance with requirements of Order 2 rule 10 of Civil Procedure Rules.

37. It seems clear to me that the plaintiffs did not appreciate fully the consequences of not substituting the deceased 1st defendant. Their case against 2nd defendant was so much interwoven with that of the 1st defendant that the fate of one had also to be the fate of the other. The abatement of the suit against the 1st defendant meant that the plaintiffs did not prove that the land was held in trust for them. It also meant that no fraud was proved against that defendant. The logical consequence of all this is that there was nothing wrong with the 1st defendant exchanging the land or even selling it to the 2nd defendant. It has to be appreciated that the 2nd defendant has denied that there was trust attached to the land or that there was breach if any such trust if it existed. He has also denied fraud. Failure to prove trust or fraud against 1st defendant meant that the 2nd defendant's denial assumes the value or force of cogency. It was a fatal blunder on the part of the plaintiffs to allow their case against the 1st defendant to rest at the stage of abatement.

38. Ultimately then, no proof was made that the land was held in trust. No proof was also made available that there was fraud perpetrated by the defendants. Given the pleadings presented by the plaintiffs, it was not possible to prove the case against 2nd defendant without first proving the case against the 1st defendant. In other words, the Achille's heel in the plaintiffs case against the 2nd defendant is their failure to pursue their case against 1st defendant to its logical conclusion.

39. The end result is that the plaintiffs have not proved their case against 2nd defendant and the same is hereby dismissed. Each side to bear its own costs.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **30TH** day of **NOVEMBER, 2021**.

In the presence of Muthee for Mugendi for 2nd defendant and in the absence of E.K. Njagi for plaintiffs.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

30.11.2021