



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 32 OF 2019

TABITHA NGARI M'IKIARA1ST PLAINTIFF

JOHN MWIRIGI SAMWUEL.....2ND PLAINTIFF

VERSUS

SMM..... 1ST DEFENDANT

PETER KIRIMI M'RINGERA2ND DEFENDANT

JACOB GITONGA MATHIU..... 3RD DEFENDANT

JUDGMENT

1. By an amended plaint dated **18.12.2017**, **Tabitha Ngari M'Ikiara** and **John Mwirigi Samuel** (the plaintiffs) sued **SMM, Peter Kirimi M'Ringera** and **Jacob Gitonga Mathiu** claiming the 1st defendant was registered at a tender age as the owner of **LR Abothuguchi/Githongo/418** hereafter the Parcel No. 418 in trust for himself and the plaintiffs but breached the trust by allegedly subdividing the land into six portions namely **3619, 3701, 3699, 3698 and 3700** which he registered and or sold to Peter Kirimi M'Ringera, Jacob Gitonga Mathiu, to himself, to one deceased Samuel M'Ithiri and Peter Kirimi without the consent, approval and or concurrence..
2. They sought for a declaration the suit land was held in trust for all the family members, nullification of the resultant subdivisions and the suit land be combined so that the District Land Registrar/Surveyor can subdivide it afresh among the named beneficiaries.
3. Through a joint defence amended and filed on 3.4.2018, the defendant's denied the allegations and allege the initial land was transferred back to the 1st defendant who subdivided it to his children and left some portion which was not subject to any alleged trust or claim by either of the plaintiffs.
4. Further the defendants averred the transactions made among themselves were lawful, the plaintiffs voluntarily participated in the said transactions and hence any challenge thereof was unmerited and unfounded both in law and in fact.
5. Additionally, the defendants pleaded they were in exclusive use and possession of their portions of land as purchasers for value. The 1st plaintiff adopted his witness statement dated 18.12.2017 and produced a certificate of **Parcel No. Abothuguchi/Githongo/418** , as **P exh 1**, official searches for subdivisions from Parcel No. 418 namely 3696, 3697, 3698, 3699, 3700 and 3701 as **P exh 2**, green cards for 418, 3698, 3699 and 3701 as **P exh 3**, mutation forms for Parcel No. 418 as **P exh 4**, proceedings at the land registrar's office for the removal of caution as **P exh 5**, court scene visit report as **P exh 6**, death certificate for her husband as **P exh 7** and the court order dated 14.12.2012 as **P exh 8**.
6. In **cross examination**, the 1st plaintiff maintained the initial registration of Parcel No. 418 in favour of the 1st defendant then a minor was in accordance with a customary trust and that the 2nd and 3rd defendants were not part of her family.
7. Further she testified the 1st defendant was as first born son in the family was to hold land in trust but sold the land without their consent or approval to the 2nd and 3rd defendants.
8. **PW2** adopted his witness statement dated 18.12.2017 relying also on all the P exh 1-8 and prayed for the cancellation of the titles issued to the defendants and subdivisions in favour of the family.
9. In **cross examination PW2** stated he did not know how the 1st defendant sold and transferred the parcels for they only came to know

about it from the land office when they went to enquire. He maintained his deceased father did not have any land which he could have sold to the 2nd and 3rd defendants.

10. **PW3** adopted her witness statement dated 18.12.2017.

11. **DW1** adopted his witness statement dated 11.10.2012 and produced exhibits namely a copy of title deed for Abothuguchi/Githongo No's 3701, 3699, 3697, 3696, 3700, 3698, 418 and sale agreements dated 30.7.2010 and 8.12.2011 as **D Exh 1-9** respectively.

12. In **cross-examination** he claimed his land was Parcel No. 3700 as per **D exh 5** which was as a result of subdivision of Parcel No. 418 initially registered in the name of the 1st defendant. He insisted though aware of the initial land, the 1st defendant had assured him there was no problem if he bought the land.

13. **Further DW1** stated he had also enquired from the late Samuel M'Ikiara M'ithiri who told him there was going to be no issue at all. Further he claimed he was not aware if the land was registered in the name of the 1st defendant at a tender age.

14. **DW2 (3rd defendant)** adopted his witness statement dated 11.12.2012 and prayed the suit to be dismissed.

15. In **cross-examination** he stated he had bought the land from the family of the late Sameul M'IKiara though it was in the name of the 1st defendant. He admitted the green card showed Parcel No. 3701 was a subdivision of Parcel No. 418 which was in the name of the 1st defendant. He insisted he was not aware how DW1 bought his land though the land belonged to the family of the deceased Mzee M'Ikiara. As a matter of fact he confirmed he knew the land belonged to that family and that upon purchase, the family was to get the remaining portion.

16. The parties filed written submissions dated 25.6.2021 and 4.8.2021 respectively.

17. The plaintiff submits the evidence produced clearly point the parent Parcel Number was No. 418 registered in the 1st defendant's name at a tender age in trust for the family, which facts were confirmed by **P exh 1, 2, 3 and 4** and that the evidence was not challenged by the 1st defendant who chose not to testify in court; that the 1st defendant could not dispose of the suit land without their input and hence the resultant sale and transfer were subject to the overriding interest of the plaintiffs.

18. The plaintiffs rely on **Isack M'Inanga Kiebia –vs- Isaaya Theuri M'Lintari & Another [2018] eKLR** on proposition that customary trust subsisted prior to 1st registration as to bind the defendants, **Felista Muthoni Nyaga –vs- Peter Kayo Mugo [2016] eKLR** on the proposition that the 2nd and 3rd defendants titles are in trust for the plaintiffs; **Andriano Munyua Bonface Mutembei Gituma [2021] eKLR** and **Patrick Gitonga M'Ikiara –vs- Ruthson Mangati M'Ikiara & 5 Others [2020] eKLR**.

19. On the part of the defendants, it is submitted the pleadings were changed in a scheme to defraud the 2nd and 3rd defendants of their parcels of land lawfully bought for value with full knowledge of the plaintiffs and their deceased husband and father respectively.

20. Further it is submitted the plaintiffs' intention is to void the sale and transfer in their favour under the guise of trust. They urged the court to find them bonafide, and innocent purchasers for value who are holding valid title deeds.

21. The plaintiffs filed seven issues for determination as per their list dated 3.4.2018 namely; if the plaintiffs and 1st defendant are family members, if the 1st defendant was registered as a proprietor of Parcel No. 418, whether the 1st defendant caused subdivision of Parcels No's 3699, 3698, 3699, 3701, 3697 and 3700; if the 1st defendant was holding the land in trust and hence breached the trust in selling and transferring the family land to the 2nd and 3rd defendants who are not family members; whether the plaintiffs and other family members live on the suit land and lastly whether the plaintiffs are entitled to the reliefs sought.

22. The plaintiffs amended their plaint on 18.12.2017 bringing in the 2nd plaintiff as a legal representative for the estate of the 1st defendant who had died on 23.7.2015 and a limited grant issued on 10.12.2015 in Meru Application No. 354 of 2015.

23. Whereas there were specific allegations levelled against each of the defendants, under paragraph 5A, 6A, 7A, 8A and 10 of the amended plaint, the defendants did not singularly and or severally deny those allegations.

24. That notwithstanding two main issues calling for determination in this matter are:-

i. Whether Parcel No's 418 and the resultant subdivisions were ancestral, family or clan lands held in trust for the plaintiffs.

ii. If the plaintiffs were involved in the subdivision sale and transfer.

The law of customary trust has now been settled in **Isack M'Inanga Kienia –vs- Isaya Theuri M'Linturi & Another [2018] eKLR**.

25. On the first issue the plaintiffs have through oral and documentary evidence established how Parcel No. 418 came to be registered in the name of the 1st defendant and how the deceased sought and was allowed to subdivide it in their favour as per the mutation forms. Unfortunately and without their knowledge or approval, the 1st defendant transferred the suit land to the 2nd and 3rd defendants. The 1st defendant has not challenged that evidence by way of testimony before the court.

26. Further the scene visit report produced as **P exh 6** confirmed the plaintiffs were still in occupation of the parcels of land with traditional boundaries still in existence. Similarly the 2nd and 3rd defendants have produced **D exh 7** which clearly shows the history of **Parcel No. 418** and an existence of a caution as early as 18.2.1997. **D exh 8 and 9** also clearly indicate the parcel as **No. 418**.
27. The 1st defendant's deceased father was not a witness to the sale agreements as well as the plaintiffs yet the defendants knew as confirmed in their testimony the land belonged to the family and hence subject to spousal consent as well as overriding interests of family members who were in occupation at the time.
28. Coming to the second issue, the defendants aver and testified the plaintiffs were involved in the subdivision, sale and transfers of the suit land.
29. **P exh 5** clearly confirms the land is family land, and that nine children were living there and that the deceased wanted to subdivide and give it to his sons. The issue of trust is also indicated in **P exh 2**.
30. The 1st defendant in his testimony before the land registrar alluded to the fact that the family had agreed that the land be subdivided into five equal portions and his late father to get a share. It is on that undertaking that the caution was removed to pave way for the subdivision to the beneficiaries.
31. The plaintiffs allege they were not involved at all by the 1st defendant after the mutation was undertaken. On the other hand the 2nd and 3rd defendants claim the plaintiffs were wholly involved as well as the deceased M'Ikiara. Unfortunately the 1st defendant did not testify and or challenge the plaintiffs' evidence so as to give credence to the respondents' assertions.
32. This being an agricultural land the transactions were subject to the land control board consent. No land control board consent forms or minutes were produced by the defendants to demonstrate that the sale and transfers were lawfully done and that the plaintiffs consent or approval was ever sought. The defendant did not involve the plaintiffs yet they knew they were entitled to a share going by **P exh 5**. See **Section 6 (1) (a) of the Land Control Act Cap 302**.
33. Indeed the 1st defendant clearly indicates it was his mother the 1st plaintiff who told him he was the registered owner of the suit land yet he trend around and failed to subdivide and transfer the same to his siblings as directed by the land registrar while lifting the caution.
34. The deceased was clear about his intention but unfortunately the same were frustrated and or diverted by the 1st defendant in favour of the 2nd and 3rd defendant contrary to the existing express customary trust.
35. The 2nd and 3rd defendants allege they were innocent purchasers for value without notice. Unfortunately their conduct betrays them. As a matter of fact, **D exh 8 and 9** shows they knew of the existence of family interests of the plaintiffs over this parcels. DW1 and DW2 in their testimony and which was confirmed by the court scene visit report knew the plaintiffs were in occupation of the suit land.
37. Paragraph 3 and 4 of the sale agreement mentions vacant possession and land control board consents. Any buyer is deemed to be aware of any encumbrances including some possessors' rights. There was already a known encumbrance by way of existing overriding rights before the agreements were entered into. So the defendants cannot purport to claim ignorance of the rights of the plaintiffs who have testified they have been in occupation of the suit land for over thirty years. See **Mwangi & Another –vs- Mwangi [1986] KLR 328**.
37. Paragraph 3 of the amended defence confirms that the 2nd and 3rd defendants knew the history of the Parcel No. 418. As clearly shown in **D exh 8 & 9** as read together with paragraph 3 above, the defendants knew there was a trust in place over Parcel No. 418. Instead of waiting for the subdivisions to be made in favour of the five brothers, the defendants instead took the portions hence disentitling the rightful beneficiaries. Had the defendants been innocent purchasers for value without notice, they would have gone beyond the 1st defendant and the deceased father at the very least seek approval from the 1st plaintiff, a known spouse and mother to the 1st defendant.
38. In my considered view the plaintiffs' overriding interest subsisted prior to the sub-divisions as per the mutation form, the possession and occupation was evident and hence in line with the holding in **Isack M'Inanga Kiebia –vs- Isaaya Theuri M'Lintari & Another [2018] eKLR**, I find a customary trust existed from the parent Parcel No. 418 and the title deed thereafter issued upon the subdivisions and transfers are subject to the overriding rights of the plaintiffs as per **Section 27, 28 and 30** of the **Registered Land Act** now repealed in which the aforesaid title deeds were issued and now captured under **Section 28** of the **Land Registration Act**.
39. Additionally **PW1** testified she is on the suit land as her matrimonial home. Similarly this amounts to an overriding and unregistered interest which interest entitles her to remain in the property as per **Section 28** above and as held in **Mugo Muiru Investments Ltd –vs- EWB & 2 Others [2017] eKLR**.
40. In **Richard Odual Opole-vs- Commissioner of Lands & 2 Others [2015] eKLR** the Court of Appeal held that where there is a tainted and irregular procedure leading to the registration of title, one cannot be a bonafide purchaser for value without notice.
41. As stated above, had the defendants done due diligence, they would have established the interests of the plaintiffs over the suit land. They cannot therefore possibly claim to have been innocent purchasers for value without notice.
42. In **Joseph Nyaga Njagi & 2 Others –vs- Michale Muchira Nduma & Another [2014] eKLR** the court held **Section 6** of the **Land Control Act Cap 302 Laws of Kenya** under a sale agreement void for all interests and purposes if the consent is not obtained. The evidence tendered by the defendants falls short of showing the defendants ever engaged the plaintiffs in getting any consent to be transferred the land.

43. Given the foregoing, it is my finding that the plaintiffs have proved their claim on a balance of probabilities. The same is allowed as per the amended plaint dated 18.12.2017.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 20TH DAY OF DECEMBER, 2021

In presence of:

No appearance for parties

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE