



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 71 OF 2019**

**CHARLES NTEERE MBOROKI .....APPELLANT**

**VERSUS**

**JAMES GICHURU ..... 1<sup>ST</sup> RESPONDENT**

**JOSPHAT MUKARIA M'MBOROKI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. H.N. Ndungu (C.M.) delivered on 9<sup>th</sup> May, 2019, in*

*Meru CMCC No. 84 of 2016)*

**JUDGMENT**

1. The appellant seeks to overturn the judgment herein on the grounds that:-

- i. The finding that the deceased had during his lifetime settled his sons on a portion of the suit land was erroneous.**
- ii. The court disregarded the appellants evidence**
- iii. The court failed to find the respondents to have taken advantage of the deceased's health status in causing the subdivisions.**
- iv. The court failed to find the appellants developments on the land.**
- v. The court failed to find constructive trust created in favour of the appellant.**
- vi. The court failed to find the appellant's intention was to have the suit land in favour of his children.**

**A. PLEADINGS**

2. In the lower court the appellant had sued the respondents who are his brothers for holding **Parcel No's Ntima Igoki/6397, 2018 and 6398** in trust for him and for breaching the said trust contrary to the wishes of his late father Henry Mboroki Mukindia. He prayed for a permanent injunction restraining the respondents from interfering with his occupation and enjoyment of a portion of the suit land; declaration of the trust; subdivision and transfer of the same in his favour in default the Executive Officer of the court to do so.

3. The respondents denied the claim and stated the parcellation and allocation of the deceased initial Parcel No. Ntima/Igoki/991 was carried out by the deceased himself during his lifetime, the appellant was granted his share which he has developed and maintained the matter was res judicata.

**B. TESTIMONY**

4. The appellant testified he was residing on **Parcel No. 6397** and 97 courtesy of a court order. He told the court **Parcels No 6397** was registered in the name of the 1<sup>st</sup> respondent while **Parcel No. 6398** was in the name of the 2<sup>nd</sup> respondent having been subdivided from parcel No. 991 which initially was in the name of his deceased father. He produced search certificates as **P exh 1, 2 and 3.**

5. He testified his late father had shared and pointed out each portion to his sons whereof he occupied Parcel No's 6397 and 6398. According to him the 1<sup>st</sup> respondent occupied Parcel No. 6396 while the 2<sup>nd</sup> respondent occupied 6399 prior to the subdivisions.

6. Further PW1 testified there were proceedings relating to the suit properties before the Meru Land Disputes Tribunal in which he was successful. He produced the copies as **P exh 4**, subsequent to which a judicial review matter was filed. He produced a copy of the judgment as **P exh 5**.

7. In cross examination the appellant denied the mutation form had been signed by his late father and insisted the 1<sup>st</sup> respondent was the one who committed the fraud and caused the transfer.

8. Further the appellant maintained the mutation form was not in line with his late father's wishes and or directives and stated that he had informed the surveyor he was not satisfied with the mode of distribution and hence any title deeds issued in line with the mutation form were erroneous and against his late father's wish. He produced a mutation form and death certificate as **P exh 6, 7** and a chief's letter as **MFI P (1) (8)**.

9. Further PW1 stated he had nothing to show on the state of mind of his late father at the time the subdivisions were done.

10. PW2 adopted his witness statement dated 15.6.2017 and stated the subdivisions were done contrary to his father's wishes especially since the appellant had made his developments on Parcel No's 6397 and 6398.

11. PW3 confirmed the appellant had made immense developments on his compound next to his late father's house and allege his late father had shown each of the sons where to live and occupy.

12. PW4 adopted his witness statement dated 15.6.2017 and confirmed the subdivisions were contrary to his late father's wishes and directives. He denied the appellant was chased away for any misconduct and only came back upon the demise of his father. Further he stated the portion for each of the brothers were clearly indicated on the ground.

13. DW1 adopted his witness statement dated 5.9.2017 and produced **D exh 1**. He informed the court the subdivisions were done in 2002, a year before his father passed on. He insisted the court order was to that each one of them continues to occupy where they had been living.

14. Further DW1 testified the appellant was living on a portion he (DW1) had made immense developments. According to him each of them got a portion as per the mutation form with the appellant getting Parcel No. 6399.

15. DW2 confirmed he was allocated Parcel No. 6398 currently occupied by the appellant as per the mutation form. He told the court he got his title deed in 2002 as well as his co-defendant.

16. With leave of the court, parties agreed and filed written submission dated 26.10/2021 and 27.1.2021 respectively.

17. On his part the appellant submits he had produced enough evidence at pages 95, 103, 106, 107 and 111 as well as exhibits at pages 15, 16 and 17 of the record of appeal in support of his case of customary trust. He relies on the holding in Peter *Gitonga –vs- Francis Mainqi M'Ikiara [2007] eKLR* and **Section 25 and 28** of the **Land Registration Act** and *George Mbiti Kiebia –vs- Isack Theuri M'Linturi & Another [2014] eKLR*.

18. Regarding breach of trust over his interests, the appellant relies on *Selly Jepchumba Samoei & 3 Others –vs- Kimwei Arap Samoei [2020] eKLR*.

19. On the other hand the respondents submit a trust as defined by law was not established by the appellant. They rely on *Juletabi African Adventure Limited & Another –vs- Christopher Michael Lockley [2017] eKLR*, and **Mill Principles of Political Economy (OP. CH N 41 BK11 CL2 at paragraph 3)**.

20. Further it is submitted the deceased gave each of the sons gifts **inter vivos** leaving no one out. They rely on *Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR*.

21. Having gone through the pleadings, evidence, grounds of appeal and the submissions by parties herein, the issues for determination in my view are:-

**a) If the appellant pleaded and proved any beneficial interest over Parcel No Ntima/Igoki/2018 and Parcel No. Ntima/Igoki/991 and its subsequent subdivisions namely Parcel No's Ntima/Igoki/6397 and 6398.**

**b) If the trial court reached the correct finding on both facts and the law.**

22. It is trite law that parties are bound by their pleadings and issues flow from the pleadings See *David Sironga Ole Tukai –vs- Francis Arap Muge & 2 Others [2014] eKLR*.

23. In the plaint dated 6.8.2010 the appellant at paragraph 4 pleaded in 1970, the deceased showed each of his sons their respective portions in **Parcel No. Ntima/Igoki/991** to be demarcated in equal shares and allowed them to occupy and develop it. At paragraph 5 he pleads his father instructed his sons to equally share beneficially his other **Parcel No. Ntima/Igoki/2018** whereof he says he took up his portion in **Parcel No. Ntima/Igoki/1991** and put up his house and developments thereon.

24. At paragraph 7 he states the deceased entrusted the defendants to undertake the subdivisions on **Parcel No. Ntima/Igoki/991 and 2018** which they allegedly did contrary to deceased wishes and or instructions and hence traversing his beneficial portions.

25. At paragraph 10 he pleads breach of trust over Parcel No. 7397, 2018 and 6398 hence prays the court declares the three parcels are held in trust for his benefit.

26. The law on customary trust has now been settled by the Supreme Court of Kenya in ***Isack M'inanga Kiebia –v- Isaaya Theuri M'Linturi and another (2018) eKLR*** that customary trust as long as the same can be proved to subsist may take several forms such as a family or clan land reserved land for future uses. The court held the list of forms was not exhaustive and that each case had to be determined on its own merits and on the quality of evidence.

27. Further the court gave out some of the elements that would qualify a claimant as a trustee as:-

- 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 group, family or clan is not so remote or tenuous as to make this claim ideals or adventitious.**
- 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.**
- f) **One need not be in actual physical possession and occupation of the land to prove a trust in land.**

28. In the case before this court, the pleadings are directed at the respondents as holding the land in trust. The respondents pleaded in their defence dated 21.3.2013 at paragraph 10 the parcellation and allocation of the suit land was done by the deceased during his lifetime when the appellant was a minor and he was shown his Parcel which he has developed over the years. I have not seen any reply to the defence in which the appellant denied those facts as pleaded by the respondents.

29. The respondent produced documentary evidence in their list of documents dated 5.9.2017 showing the subdivisions were made in 2001 and title deeds issued in 2002.

30. The appellant did not put to question the aforesaid exhibits as to their validity, authenticity, illegality and more importantly a contestation that they were not validly executed by his deceased father.

31. Similarly the appellant did not object to the production of the exhibits or deny their existence or legality.

32. Additionally the appellant did not tender any evidence to show he objected to the processing of the subdivisions either through the land registrar or the land control board if at all he was convinced the respondents were going against the wishes and intentions of his late father.

33. Evidence produced also shows the subdivisions were processed and title deeds issued a year before the demise of the deceased. The appellant did not tender any evidence that he complained to his late father that the respondents had allegedly effected transfers and or subdivisions so as to defeat his claim. The land was being shared out by his late father. As per the appellant's pleadings he was in occupation and had developed his portion. One would therefore have expected the appellant would be vigilant to ensure his land was properly surveyed and a number issued.

34. The appellant has not clearly indicted when he came to know of the changes. Be that as it may the consent for the subdivisions was dated 1.11.2001 while the mutation form shows a meeting on the site was on 4.5.2002 to effect the subdivisions. At paragraph 52 of the record of appeal, it is clearly indicated the appellant was to be gifted **L.R No. Ntima/Igoki/6399** vide his application dated 1.7.2002 and land control board consent issued on 2.7.2002. The appellant did not make his objection to the aforesaid subdivisions in line with the **Land Control Board Act Cap 302**. He instead awaited until the title deeds were issued in 2002, one of which was in his favour.

35. Further the appellant did not file a suit until 14.8.2010 which was close to 8 years down the line and five years after the death of his father.

36. In the aforesaid consents for transfer, the transactions are over properties described as gifts from the deceased to both the appellant, the respondents and other sons who are not in this suit. The said sons testified on behalf of the respondents and confirmed that what each of them was given were gifts *inter vivos* made between living persons. The said gifts were effected through the delivery of the transfer documents and land control board consents from Parcel No. 991 to the resultant title deeds.

37. The gifts became complete the moment the transfers were effected and title deeds issued in 2002 as held by the court in ***Re Estate of the late Gedion Manthi Nzioki (Deceased) [2015] eKLR***.

38. The moment the appellant, the respondents and the rest of their siblings expressly accepted the gifts then the intention of the deceased father became spent. The respondents and the appellant took up their individual title deeds free of any customary trust from each other. See ***Lucy Wangui Mwangi –vs- Benard Githii Mwangi [2019] eKLR***.

39. The appellant in my view did not tender any evidence to show he, at that point in time took any action to stop his late father from

effecting the changes if at all he was apprehensive they were prejudicial to his occupation or possessory rights. However imperfect the gift may have been to the appellant, he unfortunately acquiesced by his conduct, waiting for too long to complain after the horse had bolted. He made no protest prior to the demise of his father or so soon thereafter.

40. He now seeks to claim to recover the land which became the property of the respondents in 2002 and seek permanent injunction to restrain the respondents from interfering with his occupation and possession of **Parcel No. 6398, 6397 and 2018** whereas they hold valid title deeds which have not been impeached in account of illegality issuance through a corrupt scheme as per **Sections 25 and 28** of the **Land Registration Act**.

41. The respondents testified they were validly on their parcels of land prior to the issuance of title deeds. The appellant pleaded at paragraph 4 of the plaint that he occupied the land in 1970 and started developments. If he had any claim for the recovery of the land as per **Section 7 of the Limitation of Actions Act**, he ought to have filed the same within 12 years from 1970. The property he occupied No. 991 is no longer in existence after the changes made in 2001 and the parcels passed over to the respondents. Any claim he had also got extinguished the moment the title deeds were issued.

42. DW1 stated at page 120 of the record of appeal he took vacant possession in 1969 while DW2 stated he built on his portion in 1986 though his title deed came out in 2002. DW1 and DW2 confirmed Parcel No. 2018 belonged to the 1<sup>st</sup> respondent and in a title deed was issued on 19.6.2002. So the evidence tendered shows the respondents were on the suit land over twenty years before the suit was instituted in 2010. **See James Kiarie –vs- Geoffrey Kinuthia & Another [2012] eKLR.**

43. In my considered view they cannot be restrained or being evicted and their houses demolished since they are registered owners of the land with no overriding rights in favour of the appellant. The appellant did not lead any evidence on how much of his alleged portion was taken up by the subdivisions in creating the respondents parcel.

44. In seeking the orders sought the appellant's claim was tantamount to recovering land from the respondents yet it was land granted to them as gift **in vivos** given as early as 1970 but effected in 2002. In my considered view the appellant's claim was not only time barred but also unsustainable given that it was being brought after the donor had passed on. **See Evans Onguso & 2 Others –vs- Peter Mbuga & 4 Others [2020] eKLR.**

45. The donor had bequeathed all his sons own land. **See William Charles Fryda –vs- Assumption Sisters of Nairobi Registered Trustees & Another [2017] eKLR.**

46. As held in **Muriuki Marigi –vs- Richard Marigi Muriuki & Another**, registered owner of land cannot be forced to share his land during his lifetime. The same way the appellant could not forcefully demand his father during his lifetime to share the property contrary to his intention, I am inclined to find he could extend his claim for that which he did not get during the deceased lifetime to the respondents.

47. The appellant produced no rebuttal evidence that it was not the intention of the donor to make such gifts absolute as held in **Beatrice Wambui Kabui & 7 Others –vs- Stephen Kimotho Kabui [2015] eKLR.** Consequently the submissions that the finding by the trial court was against the intentions of the deceased lacks merit.

48. The onus to rebut the presumption of the gift to the appellant and his brothers, was on the appellant to show his late father intended the respondents to hold the property in trust for him and thus expect the property to revert back to him. He did not lead any evidence to that effect.

49. Evidence shows the appellant also benefited from the gift. Can it therefore be said he also is holding the land in trust for his brothers? To interpret the intention of the deceased otherwise would lead to absurdity and unrealistic consequences. **See JBM –vs- IMM [2019] eKLR.**

50. My finding is that the gifts were in line with **Section 42** of the **Law of Succession Act** which seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. In my considered view the appellant tendered no evidence on why such act or settlement should be disrupted, changed or frustrated particularly when by his own conduct and action he accepted his own gift before his father died in 2003.

51. In **Peter Ndiritu Kibui –vs- Ann Mugure Kibui [2016] eKLR** the court held three conditions must be met for a gift **in vivos** to be valid namely:

- a) **The individual making the transfer actually intended to make a gift.**
- b) **The donee accepted the gift made to him.**
- c) **Delivery of the property was made to the donee.**

52. In the instant case, the appellant produced no evidence that the deceased intention was not to bequeath the gifts to his sons. Secondly he produced no protest letter of the gift and or that he declined the gift. On the contrary the appellant accepted the land control board consent in his favour and the subsequent transfers.

53. Thirdly evidence was led by the respondents that after the transfer the deceased divested himself of the land by signing the transfer instruments in their favour. All these taken in totality showed the deceased voluntarily surrendered his rights over his land through gifts to his sons. Nothing has been produced by the appellant to show the said acts were not voluntary. The transfer and divestiture was immediate,

unequivocal and irrevocable. In my view I find nothing in the appellant's evidence to vitiate that clear intention.

54. Further no evidence has been tendered to show his state of mind in line with the **Mental Health Act** for this court to doubt such a clear intention.

55. In the circumstances my considered view is the trial court reached the correct decision. The appeal is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021**

**In presence of:**

Masamba for appellant

Kiruai for respondent

Court Assistant – Kananu

**HON. C.K. NZILI**

**ELC JUDGE**