



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS

ELC NO. 195 of 2011

JOHN GIKONYO GITUTHU & 17 OTHERS.....PLAINTIFFS

=VERSUS=

GIKONYO KIHUMBA.....DEFENDANT

JUDGEMENT

1. The Plaintiff filed this suit against the Defendant seeking the following reliefs;-

a. A Declaration that the Defendant is registered as co-owner in LR No. 209/136/119 and a shareholder in MATUMBO TRADING COMPANY, NEW MWANGAZA MATUMBO COMPANY and ONE HOLDING LIMITED in trust for himself and the Plaintiffs.

b. That the name of the Defendant in the register at the lands registry be cancelled and replaced with the name of the 1st Plaintiff or the name of the company or entity registered by the Plaintiffs for that purpose or such names, as this Honourable Court may order.

c. That the Defendant, his agents or servants or any person claiming through him be restrained from disposing, charging, alienating or in any manner interfering with one ninth share in LR No.209/136/119 registered in the name of the Defendant and the Defendant be further restrained from collecting any dividends, rents or payments whatsoever in respect of LR No.209/136/119.

d. The Defendant to render an account of all money received as dividends, rents or payments in respect of L R No.209/136/119 and to pay to the Plaintiffs their due shares.

e. Costs of this suit.

f. Interests on (c) and (d) above at court rates.

g. Any other/further relief that this Honourable Court may deem fit and just to grant.

2. In 1966, the Plaintiffs and the Defendant who all hailed from Kiruri Village of the then Murang'a District came together and formed an unregistered Association called Kiruri Young Men Association with the aim of pooling resources to enable them acquire property and carry on businesses. The Association elected the Defendant as its Chairman. The Defendant then informed the Plaintiffs that there was an opportunity to invest in shares of a company called Matumbo Trading Company which was running hotel businesses.

3. The Plaintiffs and the Defendant agreed to raise Kshs.2,500/= to enable them have a share in Matumbo Trading company. As the Defendant was already a member of Matumbo Trading Company, the Plaintiffs chose him to be their trustee. The Defendant would collect dividends from the business and give the same to the Plaintiffs. with time, the business under the umbrella of Matumbo Trading Company grew and they invested in New Mwangaza Matumbo Company , One Holding Ltd and in a building erected on LR No.209/136/119 along Kirinyanga Road in Nairobi.

4. The Defendant collected dividends for the Plaintiffs until 1970 when he was removed from his duties which duties were given to Kioria Kihumba and upon the death of Kiori Kihumba , Charles Kiiru kariuki the 3rd Plaintiff took over the task of collecting dividends until 1987 when the Defendant manipulated the management which stopped the 3rd Plaintiff from collecting the dividends. The Defendant also refused to sign documents for the extension of lease for LR No.209/136/119 unless he was given dividends. The management was forced to give dividends to the Defendant.

5. In 1999, the Plaintiffs filed civil suit No.10634 of 1999 at Milimani Commercial Court in which the Plaintiff's obtained Judgement in their favour which held that the Defendant was a trustee of the Plaintiffs in shares held in Blue Kongo Hotel Ltd and that he should give the Plaintiffs dividends arising therefrom. The plaintiffs contend that part of the assets in which the Defendant is a trustee is a house which is erected on LR No.209/136/119.

6. The Plaintiffs through the 3rd Plaintiff testified that the original members were 31. With time, others withdrew and others sold their shares to the now surviving 18 members. The Defendant has never paid the Kshs.368,367/= which he was ordered to pay in civil case No.10634 of 1999 or even account for dividends arising from LR 209/136/119.

7. The Defendant denied the Plaintiff's claim that he is their trustee in respect of LR 209/136/119. The Defendant stated through James Karuku that he only invited the plaintiffs to buy shares in a business called Blue Kongo Hotel Ltd and that the Plaintiffs are not entitled to any dividends from New Mwangaza Matumbo Company and One Holding Ltd. The Defendant further testified that the business of Blue Kongo Hotel Ltd collapsed in 1991.

8. The Defendant went on to state that the House on LR No. 209/136/119 was purchased by the shareholders Matumbo Trading Company in their individual capacities and therefore the Defendant is not holding a share in the house in trust for the Plaintiffs .

9. I have carefully considered the evidence adduced by the Plaintiffs and that of the Defendant. I have also considered the submissions by the Defendant. The Plaintiffs had been given 30 days to file written submissions with effect from 11th June 2019. As at 4th November 2019, the Plaintiffs had not filed their submissions. They were granted an extension of 30 more days. As at the time of writing this Judgement the Plaintiffs had not filed their submissions and if any were filed, then they are not in the file.

10. The issues which emerge for determination are firstly whether the Defendant is holding a share in LR No. 209/136/119 in trust for the Plaintiffs and secondly whether the Defendant is holding a share in a New Mwangaza Matumbo Company and One Holding Limited. The evidence which has been adduced herein is that the Plaintiffs were interested in the business of Blue Kongo Hotel Limited. This business was being run from a house erected on LR No.209/136/119 which was owned by nine individuals. LR No.209/136/119 was neither owned by Matumbo Trading Company nor Blue Kongo Hotel Limited.

11. When the Plaintiffs filed Milimani Commercial Court Civil suit No.10634 of 1999, they were only pursuing their interest in Blue Kongo Limited. They were not pursuing any interest in New Mwangaza Matumbo Limited or One Holding Limited. They were also not pursuing any interest in LR No.209/136/119 . When a consent order was recorded consolidating civil suit No.10634 of 1999 and Nairobi HCCC No. 4409 of 1999, PW1 Charles Kiiru Kariuki swore an affidavit in support of an application seeking to have the two suits deconsolidated. In paragraph 8 (c) of the said affidavit , this witness stated that the Plaintiff in Milimani Civil Suit No.10634 of 1999 that is Kiruri Young Men Association were not parties to the High Court case that s HCCC No. 4409 of 1999 and that they did not have any interest in the disputed property. This was reiterated in paragraph 8 (d) where he stated that the dispute in HCCC 4409 of 1991 was between shareholders of various properties where Kiruri Young Men Association had no interest. He went on to state that their interest was only on Blue Kongo Hotel.

12. The property which was in dispute in HCCC No. 4409 of 1991 was LR No. 209/136/119. The Plaintiffs in this suit were seeking for among other orders that they were co-owners of the said property with the Defendants. This suit was dismissed in a Judgement which was delivered on 19th October 2015. The Plaintiffs cannot therefore turn around and claim that they have interest in the same property which they expressly stated that they had no interest in. If the Plaintiffs had any interest in LR No.209/136/119 , they would have made it a subject of litigation in the suit which they filed in 1999. I therefore find that the Plaintiffs have no interest in LR No. 209/136/119 through the Defendant. This suit is actually an afterthought after the Plaintiffs failed to execute a judgement in their favour which was delivered on 21st July 2008.

13. The Plaintiffs evidence as can be seen from the proceedings in Milimani CMCC No.1064 of 1999 was that their interest was in the business known as Blue Kongo Hotel Limited. This business was being operated by Matumbo Trading Company. The business being operated as Blue Congo Hotel collapsed in 1991. The partnership which existed as at 1991 were dissolved through a deed of dissolution signed in 1991. There were new partnerships which were created. The new partnerships given to entities known as Blue Congo Bar and Hotel on LR 209/136/119, Githurai New Blue Congo, New Matumbo Butchery at Gikomba.

14. In the new partnerships which were formed in 1991, there was no mention of New Mwangaza Matumbo Limited, One Holding Limited or even Matumbo Trading Company. There is no evidence adduced by the Plaintiffs to show that these entities exist and there is therefore no basis upon which the Court can make a finding that the Plaintiffs have interest in these entities through the Defendant. I therefore find that the Plaintiffs have failed to prove their case on a balance of probabilities. The same is hereby dismissed with costs to the Defendant.

Dated, Signed and delivered at Nairobi on this 13th day of February 2020.

E.O.OBAGA

JUDGE

In the presence of:

Mr Kabugu for Mr Gichigi for Plaintiff and Mr Omollo for Mr Kimani for Defendant.

Court Assistant : Hilda

E.O. OBAGA

JUDGE