



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 134 OF 2014

KATHENDU KARERI.....1ST PLAINTIFF

PAUL NGUKU NGARI.....2ND PLAINTIFF

VERSUS

ITA KIBORIO.....1ST DEFENDANT

CHARLES NTHIGA GITUMO (Sued as the personal representative of the Estate of

MUGO GITUMO (Deceased).....2ND DEFENDANT

AND

MUNYI NGAL.....INTERESTED PARTY

JUDGEMENT

A. Introduction

1. By a plaint dated 24th September 2003, amended on 14th July 2005 and further amended on 20th March 2006 the Plaintiffs sought the following reliefs against the Defendants:

a. That this honourable court do grant a permanent injunction against the Defendants restraining them, their agents and/or servants from sub-dividing, alienating, disposing and/or in other way interfering in any way with parcels of land Embu/Gangara/27, 31,32, 34, 35, 37, 48, 53, 82, 371,431, 830, 923, 924,1012, 1038, 1041, 1066, 1641, 1734, 1735, 2086, 2822, 2823, 2824, 2825 pending the hearing and final determination of this suit.

b. That this honourable court do declare that the 1st Defendant and the deceased were registered as the owners of parcels of land Embu/Gangara/27, 31, 32, 37, 82, 371,431, 830, 923, 924, 1038, 1041, 1641, 2086, 2822, 2823, 2824 and 2825 in their capacity as the trustees of the Miugu family of the Gakenda clan.

c. That this honourable court do compel the Defendants to sub-divide parcels of land Embu/Gangara/27, 31, 32, 37, 82, 371,431, 830, 923, 924, 1038, 1041, 1641, 2086, 2822, 2823, 2824 and 2825 amongst the members of the Miugu family of the Gakenda clan in equal shares or in such shares as this honourable court shall determine.

d. That in the alternative this honourable court do order that the Plaintiffs' names be entered in the appropriate register as joint registered owners as trustees of the Embu/Gangara/27, 31, 32, 37, 82, 371,431, 830, 923, 924, 1038, 1041, 1641, 2086, 2822, 2823, 2824 and 2825 and any other parcel of land found to belong to the Miugu family of the Gakenda clan and having been registered with the deceased jointly with the 1st Defendant.

e. That further in the alternative, this honourable court do order that an entry be made in the Lands Registrar declaring that the Defendants holds the registered parcels in their fiduciary capacity as the trustees of the entire Miugu family of the Gakenda clan.

f. General damages for breach of trust.

g. Costs of this suit.

h. Interest on f and g.

i. Any other reliefs this honourable court would deem fit to grant.

B. The Plaintiffs' case

2. The Plaintiffs pleaded that they and the Defendants were members of Miugu family of Gakenda clan who were entitled to a share of the 18 properties (hereafter *suit properties*) whose particulars were set out in the amended plaint. It was contended that the Defendants were representatives of the said Miugu family during the land adjudication process and that they were registered as proprietors in trust for the said family and not as absolute owners.

3. The Plaintiffs further contended that the Defendants had either fraudulently or in breach of trust taken absolute ownership of the suit properties and refused to share out the same with the rest of the members of Miugu family hence the suit. The Plaintiffs enumerated particulars of fraud and breach of trust in paragraph 10 of the amended plaint.

C. The Defendants' case

4. The 1st Defendant filed a written statement of defence dated 23rd October 2003 denying the Plaintiffs' claim in its entirety. The 1st Defendant further raised several points of preliminary objection stating that the suit was misconceived. In particular, it was contended that:

a) *The suit did not disclose a reasonable cause of action.*

b) *The plaint did not comply with Order VI of the Civil Procedure Rules.*

c) *The 1st Defendant's registration was a first registration hence not capable of being defeated.*

d) *The suit was res judicata on account of a previous suit being HCCA No. 26 of 2002.*

5. The 2nd Defendant filed a written statement of defence dated 24th April 2006. He admitted being a member of Miugu house of the Gakenda clan but denied that the Plaintiffs were members of the same house. He also conceded that his late father, Mugo Gitumo, was a representative of Miugu house but denied any fraud or breach of trust with respect to his registration as co-proprietor of the suit properties. The 2nd Defendant further contended that the registration of his late father as proprietor was lawful and was done with the full knowledge and consent of the Miugu family.

D. The Interested Party's case

6. By a chamber summons dated 22nd May 2018 brought under **Section 3A of the Civil Procedure Act, Order 1 Rule 10 of the Civil Procedure Rules and any other enabling provisions of the law**, the Interested Party, Munyi Ngai, sought and obtained an order to be joined in the suit as an Interested Party. He also sought and obtained an order for *Embu ELC No. 338 of 2015 – Munyi Ngai V Ita Kiborio & Charles Nthiga* to be heard and determined together with the instant suit. The Interested Party had a claim of 30 acres out of *Title No. Embu/Gangara/371* (hereafter *parcel 371*) which is one of the 18 suit properties the subject of the dispute.

7. In Embu ELC No. 338 of 2015 the Interested Party's suit was based on the fact that during the land adjudication process his 30 acres of land was combined with the Defendants' parcel 371. It was further pleaded that the 1st Defendant had previously sworn an affidavit dated 27th March 2006 acknowledging that some portion of the Interested Party's land was comprised in parcel No. 371. The Interested Party also pleaded that by a written agreement dated 20th January 2010 made between him and the Defendants the latter had agreed to have the said portion surveyed and excised from parcel No. 371.

E. The Defendants' response to the Interested Party's claim

8. The 2nd Defendant filed a written statement of defence dated 16th November 2015 in response to the Interested Party's suit. He denied the claim and pleaded that he did not owe the Interested Party the 30 acres he sought. The 2nd Defendant, however, admitted knowledge of the agreement dated 21st January 2010 and indicated that he would rely on the surveyor's report at the opportune moment. The 1st Defendant did not file any defence to the said suit by the Interested Party.

F. The trial and submissions

9. This suit was heard on diverse dates between 28th February 2019 and 25th November 2019 when the trial was concluded. The Plaintiffs called 4 witnesses and closed their case whereas the 1st Defendant testified on his own behalf as the sole witness. The Interested party also testified on his own behalf as the sole witness.

10. Upon conclusion of the trial on 25th November 2019 the Plaintiffs were granted 30 days within which to file and serve their written submissions whereas the 1st Defendant and the Interested Party were granted 30 days upon the lapse of the Plaintiffs' period to file their submissions. The record indicates that the Plaintiffs filed their submissions on 18th December 2019 whereas the Interested Party filed his on 14th February 2020. The 1st Defendant's submissions, however, were not on record by the time of preparation of judgement.

G. The issues for determination

11. The court has noted that the parties did not file an agreed statement of issues for determination. The record indicates that the 1st Defendant filed a separate statement of issues but there is no indication of the other parties have file their issues. Accordingly, the court shall frame the issues for determination in accordance with the law. Under the provisions of **Order 15 Rule 2** of the **Civil Procedure Rules**, the court may frame issues from any of the following:

- a) *The allegations contained in the pleadings.*
- b) *The contents of documents produced by the parties.*
- c) *The statements made on oath by or on behalf of the parties.*

12. The court has considered the pleadings, documents and evidence on record in this matter. The court is of the opinion that the following are the key issues which arise for determination in this matter:

- a) *Whether or not the 1st Defendant was at all material times a representative of the Miugu family of Gakenda clan during the process of land adjudication with respect to the suit properties.*
- b) *Whether the Plaintiffs were members of the Miugu family of Gakenda clan.*
- c) *Whether the 1st Defendant was registered as proprietor of the suit properties as absolute owner or in trust for members of the Miugu family of Gakenda clan.*
- d) *Whether the Interested Party has demonstrated his claim for 30 acres out of Title No. Embu/Gangara/371.*
- e) *Whether the Plaintiffs are entitled to the reliefs sought in their suit.*
- f) *Whether the Interested Party is entitled to the reliefs sought in his claim/suit.*
- g) *Who shall bear the costs of the two suits.*

H. Analysis and determinations

13. The court has considered the evidence, documents and submissions on record on the 1st issue. By their original, amended and further amended plaints, the Plaintiffs pleaded that the 1st Defendant was a representative of the Miugu house of Gakenda clan in the adjudication process. By his statement of defence dated 23rd October 2003 the 1st Defendant denied such representation and put the Plaintiffs to proof thereof. However, the 1st Defendant changed tact in his witness statements and conceded that he was such a representative. He, however, denied that the Plaintiffs were members of the Miugu family.

14. At the trial hereof, the Plaintiffs' witnesses testified that both the 1st and 2nd Defendants were such representatives. During his evidence in chief and cross examination by the Plaintiffs' advocate, the 1st Defendant conceded that he indeed represented Gakenda clan and Miugu family in several cases during the land adjudication process. The court is, therefore, satisfied on basis of the material on record that the 1st Defendant was such a representative hence the 1st issue is answered in the affirmative.

15. The court has also considered the evidence and submissions on record on the 2nd issue. Whereas the Plaintiffs contended that they were members of Miugu family on whose behalf the 1st Defendant acquired the suit properties, the 1st Defendant contended that the Plaintiffs were not members of that family. The 1st Defendant produced a hand written list of 56 members which he claimed were the only members of the family. The court has considered the Plaintiffs' evidence on this issue as well. The court has taken note of the evidence of Samuel Njeru Nyaga (PW3) who the Chief of Muminji location at the material time. The land dispute was referred to him for resolution in 1998. The matter was handled with the assistance of elders presented by the disputing parties and it was resolved that the 1st Defendant was to give back some of the suit properties to members of Miugu family.

16. The court is satisfied that PW3 was a credible and truthful witness. He handled the land dispute referred to him by aggrieved members of Miugu family. He did not appear to have any interest or sinister motive in the matter. On the other hand, the 1st Defendant was not a credible and truthful witness. He appeared to be an evasive witness who was out to obfuscate the truth. For instance, when he was asked about the agreement dated 21st January 2010 which had signed, he at first claimed that he was not aware of the agreement. He eventually admitted having signed the agreement and conceded that the Interested Party was to get his share of land from parcel 371 upon survey.

17. The court has noted that the family list produced by the 1st Defendant was a list with respect to Minister's Appeal Case No. 995 of 1985. The handwritten list was apparently generated by the 1st Defendant hence its authenticity was not demonstrated. The said list cannot therefore be held to be conclusive evidence of the membership of Miugu family. The court, therefore, finds and holds that the Plaintiffs are members of the Miugu family of Gakenda clan.

18. The 3rd issue relates to the status and capacity of the 1st Defendant's registration as proprietor of the suit properties. Although the

Plaintiffs contended that the 1st Defendant was all along a representative of Miugu family and that he was thus registered in trust for them, the 1st Defendant contended otherwise. The 1st Defendant contended that he was not only the absolute proprietor in his own right but that his registration was indefeasible because it was a first registration under the **Registered Land Act** (now repealed) hence could not be impeached even on account of fraud.

19. At the trial hereof, the 1st Defendant created the impression that during the land adjudication process, he was casing with the Plaintiffs before the Adjudication Committee, the Arbitration Board, Land Adjudication Officer and the Minister. He produced voluminous documents in a bid to demonstrate that he had prevailed against the Plaintiffs and that they were trying to re-open the matter through the back-door. However, upon perusal of the said documents it would appear that most of them involved claims from different clans and houses. In particular, the *Minister's Land Appeal Case No. 995 of 1985* concerned a claim by Mucue Kiura who filed it on his own behalf, his brother Ileri Kiura, and Ngari Kiura. The material on record indicates that the said Appellant was a member of Gekara clan and that he also filed *Minister's Land Appeal Case No. 513 of 1985*. At any rate, there was no evidence on record to demonstrate that the Plaintiffs were litigating on behalf of the persons who lost during the land adjudication process.

20. The court has fully considered the material on record on this issue. The court has, in particular, considered the previous conduct of the parties and the proceedings before the Chief (PW3) and the elders. The court has also considered the 1st Defendant's affidavit sworn on 6th June 1986 in which the 1st Defendant acknowledged that he was conducting Land Appeal Case No. 995 of 1985 on behalf of the entire family. The affidavit does not, however, disclose the concerned parcel numbers but it has to be considered alongside other evidence on record.

21. The question of whether or not a registered proprietor is holding the property in trust for another person or persons is always a question of fact to be decided on the basis of the evidence on record, the dealings amongst the parties and circumstances of the case. The intention of the parties is also a crucial element to be considered. In the case of **M'Inanga Kiebia Vs Isaaya Theuri M'Lintari & Another [2018] eKLR** the Supreme Court of Kenya whilst considering the issue of customary trust held, *inter alia*, that:

“Each case had to be determined on its own merits and quality of evidence. It was not every claim of a right to land that would qualify as a customary trust. In that regard, what was essential was the nature of the holding of the land and the intention of the parties. If the holding was for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they were in possession or actual occupation of the land...”

22. In the said case, the Supreme Court also reaffirmed the position that a trust was an overriding interest which bound a registered proprietor even on a first registration. It is well understood in our law that an overriding interest does not have to be noted in the land register in order to bind the registered proprietor of a parcel of land. The court is thus satisfied from the evidence on record that the 1st Defendant was not registered as absolute proprietor in his own right but in trust for the rest of the members of Miugu family of Gakenda clan. This is so notwithstanding the fact that his was a first registration. The evidence on record reveals that the Defendants amassed over 600 acres of land at the expense of other members of the Miugu family some of whom are living as squatters.

23. The 4th issue is whether the Interested Party has demonstrated his claim of 30 acres out of parcel 371. The court has considered the evidence, documents and submissions on record on this issue. The Interested Party's evidence was that during the land adjudication process a portion of his land was combined with parcel 371 with the full knowledge of the Defendants who were then representing Miugu family of Gakenda clan. He stated that there was an understanding that his portion would be excised from parcel 371 upon conclusion of the process. The Interested Party produced a written agreement dated 21st January 2010 by which the Defendants acknowledged that a portion of the Interested Party's land which fell within parcel 371 would be surveyed and transferred to him.

24. The truth of the matter appears to be contained in the agreement dated 21st January 2010 which the 1st Defendant initially disowned but which he admitted having signed. The 1st Defendant did not contend that he was tricked into signing it or that he signed it under duress. The evidence on record shows that on the date appointed for the survey, the 1st Defendant did not turn up despite being aware of the exercise. The court is of the opinion that the 1st Defendant was a treacherous person who was not keen on resolving the Interested Party's admitted claim expeditiously. The agreement for restitution was signed about 10 years ago but he was still out to frustrate the Interested Party in his quest to regain his property. Even after being sued by the Interested Party he appeared to feign ignorance of the claim.

25. The court is satisfied that the Interested Party has demonstrated his claim with respect to parcel 371 as pleaded in the counterclaim. The court believes his evidence *in toto*. The court finds that the Defendants have no plausible defence at all to the Interested Party's claim for his portion of land. The Interested Party is therefore entitled to get his portion of land. Accordingly, the 4th issue is answered in the affirmative.

26. The 5th issue is whether the Plaintiffs are entitled to the reliefs sought in the further amended plaint. The court has already found that the 1st Defendant was a representative of the Miugu family during the land adjudication process. The court has also found that the Plaintiffs are members of Miugu family and that the 1st Defendant was registered as proprietor of the suit properties in trust for all the members of the Miugu family of Gakenda clan. It would, therefore, follow that the Plaintiffs are entitled to the reliefs sought in their amended pleading save the ones which shall be declined as specified hereafter. The court has noted that the claim for general damages was not pursued at the hearing and the Plaintiffs' submissions.

27. The 6th issue is whether the Interested Party is entitled to the reliefs sought in the counterclaim. The court having held that the Interested Party has demonstrated his claim to a portion of parcel 371 it would follow that he is entitled to the reliefs sought in his counterclaim.

28. The 9th and final issue is on costs of the suit. Although costs are usually at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should

normally be awarded costs of the suit unless, for good reason, the court directs otherwise. The court finds no good reason why the successful litigants should be deprived of costs. Accordingly, the Plaintiffs shall be awarded the costs of the suit to be borne by the 1st Defendant. Similarly, the 1st Defendant shall pay the Interested Party (who was the Plaintiff in *Embu ELC No. 338 of 2015*) costs of the suit.

29. In summary, the court makes the following findings on the issues for determination:

- a) The 1st Defendant was at all material times acting as a representative of the Miugu family of Gakenda clan during the process of land adjudication with respect to the suit properties.*
- b) There is sufficient evidence to demonstrate that the Plaintiffs are members of the Miugu family of Gakenda clan.*
- c) The 1st Defendant was not registered as absolute proprietor of the suit properties in his own right but in trust for the rest of the members of Miugu family of Gakenda clan.*
- d) The Interested Party has adequately demonstrated his claim for 30 acres out of Title No. Embu/Gangara/371 as pleaded in his claim.*
- e) The Plaintiffs are entitled to the reliefs sought in the further amended plaint as more particularly specified hereafter.*
- f) The Interested Party is entitled to the reliefs sought in his claim which was treated as a counterclaim herein.*
- g) The 1st Defendant shall bear the Plaintiffs' and the Interested Party's costs of the suit.*

I. Conclusion and disposal orders

30. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have proved their case against the 1st Defendant to the required standard. The court also finds that the Interested Party has proved his claim in the counterclaim against the Defendants. Accordingly, the court makes the following orders for disposal of the suit and counterclaim:

- a. The Plaintiffs' suit be and is hereby allowed as prayed in paragraphs (b), (c) & (e) of the further amended plaint amended on 20th March 2006.*
- b. The Interested Party's suit which was treated as a counterclaim herein be and is hereby allowed in terms of prayer (a) of the plaint dated 28th October 2015.*
- c. The Plaintiffs' reliefs sought in paragraphs (a) (d) and (f) of the further amended plaint are hereby declined.*
- d. The 1st Defendant in this suit shall bear the Plaintiffs' costs.*
- e. The 1st Defendant in Embu ELC No. 338 of 2015 shall bear the Interested Party's costs.*

31. It is so adjudicated.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 27TH DAY of FEBRUARY, 2020.

In the presence of Mr. Ithiga for the Plaintiffs, Ms. Ndorongo holding brief for Mr. Morris Njage for the 1st Defendant, Mr. Andande holding brief for Mr. Njiru Mbogo for the Interested Party and in the absence of the 2nd Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

27.02.2020