



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 4 OF 2019

JAKUBU M'MIRITI M'AMUNDI.....APPELLANT

VERSUS

PATRICK GITONGA KIRIMI.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF

THE HONOURABLE J. IRURA, PRINCIPAL MAGISTRATE IN THE

NKUBU PMCC NO. 66 OF 2014 DELIVERED ON 13TH DAY OF DECEMBER, 2018)

JUDGMENT

1. The Parties herein are family, the appellant being the father of the Respondent. On 10/3/2010, the respondent filed the suit Nkubu PMCC No. 66 of 2014 (formerly Meru HCCC No. 34 of 2010) against his father; the current Appellant. It was the respondent's case that his father had inherited land parcel No. NKUENE/KITHUNGURI/106 from his father (plaintiff's grandfather) to hold the land in trust for the respondent and other family members. In the course of the trial, it emerged that the parcel number 106 had been subdivided into several parcels including parcel No. 2282 – 2283. The Respondent had therefore sought for the following prayers:

(i) A declaration that the Appellant/defendant holds the suit property in trust of the family,

(ii) An order for the Appellant/ defendant to transfer 1 acre of Nkuene/Kithunguri/2282 & 2283 to the respondent /plaintiff and in default, the Deputy Registrar to sign all relevant documents to ensure subdivision and transfer of the land to the respondent.

2. The appellant had opposed his son's claim through a statement of defence filed on 23/3/2018 which contains a general denial. Appellant had also averred that respondent does not occupy the suit parcel No. 2282 or 2283.

3. The summary of respondents case before the trial court is as follows; That his father inherited Parcel No. NKUENE/KITHUNGURI/106, which was supposed to be held in trust for the entire family. Sometimes back the defendant without any justification sold ½ acre of the above-mentioned parcel of land and also started sub-dividing the same thereby allocating the land to the step brothers of the respondent but omitting to provide for the latter. This prompted the respondent to file LDT case No. 5 of 2004 in which the defendant was ordered to give him 1 acre but the award of the tribunal was challenged in High Court miscellaneous Application No. 183 of 2004 wherein the decision of the tribunal was quashed but respondent was advised to file a fresh suit to recover land prompting him to file the instant suit.

4. The Respondent's case was supported by his own mother one Virginia Tirindi (PW2) who identified herself as the wife of the Appellant. Two neighbours namely M'Mburugu M'Ringera (PW3) and M'Mugiira M'Reri (PW4) also gave evidence in support of respondent's case.

5. On the other hand, Appellant's testimony before the lower court was that he was the registered owner of parcel No. L.R. Nkuene/Kithunguri/106 measuring 3.488 Ha. However, this land does not exist as he subdivided the same in the year 2011 to yield 7 portions which land he transferred to his sons and he is therefore left with just one Acre. He contended that he has 13 children and two wives (one dead) and that he was willing to give the respondent a piece of land which he (Appellant) bought from one John Kiogora M'Rukaria. He admitted that respondent is his son.

6. On 13/12/2018, the learned trial magistrate Hon. J. Irura (P.M.) delivered her judgment where she allowed the claim of the Plaintiff/Respondent. The Appellant/Defendant was aggrieved by the aforementioned decision triggering this appeal. In the memorandum of appeal, the Appellant has raised 9 grounds which are:

(a) The learned Trial Magistrate erred in law and fact by finding that the appellant was registered as the proprietor of the parcel of

land L.R NKUENE/GITHUNGURI/1282 as a trustee of the respondent.

(b) *The Learned Trial Magistrate erred in law and fact by failing to find that the respondent did not plead specifically the particulars of trust in his amended plaint as required by the law hence he did not establish his case against the appellant.*

(c) *The Learned Trial Magistrate erred in law and fact by failing to find that the appellant had provided the respondent with the parcel of land L.R ABOTHUGUCHI/KIIHA/1409 and therefore the respondent had no justification to claim more land from the appellant.*

(d) *The Learned Trial Magistrate erred in law and fact by finding that the respondent was entitled to a parcel of land L.R NKUENE/GITHUNGURI/106 when the same did not exist.*

(e) *The Learned Trial Magistrate erred in law and fact by finding that the respondent could compel the appellant to share his suit property with the respondent during his lifetime (appellant) in a particular manner and designated shares during his lifetime.*

(f) *The Learned Trial Magistrate erred in law and fact by making a finding that the appellant was entitled to the portion of land L.R. NO. ABOTHUGUCHI/KIIJA/1314 when the same was not registered in the name of the appellant together with an extra portion of land L.R. NO. NKUENE/GITHUNGURI/106 when the same did not exist for sharing.*

(g) *The Learned Trial Magistrate erred in law and fact by finding that the respondent was entitled to an equal share of the parcel of land L.R. NKUENE/GITHUNGURI/1282 when he was not entitled to the same.*

(h) *The Learned Trial Magistrate erred in law and fact that she failed to consider the appellant's submission's and the judicial authorities thereof and thereby arrived at the wrong decision.*

(i) *That the decision of the trial magistrate is against the weight of evidence and the law."*

Determination

7. I hereby summarize the issues for determination as follows:

- **Whether the trial magistrate erred in determining a claim of trust when the same was not pleaded in the amended plaint,**
- **Whether the trial magistrate erred in holding that the appellant held the suit land in trust for other family members and could share his suit property during his lifetime,**
- **Whether the magistrate erred in failing to consider that Appellant had provided the respondent with a parcel No. Abothuguchi/Kijja1409 and**
- **Whether the magistrate erred in holding that respondent was entitled to land which did not exist.**

8. This being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and make its own conclusions, **See Selle & Another Vs Associated Motor Board Co. Ltd (1968).**

9. As regards the first issue, I find that Trust has been pleaded and even particularized in paragraph 5 and 10 in the amended plaint.

10. On the issue of Customary Trust, and whether Appellant could be forced to share out his property during his lifetime, the court has considered the evidence which was tendered before the trial magistrate's court. The Appellant has admitted that respondent is his son. The green card in respect of the suit land No. Nkuene/Kithunguri/106 shows that the suit land was first registered in the name of Amundi Riria before it went into the hands of the appellant. Appellant had also stated that he did not purchase the suit land No. 106. It follows that this land was ancestral land to be held in trust through the subsequent generations.

11. Customary trust was well explained by the Supreme Court in the case of **Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another [2018] eKLR** where it held as follows:

"Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is 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 are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.

2. The claimant belongs to such family, clan, or group

3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.

4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

12. The respondent does snugly fit in the definition of a claimant in terms of customary trust. I would wish to distinguish this case from the case of **Moffat Gichuru Vs M’Imanyara M’Murithi & 7 Others Meru ELC No. 54 of 2015** cited by the Appellant and which is my own judgment. In the **Moffat Gichuru** case, Moffat son of M’Imanyara simply wanted the entire suit land for himself to the exclusion of all other family members on the basis that he was given the land by his uncle and hence the land was never family land.

13. The present case has an uncanny resemblance to the case of **Mbui Mukangu Vs Gerald Mutwiri Mbui (2004) eKLR** where a father (Mbui Mukangu) who was the registered owner of a parcel of land of which his son Gerald wanted the father to be stopped from alienating. It turned out that Mbui Mukangu had divorced the mother of Gerald years back. In the court of Appeal’s finding, it was held that:

“It is significant we think that unlike the Muriuki Murigi case (which appellant herein has relied on) where the father had his own land and could therefore do whatever he wished with it, the land registered in the name of Mbui was ancestral land that devolved to him on the death of his father”

14. The appellant has averred that he should not be compelled to share out his land during his life time. However, in the instant case, it is crystal clear that the appellant has put measures to ensure that the suit land is out of reach of the respondent by alienating the same. That is why he is confident stating that the suit land no longer exists. I am inclined to find that the trial magistrate arrived at a correct decision in holding that respondent was entitled to the suit land.

15. On the issue raised by appellant that he has provided his son with another parcel, L.R Abothuguchi/Kiijo/1409, it is noted that the alleged parcel was not ancestral land. Appellant had allegedly bought this land (or was buying it). The respondent ought to realize that his son is not claiming an inheritance from him, such that the father was bound to get his son **“any land”**. What the Respondent was claiming was an entitlement of the family land held under a Trust through the concept of intergenerational equity. In any event, there is nothing to indicate that Appellant had transferred this **“purchased land”** unto his son.

16. On whether the magistrate erred in failing to consider that land No. 106 did not exist, I have considered that the suit was filed in 2010 as MERU H.C.C.C. NO. 34 of 2010 when the parcel No. 106 was intact. The green cards availed by both litigants show that respondent had lodged a caution way back on 15/10/2003. In his evidence before the lower court, the appellant stated that:

“I went to the Registrar and had the caution removed. Gitonga did not know as the land belonged to me. I sold part of the land and I am utilizing the proceeds”

17. In his recorded statement of 7/10/2014, Appellant stated that:

“In the year 2011, I subdivided my land parcel No. Nkuene/Kithunguri/106 into 7 portions”.

18. What resonates from this evidence is that the Appellant took deliberate steps to have the land alienated during the subsistence of this suit. The magistrate took cognizance of the maneuvers of the appellant where she stated that:

“Having said as much, this court is alive to the fact that any tendency which can be read as discrimination must be nipped from the bud as that goes against the tenets of natural justice. I do therefore hold that the plaintiff was entitled to the parcel of land number 106 as the defendant was holding the same in trust for distribution amongst all beneficiaries without any discrimination”.

19. It was therefore quite in order for the magistrate to find that the respondent was entitled to a share of land No. 106 or its resultant subdivisions.

20. The upshot of my findings are that Appellant’s case is dismissed with costs to the respondent

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12TH DAY OF FEBRUARY 2020.

IN THE PRESENCE OF: -

C.A Kananu

Kiogora for appellant – present

Kithinji holding brief for Respondent – present

Parties absent

HON. LUCY. N. MBUGUA

