



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 106 OF 2009

KENNETH KIREMA MUNEN.....1ST PLAINTIFF

MARTIN KIREMA MUNENE.....2ND PLAINTIFF

VERSUS

HARRIET NTAKIRA MATIRI.....1ST DEFENDANT

BENJAMIN NKANDO MUNENE.....2ND DEFENDANT

JUDGMENT

Introduction

1. By their plaint dated 24th July, 2009 and filed on even date, the plaintiffs sought the following orders against the defendants:-

a) An order directing the defendants to transfer 2/3 of land parcel ABOTHUGUCHI/KITHIRUNE/2150 to the plaintiffs and in alternative inclusion of the plaintiffs in the title deed.

b) General damages for breach of trust

c) Costs of the suit and interest

2. In response to the plaintiff's suit, the 1st defendant in opposition filed her statement of defence dated 28th August, 2009 and the 2nd Defendant also filed his defence dated 27th August, 2009.

Plaintiffs case

3. The summary of the plaintiff's case is as follows. They are claiming a portion of Land Parcel Number **ABOTHUGUCHI/KITHIRUNE/2150** (hereinafter referred to as the subject property) which is registered in the names of the defendants.

4. They called 3 witnesses to support their case. The 1st Plaintiff (PW1) put out the plaintiffs' case, he told the court that they are the grandchildren of the 1st Defendant, being the sons born out of wedlock of one of her sons by the name Josphat Munene who died in the year 1993, and that the 2nd defendant is their step brother. In support of this they produced their respective birth certificates and a letter from the Chief Nkuene Location dated 21/10/1993 attesting to the same, which letter was also admitted in NKubu SPMCC No. 40 of 2008, a suit between the 1st and 2nd defendant over the subject property.

5. It is their case that the subject property is ancestral land and therefore they are entitled to their deceased father share which they claim is the subject property, which the defendants hold it in trust. And that the consent reached by the defendants in NKubu SPMCC No. 40 of 2008 where they agreed to subdivide the land equally

among themselves is detrimental to their interest and amounts to breach of trust. They allege that they are in occupation of the subject property.

6. Julius Mburugi Materi (PW2) testified that he is the uncle of the Plaintiffs, and that the 1st defendant is his biological mother and the 2nd defendant his nephew. He told the court that the subject property was as a result of subdivision of Land Parcel No. ABOTHUGUCHI /KITHURUNE/100 belonging to his late father, which land he claims is ancestral land. It was his testimony that in 1995 his late father called a meeting attended by the chairman of the clan one Muindi and Mr. Riungu among others, where the land was divided into three portions,

and since his brother had died, his father directed that the subject parcel of land be registered in his mother's name and that of the 2nd defendant who was minor, and that his mother was to take care of the interest of the two sons who are the plaintiffs. He told the court that the defendants herein have acted in breach of trust.

7. Edward Muindi (PW3) testified that he is a neighbor and a member of the Plaintiffs clan, and told the court that he was present when the Plaintiffs grandfather summoned the clan members and subdivided Land Parcel No. ABOTHUGUCHI/KITHURUNE/100 into three portions as alleged by PW2.

Defendants Case

8. The 1st Defendant testified as DW1 in opposition of the plaintiffs' case. She denied knowing or having met the plaintiffs and told the court that she had two sons, one is Josphat Munene now deceased and Julius Mburugu (PW2). She stated that the deceased son had one son who is the 2nd defendant and three daughters. It is her case that her deceased husband left the subject parcel of land which is 8 acres, and she was to hold 4 acres in trust of the 2nd defendant who was a minor then and the other 4 acres belonged to her and she was to give to her daughters Salome Nduba and Florence Chaku.

9. Salome Kanugu (DW2) testified that she is the daughter of the 1st defendant herein. She told the court that she is aware of a consent reached in NKubu SPMCC No. 40 of 2008 and that the Land Parcel No. ABOTHUGUCHI/KITHURUNE/100 was sub-divided into 2148, 2149 and 2150, and that the two portions 2148 and 2149 were registered in the name of PW2 Julius Mburugu. And that his father originally came from a place called Oruko. It was her testimony that PW2 was given portion number 2148 to utilize for himself and Portion No. 2149 was to be held in trust for the other children. And that the subject property No. 2150 was to be divided into two and 4 acres held by the 1st Defendant in trust for children who do not have land and the other 4 acres given to the 2nd Defendant.

10. Joyce Karimi Muturi (PW3), Sussy Mpinda (DW4) and Margaret Gatwiri Matiri are the daughters of the 1st Defendant and their testimonies is similar to that of DW2, they all denied knowing the plaintiffs and that they knew them after the filing of the above Nkubu Civil Suit No. 40 of 2008.

2nd Defendant case

11. In support of his case the 2nd Defendant testified that he occupies the subject property, in that he is in occupation of 4 acres whereas the 1st defendant has the other 4 acres which she uses it for farming. He told the court that the 1st defendant lives in Parcel No. 2149 and denied ever seeing or knowing the plaintiffs.

Submissions

12. The Plaintiffs filed their written submissions dated 18th December, 2018 and filed on 19th December, 2018. They urged their case as stated above and addressed 12 issues which can be summarized as follows. The first is whether they have established their relationship with the 1st and 2nd defendant herein as the grandmother and step brother respectively. It is their submissions that they have tendered evidence to prove that they are the children of Josphat Munene Matiri who is the son of the 1st Defendant and the late Wilson M'Matiri M'rintaragu (their alleged grandfather), and that the 2nd defendant is their step brother and that their late father died when they were minors.

13. The second issue addressed by the Plaintiffs is on whether the subject property is registered in the names of the defendants in trust. In this respect they submitted that their deceased grandfather divided L.R NO. ABOTHUGUCHI/KITHURUNE/100 into three portions, and that L.R NO. ABOTHUGUCHI/KITHURUNE/2150 was earmarked to the family of their late father Josphat Munene, and being his sons they are entitled to the same.

14. The third issue addressed by the Plaintiffs is whether there was breach of trust by the defendants, and in this regard they submitted that the registration of the subject property in the names of the 1st and 2nd defendant was to have them hold it in trust of the family of their late father and therefore the defendants action dividing the subject land between themselves is in breach of trust,

adding that the subject land is an ancestral land. In this respect they rely in the case of **George Mbiti Kiebia & Another Vs Isava Theuri M'Lintari & Another (2014) e K.L.R.**

15. The fourth issue is on whether they are in occupation and possession of the subject property, and in this regard they submitted that they are in occupation of the subject property and that the same was pursuant to the invitation of the defendants herein.

16. The final issue is on whether they are entitled to the sought orders, and they submitted in this respect that they have proved their case to warrant this court to issue the sought orders with costs and interest.

17. The defendants relied in their joint written submissions dated 9th January, 2019 and filed on 14th January, 2019. They identified four issues for determination. The first issue is on whether the subject parcel of land is ancestral land. In this respect they submitted that the subject parcel of land is not ancestral land and relied in the testimony of DW1 Salome Matiri and the evidence of the late Wilson M'Matiri in Nkubu SPM No. 40 of 2008 who told the court that their original home was somewhere in Uruku where their deceased grandfather left his siblings behind, and therefore the subject land cannot be ancestral land and that the plaintiff claim is mere allegation.

18. The second issue addressed by the defendants is on whether the plaintiff are the sons of Josphat Munene M'Matiri, and in this respect they submitted that the family became aware of their existence when the division of the subject land became contentious and after being

brought on board by PW2.

19. The 3rd issue addressed by the defendants is on whether the plaintiffs are entitled to a share of the subject land, and in this regard they submitted that the plaintiff are claiming a share of their deceased grandfather land bequeited to the 1st defendant (his wife) who was to hold it in trust of the 2nd Defendant who was a minor and that the issue of birthright and ancestral land is irrelevant. In Addition, they submitted that under Part V of the law of succession the grandchildren have no right to inherit from their grandparents and further that the plaintiff claim in this regard ought to have been filed in the Succession Court and not an ELC court, which they argue lacks the jurisdiction. They rely in the case of *Yusuf Namayi and Cleophas Amutala Namayi and Judith Were Succession Cause No. 457 of 2005*.

20. The final issue addressed is on whether there is a breach of trust by the defendants. In this regard they submitted that the plaintiffs failed to prove the existence of trust as envisaged under **Section 116 of the evidence Act**. They submitted that the plaintiffs are not automatic beneficiaries of the estate of the 1st defendant and therefore the same does not arise. And that the plaintiffs have not proved the two elements of breach of trust, which is dishonest assistance and Knowing receipt principles as explained in *Alistair Hudson of Equity Trusts, 4th Edition at Page 732*.

21. It is their submissions that the Plaintiffs are strangers and if indeed they existed as part of the beneficiaries, their deceased grandfather Wilson Matiri would have in 1997 when he was distributing the subject parcel of land considered the plaintiffs who were of age of majority in view of the fact that they were born in the year 1977 and 1978 respectively.

22. In sum they submitted that the plaintiff has failed to prove the existence of a trust and that this suit is a waste of court time and ought to be dismissed with costs.

Issues and Determination

23. I have considered the parties pleadings, respective testimonies in court and filed written submissions, and in my view two issues arise which will settle the dispute herein. The first is whether the Plaintiffs have established their relationship with the Defendants and secondly whether the Defendants held the suit land in trust for the Plaintiffs.

24. On the first issue which is as to whether the Plaintiffs have established their relationship with the Defendants. In support of this fact the Plaintiffs have shown the court their birth certificates which prima facie shows that they are children of the deceased Josphat Munene who was the son of the 1st Defendant and the father of the 2nd Defendant. PW2 who is the brother of the deceased and son of the 1st Defendant also confirmed this fact. The 1st and the 2nd Defendants did not adduce any evidence to counter the documentary evidence adduced in this regard, and therefore it is my finding that the Plaintiff have proved this issue to the required standard, that is on balance of probabilities.

25. On the second issue which is as to the whether the Plaintiffs have established that the suit land was registered in the names of the Defendants in trust. It is trite that Customary trust is one of the overriding interest hinged on the land that is recognized in the **Land Registration Act, 2012** as implied in **Sections Section 27 & 28 and 30 of Registered Land Act**.

26. In the case of *Kanyi Vs Muthiora (1984) KLR 712* the Court stated in this regard that;

“The registration of the land in the name of the appellant under the Registered Land Act (Cap 300) did not extinguish the respondent’s rights under Kikuyu Customary Law and neither did it relieve the appellant of her duties or obligations under section 28 as a trustee..... The trustees referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”

27. Additionally, Justice Khamoni in *Gathiba Vs Gathiba Nairobi HCCC No. 1647/84* case cited by the parties noted that:

“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under Section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to Section 28 and section 126(1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary law has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to Section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as trustee”.

28. Further, In *MERU H.C.C.C No. 146 of 2000 - Peter Gitonga Versus Francis Mainigi M’ikiara*, it was stated that:-

A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”.

29. In *Mbui Vs Mukangu Vs Gerald Mutwiri Mbui C.A No. 281 of 2000*, the Court of appeal noted that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of a customary trust

30. In this case the Plaintiffs have pleaded that the registration of the 1st and 2nd Defendant of Land Parcel L.R NO. ABOTHUGUCHI/KITHURUNE/2150 was in trust of the family of their deceased father Josphat Munene family. They gave the history of the subject parcel of land, stating that it originated from Land Parcel No. ABOTHUGUCHI/KITHURUNE/100, where their deceased grandfather subdivided the same into three portions, that is ABOTHUGUCHI/KITHURUNE/2148, 2149 and 2150, and that L.R No. ABOTHUGUCHI/KITHURUNE 2148 was given to PW1 and 2149 was also registered in the name PW2, who was to hold the same in trust of the 1st Defendant and the her daughters, and that 2150 was given to the family of the Plaintiffs father, and the same was registered in the names of the 1st and 2nd Defendant to hold in trust of the family of Josphat Munene, that included the Plaintiff.

31. PW2 is the brother of the Plaintiffs father and in his testimony confirmed the Plaintiffs version of events and supported their claims alleging that the 1st Defendant who is his mother acted in breach of trust. Further PW3 testimony is that he is a member of the clan and attended the meeting where the Plaintiffs grandfather sub-dived parcel no ABOTHUGUCHI/KITHURUNE/100, giving credence to PW2 evidence.

32. The defendants on the other hand denied the Plaintiffs claims, both alleging that they have never known the existence of the plaintiff as the sons of the deceased Josphat Munene. The 1st defendant in her case alleged that she was given the 4 acres of the subject parcel land to hold it in trust for the 2nd Defendant and the other 4 acres for herself and she was to give to her daughters.

33. The burden of proof in civil claim is that of balance of Probabilities as was held in the case of **Wareham t/a A.F Wareham & 2 others Vs Kenya Post Office Savings Bank (2004) 2 KLR** where the court stated:-

“The burden of proof is on the plaintiff and degree of proof is on a balance of probabilities. In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail”.

34. Subjecting the parties respective cases herein to the above, it is my finding that the Plaintiffs have established their case to the required standard, that is on a balance of probabilities and I therefore find that the registration of the Defendants herein as the owners of Parcel L.R NO. ABOTHUGUCHI/KITHURUNE/2150 was made in trust of the family of the late Josphat Munene, who is also the Plaintiffs father and therefore they are entitled to a share thereof.

Conclusion

In conclusion, it is my finding that the Plaintiffs have proved their case to the required standard as noted hereinabove, and I therefore allow the same with each party bearing their own costs. I therefore direct that the subject parcel of Land be divided equally among the children of the deceased Josphat Munene.

DATED and SIGNED at Kerugoya this 7th day of February, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

READ, DELIVERED and SIGNED in open Court at Meru this 10th day of February, 2020.

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L.N. MBUGUA

ELC JUDGE, MERU

In the presence of: