



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 301 OF 2013

MISHECK WARUI NUTHU1ST PLAINTIFF

DAVID MWANGI NUTHU2ND PLAINTIFF

VERSUS

STEPHEN KABUYU NUTHUDEFENDANT

JUDGMENT

1. In the ordinary course of life disputes within the family are neither strange nor uncommon. When they arise, efforts should be made to resolve them at home, within the family itself. Sometimes though, no solution is found at home and as undesirable as it is, members of a family find themselves in court litigating against each other. This is one such case: the plaintiffs and the defendant are blood brothers. The court exhorted the parties to negotiate and gave them an opportunity to do so. Nevertheless, no settlement was reached thus leaving the court with no option but to hear and determine the dispute.

2. The plaintiffs commenced proceedings herein through plaint filed on 15th April 2013 wherein they averred that all the parties herein reside on the parcel of land known as Kabazi/Munanda Block 1/66 (the suit property) which is registered in the name of the defendant. They contend that the suit property is family land which belonged to the parties' deceased father having been allocated the same by Munanda Farmers Co. Ltd and which was registered in the defendant's name as the first born son to hold in trust for himself and the plaintiffs. That the deceased had prior to his death allocated to the parties herein their respective portions of the suit property and the parties took possession of their portions which they continue residing on. They further averred that the deceased had the title of the suit property in his custody and that upon his death the title was retained by Pricilla Wambui Nuthu who was the mother of the parties. That the defendant took possession of the title upon the death of the parties' mother. The plaintiffs also averred that from the year 2011 upon being registered as the proprietor of the suit property the defendant sought to evict the plaintiffs, sought to lease the suit property to outsiders and has been interfering with the plaintiffs' cultivation thereon. They therefore seek judgment against the defendant for:

a) A declaration that the defendant's registration as proprietor of LR. No. Kabazi/Munanda Block 1/66 is in trust for the plaintiffs and an order for subdivision of the suit land and for transfer of the plaintiffs' portions to themselves absolutely.

b) Costs of this suit.

3. The defendant filed statement of defence in which he denied the plaintiffs' allegations and stated that he was allocated the suit property by Munanda Farmers Co. Ltd. He urged the court to dismiss the suit with costs.

4. The matter proceeded to hearing at which although duly served, the defendant did not attend. The 1st plaintiff testified that the 2nd plaintiff and the defendant are his brothers and that in 1971 their mother had shares in Munanda Farmers Co. Ltd. Since she did not want to have the shares in her name out of respect for their father, she had the shares registered in the name of the defendant. She paid for the shares and was issued with receipts which the witness stated were found among her belongings after she passed away. He produced thirteen receipts (PEXb.1) He added that the title for Kabazi/Munanda Block 1/66 (the suit property) was issued in 1987 in the name of the defendant who currently has custody of the original of the title deed. He produce a copy of title deed (PEXb.2) and added that the family of the parties' father Paul Nuthu Kabuyu including the plaintiffs have been on the suit property since they got the plot. He further testified that the parties' father passed away in 1992 and that their mother is also deceased. That prior to his death their father pointed out to each of us the parties herein their respective portions of the suit property and that what was pending was survey. That on 9th January 2010 the family had a meeting at Muranga where all the parties herein, the parties' aunt by the name Rachel Wangari, one Nyagi Mwangi, one Grace Nyambura, one Johnson Nuthu and one Samuel Maina Nuthu were all present. That at the meeting, a written agreement dated 9th January 2010 was signed in which the defendant admitted that the plot belongs to the family and that it would be divided into 3 portions. That the agreement is in Kikuyu language (PEXb.3A) with a translation into English (PEXb.3B). He further testified that the defendant did not comply with the agreement. Regarding the defendant's allegation in his statement that he paid for the shares, the witness disputed that contention and added that the defendant who was born in 1963 was only 8 years old as at 1971 and that there is no way an 8 year old without money could buy shares. He further stated that if it was true that the plot belongs to the defendant, the defendant would have taken action against the

plaintiffs. He concluded by stating that they issued a demand letter dated 2nd January 2013 (PExb.4) to the defendant prior to filing this case but he did not respond. He therefore urged the court to grant them judgment as per plaintiff.

5. Both the plaintiffs' and defence cases were closed at that point. Parties were ordered to file and exchange submissions. Although served with the order, the defendant did not file any submissions.

6. For the plaintiffs, it was argued that the suit property belonged to the parties' deceased father and was registered in the defendant's name as the first born to hold it in trust for the plaintiffs pursuant to Kikuyu customary law. That the customary trust was reinforced by the agreement dated 9th January 2010 and that in the circumstances of this case the court should uphold the issue of trust so as to ensure that the overriding objective to do substantive justice is realised. The plaintiffs relied on the cases of Eustace Mungai Mathigu v Mwaura Mathigu & another [2018] eKLR, Joseph Wainaina Gathiru v Anthony Njoroge Gathiru [2018] eKLR, Chase International Investment Corporation and Another v Laxman Keshra and 3 others [1978]eKLR and Jason Gitimu Wangara v Martin Munene Wangara & others [2013] eKLR.

7. I have considered the pleadings herein, the evidence and the submissions. As previously noted, the defendant did not offer any evidence. In the circumstances, the plaintiffs' evidence has remained unchallenged. From the material on record, I am satisfied that the defendant is the registered proprietor of the suit property pursuant to the title deed dated 16th June 1987. As a registered proprietor the defendant is entitled to the privileges and benefits accorded by **Section 24** of the **Land Registration Act**. Under **Section 26** of the Act, the court is bound to accept the certificate of title as conclusive evidence of proprietorship. The said sections provide as follows:

24. Interest conferred by registration

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...

8. Similarly, **Section 25** of the aforesaid Act protects the rights of a registered proprietor in the following terms:

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

9. Thus, the registration of a person as proprietor makes him the absolute and indefeasible owner but such ownership is subject to among others the encumbrances endorsed in the certificate and obligations as a trustee. Further, under **Section 28** of the Act, all registered land is subject to such overriding interests as trusts including customary trusts which do not have to be noted on the register.

10. The plaintiffs maintain that the defendant holds the suit property in trust for them. The defendant's title was issued under the **Registered Land Act** (repealed). **Sections 28** and **30** of that statute just like **Section 28** of the **Land Registration Act**, recognised customary trusts as overriding interests. Whether or not trust exists is really a question of fact which must be proven. The Supreme Court stated as follows in Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR with regard to customary land rights:

[52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and

other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

*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.*

11. There is uncontroverted evidence on record herein that the parties are brothers and that the family of the parties' father Paul Nuthu Kabuyu (deceased) including the plaintiffs have been residing on the suit property before the father passed away in 1992. Similarly, it is not disputed that prior to the deceased's death he pointed out to each of the parties herein their respective portions of the suit property and that all that remained was survey and subdivision of the land. Equally, I am satisfied that the parties herein met on 9th January 2010 in the presence of witnesses and signed the written agreement dated 9th January 2010. A reading of the translation of the agreement shows that the parties acknowledged therein that the defendant was holding the suit property in trust and that it would be sub-divided into 3 portions to be shared by each of the parties herein. Even if such an agreement had not been produced, the fact that the suit property was family land and that the defendant is the elder brother of the plaintiffs leads to a rebuttable presumption that the defendant holds the property in trust for himself and his brothers. That presumption has not been rebutted. I am further satisfied that a demand letter dated 21st January 2013 was issued to the defendant prior to filing this case requiring him to have the suit property subdivided and titles issued to the parties herein but he neither responded nor complied. His actions clearly show a breach of the trust. The solution in the circumstances is to accede to the plaintiffs' plea that the property be subdivided so that each party gets his exclusive parcel.

12. Although the defendant averred in his statement of defence that he was allocated the suit property by Munanda Farmers Co. Ltd and that it therefore exclusively belongs to him, he did not tender any evidence either to support that contention or to challenge the plaintiffs' version of events.

13. In view of the foregoing, I am persuaded that the plaintiffs have established their case. I therefore make the following orders:

- i) It is hereby declared that the defendant holds the parcel of land known as LR. No. Kabazi/Munanda Block 1/66 in trust for himself and the plaintiffs.**
- ii) The defendant is hereby ordered to subdivide the parcel of land known as LR. No. Kabazi/Munanda Block 1/66 into three (3) equal parcels such that each party shall have his own separate parcel and a certificate of title in respect thereof in the party's name.**
- iii) The defendant is hereby ordered to process certificates of title for each of the parcels referred to in (ii) above and hand over to the plaintiffs their respective certificates of title in their respective names within ninety (90) days from the date of delivery of this judgment.**
- iv) In default of the defendant complying with (ii) and (iii) above within the stipulated period, the Deputy Registrar of this court to execute such documents and take such steps in place of the defendant as will be necessary to ensure that each party shall have his own separate parcel and a certificate of title in respect thereof as ordered above.**
- v) Parties shall equally share the costs of subdivision and issuance of the titles.**
- vi) Considering that the parties are brothers, each party shall bear own costs of this suit.**
- vii) The plaintiffs to extract and serve these orders upon the defendant within fourteen (14) days from the date of delivery of this judgment.**

14. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 30th day of April 2020.

D. O. OHUNGO

JUDGE