



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND

AT MERU

ELC APPEAL NO. 16 OF 2018

PATRICK GITONGA M'IKIARAAPPELLANT

VERSUS

RUTHSON MANGATI M'IKIARA1ST RESPONDENT

HUDSON MURIIRA M'IKIARA.....2ND RESPONDENT

SOLOMON MBAABU M'IKIARA..... 3RD RESPONDENT

MOSES KOOME.....4TH RESPONDENT

JAPHET MURIIRA M'IKIARA5TH RESPONDENT

MOSES NDUBI ALIAS JOMO M'IKIARA..... 6TH RESPONDENT

(Being an appeal from the judgment and decree of the Hon. Mayamba C.A SRM in Meru Civil Case No. 693 of 2002 delivered on 18/10/2017)

JUDGMENT

1. The appellant being the defendant in the trial court was sued by the respondents for a declaration that he holds L.R.ABOTHUGUCHI/KATHERI/54 (hereinafter *the Suit Land*) in trust for all the respondents and costs of the suit. On 18/10/2017 the trial court entered judgment in favour of the respondents as follows:

a. A declaration is hereby issued that the defendant holds L.R ABOTHUGUCHI/KATHERI/54 in trust for all the plaintiffs and an order is granted for sub division of the parcels into 2 acres for each plaintiff and 3 acres for the defendant. For avoidance of doubt the plaintiffs who have passed on, their portion shall go to their heirs in equal distribution as per the agreement by the clan. In regard to the deceased 1st plaintiff who was their father, the portion shall remain with the defendant as the eldest son if the mother is not alive who shall be entitled to the same.

b. Cost of this suit shall be borne by the parties themselves.

2. The appellant being aggrieved by the decision filed this appeal based on five (5) grounds which may be summarized as follows: **that the learned trial magistrate erred in law and fact in assessment of the evidence and finding that the appellant held the Suit Land in trust for the respondents.**

3. The appeal was canvassed by way of written submissions. The appellant submitted that the Suit Land belonged to his grandfather who donated it to him. He then subdivided the land and transferred half to his father (1st plaintiff) who brought his step-brothers to occupy his share. He contends that he does not hold the Suit Land in trust for the respondents. It was submitted that during land consolidation and adjudication, ancestral land allotted to an individual family member by family or head of family registered and occupied by such individual became that individual's private land unless it was occupied by other family members when it may be held that the registered owner held the same in trust for those other family members. None of the respondents were living on the suit land when the same was allotted to the appellant as the family was living on L.R No. Kibirichia/Ntumburi/131. Thus, the trial magistrate erred in his Judgment, the appeal should be allowed and judgment be set aside

4. The respondents submitted the appellant held the Suit Land in trust for them and they relied on the Supreme Court decision of **Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another [2018] eKLR, Wilberforce Muthinga Nguru & another v Hezron Maina Titus Nguru [2016] eKLR** and **Margaret Nkirote & 2 others v Mutwiri Mutungi [2019] eKLR**.

5. As the first appellate court, this court is to evaluate, assess and analyze the extracts on record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123**.

6. The suit before the trial court had proceeded to hearing where each party called their witness who relied on their witness statements of which they were cross-examined upon.

7. **PW1 Solomon Mbaabu M'Ikiara** stated that 1st plaintiff was his father while the 2nd – 8th plaintiffs and defendant are his brothers. He testified that the Suit Land is registered in the name of the defendant who is their eldest brother. He was given the land to hold in trust for they were underage. Some of the plaintiffs stay on the Suit land while others cultivate the same. As for him, he just cultivates the land but does not stay there. He recalled that on 15/10/1994 their father called for a clan meeting and explained how the family land was to be shared. For the land at Ntumburi, each person was to get 5 acres. For the suit land at Katheri, the appellant was to get 3 acres while the rest were to get 2 acres each. The defendant who was present at the meeting signed in the agreement.

8. Pw1 further stated that their father (1st plaintiff) passed on on 9.12.2005. There was another meeting on 16.4.2011 which defendant did not attend where the elders agreed on how the Suit Land was to be distributed as earlier stated. He is not aware if in 1976 their father called the defendant in front of their grandfather to ask the defendant to give him half of the Suit Land.

9. **PW2 Japhet Muriira M'Ikiara's** evidence is similar to that of his brother, pw1 save that he did not manage to attend the family meeting. PW2 was born in 1981.

10. **PW3 Kirimi Solomon Magambo** is a relative of the litigants. He stated that M'Ikiara M'Mbogori was his uncle. He averred that the Suit Land is ancestral land which the 1st plaintiff disclosed to him that he registered it in the name of the defendant in 1963 to hold in trust for all the other brothers. It was M'Ikiara who transferred the Suit Land to the defendant.

11. The other brothers of the litigants who testified on the side of the plaintiffs are; **PW4 Moses Ndubi**, (born in 1962), **PW5 Hudson Muriira M'Ikiara** (born in 1958), **PW6 Ruthson Mangati** (also born in 1958) and **PW7 Moses Koome M'Ikiara** (born in 1975). They confirmed the assertions which had been made by pw1.

12. **PW8 Joseph Mbaya Mater** stated that M'Ikiara M'Mbogori was his cousin. He recalled that there was a meeting in Kibirichia Market which involved elders and children of M'Ikiara which was reduced into minutes, which he produced as *P Exh. 2*. The meeting concerned the Suit Land where the defendant was to get three (3) acres, while each of the plaintiffs was to get two (2) acres.

13. **DW1 Patrick Gitonga M'Ikiara** stated that he was born in 1956 outside wedlock and brought up by his grandfather M'Mbogori Mbogori. His grandfather gave him the Suit Land and also asked him to donate half of the parcel to his father of which he complied. They even went to the Land Control Board to sub-divide the land. He occupies 9 ½ acre portion and his brothers Solomon Mbaabu, Hudson Mangati and Moses Ndubi stay on the other half portion of the suit land. It was his grandfather who informed him that the Suit Land had been registered in his name. There is only one title but on the ground the land has been divided into two portions. He knows that his father has another parcel of land in Kibirichia/131 which he has a share of.

14. **DW2 Geoffrey Mwithiga**, testified that he is 72 years of age and that the Suit Land which is occupied by the defendant borders his own land. In 1981 when the land was being subdivided into two portions by the district surveyor, he was present together with the 1st plaintiff and defendant. That it was M'Mbogori Mbogori who directed the defendant to give his father half of the Suit Land. He has leased a part of the suit land from the defendant.

15. **DW3 M'Ringera Stephen**, is aged 84. He testified that his land too borders the Suit Land. In 1976 M'Mbogori Mbogori informed him that he wanted Gitonga to give his father part of the land of which he agreed. They did so and at the middle of the land, they measured a twenty (20) feet wide road. Later a surveyor came and subdivided the land as they had earlier done.

Determination

16. The issue for determination is ***whether the appellant holds the Suit Land in trust for the respondents.***

17. The suit land appears to be ancestral land. The appellant confirmed this during cross examination adding that the land was registered under his name in 1963. **Section 28 of *The Registered Land Act CAP 300*** (now repealed) provided that:

“The rights of a proprietor, whether acquired on first registration or whether acquired 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 -..... (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The current legislation being the ***Land Registration Act No.3 of 2012*** has similar provision under Section 25.

18. In the case of Isaac Wanjohi and another vs A.K Mbwiria and others Nairobi High Court Civil Case No. 383 of 1999 Visram CA on 31/7/2000 (unreported) held as follows:

a. “.....”

b. There is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration; and there is nothing to prevent giving effect to such a trust by requiring the trustee to execute transfer documents

c. A relationship of trust can be implied from the circumstances of a case.

d. To establish or infer a trust, the word “trust” need not be used and all that is necessary is to establish that the legal title was in the plaintiff and the equitable title in the defendant.

e. Trust cannot be said to exist where there is no personal, physical or fiduciary relationship between the parties.”

19. In the case of Isack Kieba M’Inanga v Isaaya Theuri M’Lintari & another [2018] eKLR, it held as follows:

“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.”

20. The respondents alleged that the Suit Land was registered under the name of the appellant who was holding for them in trust for they were of tender age. **PW3** who drafted the minutes at the meeting held on 15/10/1994 by the parties’ father and clan members show that the appellant was in attendance. The minutes show how their father distributed the Suit Land and Kibirichia/Ntumburi/131 amongst his children. No objection seems to have been raised by appellant.

21. According to the appellant, the Suit Land was given to him by his grandfather. Then his grandfather asked him to give his father half of the land. **DW2** and **DW3** corroborated this. However, **DW2** added this in his testimony ;

“The grandfather asked us to ensure that Gitonga gives his siblings a parcel of land”.

22. It has also emerged that the appellant was about 7 years by year 1963 when the suit land was registered in his name. As noted and analyzed by the trial magistrate, **“it was not possible for him (appellant) to understand the impact of such registration and so his claim that his grandfather gave him the parcel of land and instructed him to give his father half a portion was doubtful. “**

23. I agree that the appellant could not have comprehended the issue of registration. The trial magistrate made reference to the *AMeru* Customs whereby **“male children had parcels of land registered in their names to share with others as per facts relieved herein and admitted as much by the defendant...”**.

24. From the foregoing I am of the view that the suit land was ancestral/ family land of which, the appellant held the same in trust for his father and the other siblings. The appellant has advanced a claim that his siblings were not even born when he was given the land. However, it is noted that customary trust has the flavor of intergenerational equity, thus even future generation stand to benefit from such land on the basis of that principle of intergenerational equity. I therefore conclude that the trial magistrate did not err in his Judgment. **The appeal is hereby dismissed and each party to bear their own costs. I hereby grant a stay of 60 days.**

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE