



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 86 OF 2017

JACKSON MWANGANGI KING'OE.....PLAINTIFF

-VERSUS-

MUTHIANI KING'OE.....1ST DEFENDANT

MBATANI KING'OE.....2ND DEFENDANT

J U D G E M E N T

1. The Plaintiff and the 1st Defendant herein are brothers and also sons of the 2nd Defendant. During the adjudication process, the three were allocated land plot number 164 Thange Settlement Scheme. The said plot was registered in the name of the 2nd Defendant to hold in trust for her sons who include the Plaintiff and the 1st Defendant.

2. The 1st and the 2nd Defendant's sold a portion of the said parcel of land without the consent of the Plaintiff herein and hence the instant suit.

3. By his amended Plaint dated 29th June, 2018 and filed in court on 09th July, 2018 the Plaintiff prays for judgement against the Defendants jointly and severally for: -

(i) An order of permanent injunction restraining the Defendants from selling and/or dealing in any way howsoever with the said plot No.164 Thange Settlement Scheme.

(ii) General damages for the destruction of suit parcel of land by the Defendants during the process of selling.

(iii) Costs and interest of this suit at court rates.

4. The Plaintiff has averred in paragraphs iii, iv, v, vi and vii of his amended plaint that his claim against the Defendants is to stop them from selling a portion of plot No.164 Thange Settlement Scheme, that the allotment number to the said plot was first issued under his name. That he later asked the Land Adjudication/Settlement Officer to record the plot under his mother's name to hold in trust for him as well as his brothers, that the plot allotment documents are in his custody and that on 10th July, 1999 the Plaintiff invited the family/clan members to help resolve the dispute concerning the aforementioned plot No.164.

5. The Plaintiff's claim is denied by the Defendants in their defence dated 31st July, 2017 and filed in court on even date.

6. In paragraphs 3, 4, 5, 6 and 7 of their defence, the Defendants have averred that they deny selling portions of plot No.164 Thange, that they deny the Plaintiff was at any time the owner of plot No.164 Thange Settlement Scheme, that the land in question is registered in the 2nd Defendant's name and that the family meeting held of 10th July was to subdivide the plot amongst the sons of the 2nd Defendant who include the Plaintiff.

7. During the hearing of the Plaintiff's case on 11th November, 2019, he adopted his recorded statement dated 05th July, 2019 as his evidence. He produced five documents in his list of document dated 06th December, 2017 and filed in court on 02nd January, 2018 as P.Exhibit Nos. 1, 2, 3, 4 and 5 respectively. These were a copy of Mr. King'oe Ngovi's declaration of division of land dated 11th May, 1981 (P.Exhibit No.1), a copy of letter from the Land Adjudication/Settlement Officer dated 30th August, 1994 (P.Exhibit No.2), a copy of letter from the Chief addressed to the Plaintiff dated 31st October, 2005 (P.Exhibit No.3), a copy of a letter from the Chief addressed to the 2nd Defendant dated 03rd November, 2005 (P.Exhibit No.4) and a copy of the demand letters addressed to the Defendants dated 25th May, 2016 (P.Exhibit No.5).

8. Briefly, the Plaintiff's evidence was that the 1st and 2nd Defendants are his brother and mother respectively. He went on to say that the two Defendants sold a portion of plot No.164 Thange Settlement Scheme. He added that the said plot number 164 belongs to him. That during the adjudication process, he was the one who requested that the said plot number 164 be registered in the 2nd Defendants name even though it was initially under his name.

9. His dispute with the two Defendants is that they sold a portion of plot No.164 without his knowledge or involving the other brothers. The Plaintiff sought the cancellation of the sale of the said portion of land.

10. On being cross-examined by the 1st Defendant, the Plaintiff told the Court that their father had six sons and that three of the sons got land according to their mother's houses. That their late father had three wives and only the 2nd Defendant is still alive. He said that he called for a clan meeting in 1999 because of the problems that the 1st Defendant was causing him. He pointed out that the clan meeting had nothing to do with sub-division of land. According to the Plaintiff, he would like the buyer of the portion of plot number 164 be evicted so that the portion can be subdivided amongst the family. And on being cross examined by the 2nd Defendant, the Plaintiff told the Court that the suitland belongs to his father.

11. The Plaintiff reiterated in his evidence in re-examination that he was not consulted when the Defendants sold the land.

12. The Plaintiff called David Mutave King'oe (PW1) as his sole witness. In his evidence in chief, King'oe adopted his recorded statement dated 05th July, 2019. His evidence was that the 1st Defendant is his step brother while the 2nd Defendant is his step mother. He went on to say that before his father, King'oe Ngovi died, the latter summoned clan elders in 1981 and subdivided the family land to one Mutave King'oe, Mwangangi King'oe (Plaintiff) and one Makiti King'oe who each came from three wives of his father. He pointed out that the land is yet to be subdivided and that he was aware that the Defendants have sold to outsiders portions of the land.

13. On being cross-examined by the 1st Defendant, David (PW1) told the Court that each of the three sons of their late father was to hold their portions in trust for their siblings and that the clan elders who were summoned by the Plaintiff were not supposed to subdivide the land. He agreed that the portion of the 1st Defendant's land was marked with sisal plants which under Kamba Customary Law denotes boundaries. He also said that the land in dispute is in the name of the 1st Defendant's mother.

14. Hearing was adjourned to 9th December, 2019 to enable the Defendants translate into English a document attached to the statement of the 2nd Defendant filed in court on 8th January, 2018.

15. During the hearing of the Defendants' case on the 09th December, 2019, the 1st Defendant in his evidence in chief adopted his statement dated 8th January, 2018 as his evidence. He went on to produce three documents in his list of documents dated 19th November, 2019 as D.Exhibit Nos. 1, 2 and 3 respectively. The documents were a letter from the Ministry of Lands and Physical Planning showing Mbatani King'oe (2nd Defendant) as the legal owner of Plot No. 164 Thange Settlement Scheme (D.Exhibit No.1), a letter from Mwangangi King'oe addressed to Mbatani King'oe to inform her about the clan meeting that was to be held on 9th July, 1999 to subdivide plot No. 164 (D.Exhibit No. 2) and a letter from the area Chief after Mbatani King'oe reported Mwangangi King'oe for taking her mother's ID Card (D.Exhibit No. 3).

16. Briefly the 1st Defendant's evidence was that during adjudication that commenced in 1994, plot number 164 was issued to the 2nd Defendant while plot number 165 was allocated to the Plaintiff. That in 2016, he asked the 1st Defendant to allow him to sell his share of plot 164 and she agreed. That he offered the share to the Plaintiff who kept on promising to buy it but ended up not doing so. With permission of the 2nd Defendant, he sold his portion to a different buyer.

17. The 1st Defendant's evidence in cross-examination was that the 2nd Defendant's name was the one that was in the register all through. He reiterated that plot number 164 was adjudicated upon in 1994. He went on to say that he and the others were shown their respective portions of land within plot number 164. He said that he sold the portion that was allocated to him. He added that he did not involve the Plaintiff since the two were not in good terms.

18. The 2nd Defendant in her evidence in chief adopted her statement dated 8th January, 2018 and in addition the evidence of her co-defendant.

19. Her evidence in cross-examination by Mr. Mwinzi for the Plaintiff was that plot 164 was registered in her name and at no time was her name substituted with that of the Plaintiff.

20. At the time of writing this judgment, it is only the Plaintiff's Counsel who had filed his submissions. The Counsel framed five (5) issues for determination namely;

a) Whether Plot No. 164 Thange Settlement Scheme is Family/Ancestral Land;

b) Whether the recorded owner, Mbatani King'oe holds the parcel of land in trust for other beneficiaries;

c) Whether the Defendants have irregularly been selling portions of the land;

d) Whether a permanent injunction could issue;

e) *Who pays the costs.*

21. The Counsel addressed the five issues together albeit in passing.

22. The Counsel submitted that there is no dispute that the parcel of land in question is family land. That the 1st and 2nd Defendants admit that the land was subdivided among all the family members, including those who are not parties to this suit. It was further submitted that the Defendants have in paragraph 7 of their defence admitted that the land was to be shared among others, the 2nd Defendant and other siblings of the Plaintiff. In support of his submissions, the Counsel relied on the case of **Isack M'inanga Kiebia V Isaaya Theuri M'lintari & Another [2018] eKLR** where at paragraph 52, the Supreme Court of Kenya held that;

“[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.”

23. Based on the authority, the Counsel urged the Court to make a finding that parcel number 164 Thange Settlement Scheme is subject of a customary trust held by the 2nd Defendant in favour of the Plaintiff, the 1st Defendant and other family members.

24. Secondly, the Plaintiff's Counsel submitted that the Defendants have created the impression that they can sell and dispose off portions of the land at will an act the Counsel referred to as misguided, misplaced and irregular.

25. Having read the pleadings, the evidence on record and the submissions filed by the Plaintiff, I am of the view that the only issue for determination is whether or not the Plaintiff is entitled to the orders sought. I say so because from the evidence on record and the submissions by the Plaintiff's Counsel, there is no doubt that plot number 164 Thange Settlement Scheme is family and/or ancestral land. There is also no doubt that the plot in issue is registered in the name of the 2nd Defendant even though it seems that title document is yet to be issued. The evidence on record is that the portion of plot No.164 was purchased by a person who is not a party to these proceedings. The Plaintiff contends that the sale was irregular since other family members entitled to the land were not consulted. A cardinal principle of justice is that no one shall be condemned unheard. The buyer of the portion that the 1st Defendant claims was his is known. He was not sued jointly with the Defendants herein so that he too could have a chance to present his evidence before the court has its way. The Plaintiff did not give any reason as to why he did not enjoin the third party in these proceedings as he/she appears to be a necessary party. Further the Plaintiff has not controverted the 1st Defendant sold the portion that he had been allocated and which offer he had the Plaintiff first priority to buy. It would be improper to condemn the 3rd party unheard and as such any finding is that the Plaintiff has not satisfied this Court that he has a cause of action against the Defendants. His case must therefore fail.

26. Having so found, it is clear that the parties are related to one another with the 2nd Defendant being the mother of the Plaintiff and the 1st Defendant. In order to promote family harmony and reconciliation, the circumstances of this case dictate that each party bears his/her own costs. Consequently, I dismiss the Plaintiff's case and I order parties to bear own costs.

Signed, Dated and Delivered at Makeni via email this 28th day of May, 2020.

MBOGO C. G.,

JUDGE.

Mr. G. Kwemboi – Court Assistant