



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 136 OF 2013

MURAGE NJERU.....PLAINTIFF

VERSUS

LINUS MBOGO NJERU.....DEFENDANT

JUDGMENT

INTRODUCTION

The plaintiff originally instituted this suit through the Magistrate's Court being SRMCC No. 269 of 2009 where he sought the following prayers:

- a. A permanent injunction against the defendant herein restraining him, by himself, his agents, servants, employees and/or anybody else acting on his behalf from wasting, selling, alienating, disposing, leasing, sub-dividing, transferring land parcel No. BARAGWI/THUMAITA/526 and/or evicting the plaintiff and his family from the said land parcel No. BARAGWI/THUMAITA/526 pending the hearing and determination of this suit.**
- b. Determination of trust in land parcel No. BARAGWI/THUMAITA/526 the sub-division of the said land into two equal shares measuring 4.1 acres each and transfer of 4.1 acres to the plaintiff.**
- c. Costs and interest at Court rates.**
- d. Such further or other relief as this Court deems fit to grant.**

The defendant filed a statement of defence dated 30th November 2009 denying the plaintiff's claim. At paragraph 6 of the statement of defence, the defendant averred, that there was another case being HCCC No. 23 of 2002 in which the plaintiff had filed and which was dismissed for want of prosecution and where he had filed a defence and counter-claim in which he had sought to have the plaintiff evicted from the suit land. The said case SRMCC No. 269/2009 was later transferred to this Honourable Court and consolidated with HCCC No. 23 of 2002 (Embu, then ELC No. 13 of 2013 (Kerugoya) vice this Honourable Court's orders of 25th July 2014.

PLAINTIFF'S CASE

The plaintiff testified and raised an issue of trust to the effect that land parcel No. BARAGWE/THUMAITA/526 was a clan land and the defendant who is his elder brother was given the land to hold in trust for him. The green card produced shows that one Njeru Mbogo became registered as proprietor of the land on 15th November 1958. The plaintiff also testified that their mother was unmarried and that they were brought up together with the rest of the siblings at their maternal grandmother's place (Maria Wanjira Mbogo). He stated that as women were not being given land, both their mother Wanjiru Mbogo Alias Wathuiya Mbogo C. and their maternal grandmother Maria Wanjira Mbogo could not be registered in the clan land. As such, the land given to their family was registered in the name of their maternal uncle, Njeru Mbogo. The plaintiff further stated that their mother Wanjiru Mbogo was not married and that is why they (both the plaintiff and the defendant) have the name Njeru as their Surname depicting the name of their grandfather. The plaintiff also stated that after their maternal uncle Mbogo Njeru died, his mother Maria Wanjira Mbogo (parties maternal grandmother) inherited the land which was later transferred to the defendant to hold in trust for the plaintiff.

DEFENDANT'S CASE

The defendant in his evidence stated that their mother was married to one Wambugu. He also stated that the suit land is a clan land given to their maternal grandfather but registered in the names of their maternal uncle Mbogo Njeru on 15th November 1958. The defendant also

stated that the plaintiff's recourse was to challenge the succession cause. He stated that the plaintiff has always utilized a portion of the suit land. He stated that the land was transferred to him through succession cause which the plaintiff did not challenge and that he had salvaged the said land after paying some loan advanced using the same. He stated that the grant did not state that the defendant or the grandmother Maria Wanjira Mbogo was to hold the said land in trust for himself and the plaintiff. He stated that the suit land is not a clan land but was registered in the name of the defendant after succession in 1986. He said that the mere fact that the plaintiff has been cultivating some portion of the suit land does not entitle him to a share of the same.

ISSUES FOR DETERMINATION

The following are the issues for determination:

- 1. Whether a determination of trust has been established?**
- 2. Whether the suit land is ancestral land?**
- 3. Whether the suit land parcel No. BARAGWE/THUMAITA/526 was transmitted to the defendant through succession cause?**
- 4. Who shall bear the costs of this suit?**

ISSUE 1

Whether a determination of trust has been established?

A question of how a trust is created is a question of fact as was succinctly put in the case of *Mumo Vs Makau (2002) 1 E.A. 170*. The plaintiff, Murage Njeru stated in his evidence that the suit land parcel No. BARAGWE/THUMAITA/526 is a clan land and that the defendant who is his elder brother was given the said land to hold in trust for himself and for him as well. The plaintiff further stated that their maternal uncle one Njeru

Mbogo was given the suit land by the clan and became registered during the land demarcation and adjudication period on 15th November 1958. That fact was confirmed from the green card produced as Plaintiff's Exhibit No. 1. The plaintiff also testified that their mother was unmarried and that him and the rest of their siblings were brought up at their maternal grandmother's place (Maria Wanjira Mbogo). He stated that as women were not being given land under Kikuyu Custom, both their mother, Wanjiru Mbogo Alias Wathuiya Mbogo C. and their maternal grandmother Maria Wanjira Mbogo could not be registered in the clan land and that the land given to their family was registered in the name of their maternal uncle Njeru Mbogo. The plaintiff further stated that their mother (Wanjira Mbogo) was not married and that is why him and his brother Linus Mbogo Njeru have the name '*Njeru*' as their Surname which is the name of their grandfather.

The defendant in his evidence explained that their mother was married to one Wambugu. However, he did not explain why he was not living in his father's land and not their maternal uncle's land Njeru Mbogo. From the evidence adduced by the plaintiff and the defendant, I find facts and explanation given by the plaintiff Murage Njeru more probable than not. The green card produced by the plaintiff as Plaintiff's Exhibit No. 1 indicates that the first registered owner was Njeru Mbogo on 15th November 1958. It was registered the same time when land demarcation and adjudication was taking place in Kenya. The Surname of both the plaintiff and the defendant also agrees with the explanation given by the plaintiff in his evidence. The evidence given by the defendant that their mother was married to one Wambugu is not reflected from his Surname or that of his brother the plaintiff herein or even his mother. The defendant's evidence in my view has no evidentiary value. What is not in dispute is that both plaintiff and the defendant together with their families live on the suit land. The defendant has not explained why they reside in the land if the land is not ancestral. I find the evidence adduced by the plaintiff satisfactorily to determine the existence of trust on the suit land parcel BARAGWE/THUMAITA/526.

ISSUE NO. 2

Whether the suit land is ancestral land?

The Green Card produced by the plaintiff as Plaintiff's Exhibit No. 1 indicates that the first registered proprietor of the suit land was Mbogo Njeru on 15th November 1958. The plaintiff has explained his relationship, that of the defendant and the first registered proprietor as their maternal uncle. The plaintiff's evidence was not controverted by the defendant. I find that the suit land parcel No. BARAGWE/THUMAITA/526 is an ancestral land.

ISSUE NO. 3

Whether the land parcel No. BARAGWE/THUMAITA/526 was transmitted to the defendant through succession cause?

The defendant in his testimony stated that the suit land was passed to him through succession. However, he did not provide the particulars of the succession cause. The green card produced by the plaintiff did not also indicate that the defendant acquired the suit land through succession. I find that the defendant's allegation that he acquired the suit land through succession is not supported by tangible evidence. Consequently, the defendant's allegation is therefore rejected.

CONCLUSION

My conclusion from my analysis of all the issues in dispute herein is that a trust has clearly been established by the plaintiff as existing in the suit land parcel No. BARAGWE/THUMAITA/526. The plaintiff has stated that he is occupying approximately three (3) acres out of the suit property measuring 9.20 acres. I find that he is entitled to the same.

In the final analysis, I make the following orders:

- 1. It is hereby declared that the plaintiff, Murage Njeru has established the existence of a trust in L.R. No. BARAGWE/THUMAITA/526.**
- 2. An order is hereby issued for the sub-division and transfer of three (3) acres of land from parcel No. BARAGWE/THUMAITA/526 registered in the name of the defendant LINUS MBOGO NJERU to the plaintiff MURAGE NJERU.**
- 3. As regards costs, I take into account that the litigants are brothers who are close family relatives. As such, I order that each party to bear his own costs.**

It is so ordered.

DATED, DELIVERED and SIGNED in open Court at Kerugoya this 22nd day of May, 2020

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. M/S Wangechi Munene for Plaintiff
2. Ms Wambui holding brief for Mr. Mugusu for Defendant
3. Okatch – Court clerk