



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NUMBER 507 OF 2017

(FORMERLY KISII ELCC NUMBER 420 OF 2014)

DANIEL MWITA NYAISUTI.....PLAINTIFF

VERSUS

MWITA RAGITA.....1ST DEFENDANT

MUGOSI RAGITA.....2ND DEFENDANT

JUDGMENT

A.INTRODUCTION

1. The property in the instant dispute is a parcel of land, LR No Bukira/Buhiringera/358 measuring approximately six decimal nine (6.9) hectares in area (The suit property herein). The same is a subdivision of the parent land, LR No Bukira/Buhiringera/144. The other subdivision thereof is LR No Bukira/Buhiringera/359 measuring approximately five decimal five (5.5) hectares in area.
2. The dispute was initially lodged at Kisii Environment and Land Court. However, on 28th March 2017, the suit was transferred to this court for hearing and determination.
3. The plaintiff, Daniel Mwita Nyaisuti is represented by learned counsel, Mr. J.O Soire.
4. The first and second defendants namely, Mwita Ragita and Mugosi Ragita respectively are represented by the firm of Oguttu, Ochwangi, Ochwal and company Advocates formerly Oguttu Mboya and company Advocates.

B.THE GIST OF THE PLAINTIFF'S CASE

5. By a plaint dated 27th October 2014 and filed in court on 31st October 2014, the plaintiff has sued the defendants jointly and or severally for the following reliefs;
 - i. A declaration that the defendants herein hold land currently registered as parcel No. BUKIRA/BUHIRINGERA/358 in trust for themselves and the plaintiff herein and the family of Nyaisuti Chacha Mahegete.
 - ii. An order directed against the defendants herein to transfer a portion measuring 6.2 hectares in the said land parcel NO. BUKIRA/BUHIRINGERA/358 to the plaintiff.
 - iii. A permanent injunction restraining the said defendants either by themselves or their agents or servants and or any persons acting on their behalf from evicting and or in any manner interfering with the quiet possession of the said plaintiff and the family of Nyaisuti Chacha Mahegete.
 - iv. Any other order this court may deem fit to grant.
 - v. Costs of this suit.
6. The plaintiff claims interalia, that at the time of land adjudication and registration in Buhiringera section, the parent land was solely owned

by the plaintiff's grandfather, Nyaisuti Chacha Mahegete (deceased 1) who invited his sister, Boke Sabai(deceased 2), who sired the defendants' father Ragita Otingo (deceased 3), to the land. That the family of the plaintiff and the family of the defendants have occupied and used the parent land registered in the names of Deceased 3, 1st defendant and the 2nd defendant in equal shares.

7. The plaintiff further claims that sometimes before the year 2010, without the consent and or permission of the plaintiff and the family, the defendants jointly and or severally sold a portion of land namely the other subdivision of the parent land. Thus, it provoked the instant suit.

8. In his testimony, the plaintiff (PW1) relied on his statement dated 27th October 2014 as his evidence in chief. He further relied on his list of exhibits dated 27th October,2014 (PEXhibits 1 and 2) and called no witness herein.

9. By submissions filed on 1st November 2019, learned counsel for PW1 made reference to the orders sought in the plaint, identified and analysed in favour of PW1, three (3) issues for determination including whether the defendants are the registered owners of the suit property and whether they hold the same in trust for PW1 and his family. To buttress his submissions, counsel cited the Court of Appeal decision in **Mbui-vs- Mbui (2005) 1EA 250** regarding trust, an overriding interest on registered land.

C. THE GIST OF THE DEFENDANTS' CASE

10. In their joint statement of defence dated 1st December 2014 and filed in court on 4th December 2014, the defendants denied the instant claim and sought its dismissal with costs. They stated that Deceased 1 did not reside on the parent land.

11. The defendants also stated that PW1 is a busybody who has failed to particularize the basis of trust. That therefore this suit is premature and misconceived.

12. On 19th November 2019, the first defendant testified inter alia, that Deceased 1 and Deceased 3 were not related over the suit land. That PW1 who has no letters of administration herein trespassed into the suit land in the year 2014.

13. Learned counsel for the defendants filed submissions dated 7th November 2019 providing a brief background of the dispute, framed and analysed four (4) issues for determination inter alia, that PW1 has no requisite standi to mount the instant suit and that the issue of trust has not been pleaded and proved in this suit. To reinforce the submissions, counsel relied on authorities including **Virginia Edith Wambui Otieno-vs-Joash Ochieng Ougo and another(1982-88)IKAR 1049, Susan Rokih-vs- Joyce Kandie and 6 others (2018) eKLR and Isack M'Inanga Kiebia-vs- Isaya Theuri M'Lintari and another (2018) eKLR** that an action started by an intestate's intended administrator before the grant of letters of administration is incompetent at its inception, what constitutes a cause of action and a customary trust respectively.

D. ISSUES FOR DETERMINATION

14. I have thoroughly considered the respective pleadings, evidence and submissions of the parties to this suit. So, what are the issues for determination herein in line with the Court of Appeal decision in **Galaxy Paints co Ltd-vs- Falcon Grounds Ltd (2000) 2EA385?**

15. In view of the foregone discourse coupled with the issues framed by the parties in their respective submissions, the issues for determination boil down to whether;

a) The plaintiff is clothed with the requisite authority to originate the instant suit.

b) Depending on the outcome in issue number (a) hereinabove, has the plaintiff proved his claim hinged on trust against the defendants to the requisite standard?

E. ANALYSIS AND DISPOSITION

16. On the first issue, PW1 stated that prior to land adjudication and registration in Buhiringera adjudication section, the parent land was solely owned by Deceased 1. Instructively,paragraph 2 of his statement(evidence)reads in part;

"...land is that it was originally solely owned by Nyaisoti Chacha Mahegete who was my grandfather and is now deceased..."

17. It is important to note that at paragraph 11 of their statement of defence, the defendants pleaded in sum;

a) PW1 is not seized of locus standi to mount this suit.

b) The present suit is want of a cause of action.

18. The term "**legal representative**" is defined at section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya. I take into account the definition accordingly.

19. The powers of a legal representative are spelt out under section 82 of the Law of Succession Act Chapter 160 Laws of Kenya. The powers include institution of legal actions.

20. In *Republic-vs-Attorney General ex parte John Mugo (2013)eKLR* on the role of legal representative, my senior sister, Hedwig Ongundi J held;

“... And a legal representative is a person who has been issued letters of grant. This is provided under section 82(a) of the Law of Succession Act...”

21. Similarly, in *Omari Kaburu v Industrial and Commercial Development Corporation Ltd (2007)eKLR*, Wanjiru Karanja J (as she then was and now JA) held thus;

“The law is that the grant is what clothes a person with locus standi in and sue on behalf of the estate of the deceased...”

22. It is trite law that the estate of the deceased person including deceased 1 and 3 in the instant suit, is vested in the legal representative; see *Troustik Union International and another-vs-Jane Mbeyu and another (1993)eKLR* .

23. According to the submissions of counsel for the defendants who cited **Virginia Otieno case** (supra), PW1 is devoid of locus standi to generate the present suit. Since PW1 is not clothed with legal authority in the form of a grant in respect of the estate of deceased 1 and failed to sue a legal representative of deceased 3, his claim fails for want of locus standi in the obtaining scenario.

24. As regards the second issue, I am not unaware that trust is a question of fact to be proved by way of evidence; see *Mumo-vs Makau (2002)1EA 170*.

25. Section 163 of the Registered Land Act Chapter 300 Laws of Kenya (the repealed Act) provided for the application of common law modified by equity as observed in the case of *Mutsonga-vs- Nyati (1984) KLR 425*. In that regard, has PW1 acquired implied trust over the suit property?

26. Pursuant to Section 3(2) of the Judicature Act Chapter 8 Laws of Kenya, this court shall be guided by African customary law in civil cases in which one or more of the parties is subject to or affected by it, so far as, it is applicable and is not repugnant to justice and morality or inconsistent with any written law; see also *Virginia Otieno case (supra)* and **Article 159(3) of the Constitution of Kenya, 2010**.

27. Admittedly, he who seeks to rely on any African customary law including customary trust as the basis of his claim must prove by evidence the existence of such custom; see *Ernest Kinyanjui Kimani-vs- Muiru Gikanga and another (1965)EA 735*.

28. This court is conscious of the rights of PW1 as provided for under section 24, 25 and 26 of the Land Registration Act, 2016(2012). Nevertheless, the said rights are subject to overriding interests including customary trusts as stipulated under section 28 of the same Act.

29. I am also quite aware of **Order 2 Rule 10 (supra)**. Clearly, PW1 failed to plead particulars of trust as alleged in his plaint in this suit.

30. Moreover, I subscribe to the Supreme Court of Kenya decision in **M’Inanga Kiebia case** (supra) that a claimant would qualify as a trustee based on some key elements. However, in view of the determination of the first issue hereinabove and since PW1 failed to plead and prove some of those essential elements, his case against the defendant absolutely fails.

31. In the premises, I find that the plaintiff’s suit is premature and unfounded. He has failed to prove his claim against the defendants jointly and severally on a balance of probabilities.

32. A fortiori, the instant suit mounted by way of a plaint dated 27th October 2014, be and is hereby struck out with costs to the defendants jointly and severally.

33. It is so ordered.

Delivered, Signed and Dated at Migori through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the prevailing Corona Virus pandemic, this 20th day of May, 2020.

G. M. A. ONGONDO

JUDGE