



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 276 OF 2013

(FORMERLY HCCC NO. 45 OF 2009 (O.S))

RAEL CHEPNGETICH EMAINA.....PLAINTIFF

VERSUS

CHELULE ARAP MAINA.....1ST DEFENDANT

ZAKAYO CHESIMET.....2ND DEFENDANT

JUDGMENT

1. By Originating Summons dated 6th February 2009, the plaintiff seeks the following orders:

1. That there be a declaration order that that the 1st defendant/respondent being the owner of all that parcel of land known as LR. No. Njoro/Ngata Block 5/170 and Ndundori/Mugwathi Block 2/321 (Murunyu) measuring 4.126 Ha and 1.8 Ha respectively now the subject of determination, holds the same in trust, equitable or otherwise of the plaintiff and her children, any and sale and/or transfer of the aforementioned parcels of land, in whole, to a third party, is an act of dispossessing the plaintiff and her eight (8) children their equitable and constructive rights over the said parcel of land and therefore the 1st defendant/respondent be permanently enjoined from selling and/or transferring the said parcels of land, in whole.

2. That the costs of this application be borne by the defendants/respondents.

2. The plaintiff herein is the wife of the 1st defendant. Given that relationship, the matter was referred to mediation but the mediation failed to yield any settlement. Hearing of the matter thereafter proceeded by way of oral evidence.

3. The plaintiff testified as the sole witness in support of her case. She stated that the 1st defendant with whom she has 8 children. She is his second wife. The 1st defendant has a total of 17 children. She added that her family used to live at Moronyo but later relocated to the parcel of land known as Njoro/Ngata Block 5/170 where she was residing together with her children as at the date of her testimony. She added that when they moved to the Njoro/Ngata Block 5/170, they were informed by the 2nd defendant that their plot had been changed and were told to move to the other plot. The 2nd defendant told them so in the presence of the 1st defendant. She refused to move and conducted a search. The certificate of search dated 30th December 2008 showed that the plot Njoro/Ngata Block 5/170 was at that time registered in the name of her husband, the 1st defendant. Prior to that she registered a restriction against the title. She was later summoned by the land registrar through letter dated 2nd February 2009 to show cause why the restriction should not be removed. She added that she attended the registrar's office with the family but did not agree to removal of the restriction. That the 2nd defendant wanted to be refunded some money which the family agreed to in an agreement dated 22nd December 2008 but he later changed his mind and refused. She conducted another search and the certificate of search dated 2nd September 2010 showed that the 1st defendant was still the registered owner of the plot. She urged the court to order that she and her children remain on the plot since they have nowhere else to go to.

4. Under cross-examination, she stated that she started living on Njoro/Ngata Block 5/170 in February 2008 and that she started constructing on it in March of the same year. She added that the 2nd defendant is their neighbour and that his plot Njoro/Ngata Block 5/87 is about three plots away from Njoro/Ngata Block 5/170. That she got to know about the plan to swap plots in December 2008. That the plot is 10 acres, just like the 2nd defendant's plot. She added that the family has another plot which is located in Ndundori and is registered in the name of her husband. The plot is Ndundori/Mugwathi Block 2/321 (Murunyu). She added that the reason for the swap was that her husband wanted to move the family further away from his in-laws' plot.

5. Plaintiff's case was then closed

6. The 1st defendant testified next as DW1. He stated that he is a farmer and a husband to two wives one of them being the plaintiff herein and that he has sixteen (16) children. That they have been living together as husband and wife with the plaintiff and I am the registered owner of the two parcels of land being Njoro/Ngata Block 5/170 and Ndundori/Mugwathi Block 2/321. His family initially resided on Ndundori/Mugwathi Block 2/321 while farming on Njoro/Ngata Block 5/170. However after the post-election violence in the year 2007 his house was burnt down and the family was chased away. He relocated to his other parcel of land Njoro/Ngata Block 5/170. However since there was no house on the said parcel of land he sought refuge in an unoccupied house nearby which belonged to Mr Kangethe, another victim of the post-election violence. After sometime there was calm in the area and Mr Kangethe came back to his house and therefore he was forced to look for an alternative place to live with his family. The plaintiff herein and his children were accommodated by his in-laws while he went to Bomet to live with his first wife. This arrangement went on for a short time when the plaintiff called him back to Njoro over matters of the children's school fees. Immediately, disagreements and quarrels started to emerge between his in-laws, the plaintiff and himself. He therefore approached and sought assistance from the 2nd defendant to rent from him a place where he could stay far from his in-laws. Since he needed a long lasting solution to the problems, he decided to exchange his parcel of land Njoro/Ngata Block 5/170 which was close to his in-laws' home with the 2nd defendant's parcel of land Njoro/Ngata Block 5/87 so as to enable him live peacefully far away from his in-laws. The transactions were started on 4th November 2008 and he was eventually issued with the title for Njoro/Ngata Block 5/87 on 19th November 2008.

7. He further stated that on 16th December 2008 the plaintiff herein lodged a restriction on the Title Number Njoro/Ngata Block 5/170 then belonging to the 2nd defendant. That he wrote a letter dated 21st January 2009 to the District Land Registrar in response to the restriction lodged on the said parcel of land and the registrar responded by writing a letter dated 2nd February 2009 to the plaintiff requesting for a meeting on the issue and advising her to remove the restriction. The plaintiff refused to respond despite reminders and the registrar removed the restriction and issued the 2nd defendant with title deed. He denied that there was a family meeting where it was agreed to reverse the transaction and added that he did not sign the minutes of the alleged family meeting. He further stated that his family has not been denied any entitlement of the land but they can only construct and cultivate on Njoro/Ngata Block 5/87 which is legally in his name and not Njoro/Ngata Block 5/170 which legally belongs to the 2nd defendant. He added that the plaintiff has continued to cultivate on Njoro/Ngata Block 5/170 and even erect a temporarily structure thereon despite an order issued by the on 18th February 2009 to the effect that the status quo be maintained.

8. Next, the 2nd defendant testified as DW2. He stated that the 1st defendant has been his neighbour in Njoro since 1982. In 2007 the 1st defendant went to his home and asked him to give him the parcel of land known as Njoro/Ngata Block 5/87 in exchange for the 1st defendant's Njoro/Ngata Block 5/170. The 1st defendant wanted the exchange because according to him his plot was neighbouring the plot of his parents in law. He said that culturally, it was not appropriate that he borders his in laws. The 2nd defendant told him to go and consult his family and agree. Four days later he returned and told the 2nd defendant that they had agreed. He asked the 2nd defendant to do the exchange.

9. The 2nd defendant further stated that he agreed to the exchange since both plots had no developments. He added that they both went to Lands Registry at Nakuru and told the Land Registrar about the intended exchange. The registrar told them that we could not do the exchange since the plaintiff had lodged a restriction. The registrar therefore wrote to the plaintiff and asked her to show cause why the restriction should not be removed. The plaintiff did not respond despite reminders from the registrar. The registrar then allowed the exchange and gave the 1st and 2nd defendant titles. The 2nd defendant further stated that he was given title for Njoro/Ngata Block 5/170 dated 8th April 2009 and the 1st defendant was given title for Njoro/Ngata Block 5/87 dated 19th November 2008. He produced copies of the titles and green cards for both plots. He added that as at the time of his testimony, plot Njoro/Ngata Block 5/87 had no one residing on it while the plaintiff was residing on Njoro/Ngata Block 5/170 and that the exchange was done willingly. He insisted that the titles have never been invalidated and that he is not agreeable to any reversal of the exchange.

10. Defence case was thereby closed.

11. Parties then filed and exchanged written submissions. For the plaintiff, it is argued that she and her children are fully dependent on the suit property and that their interest overrides any other interest that the 1st defendant may have over the property. That owing to the fact of marriage and the fact that the plaintiff has been using Njoro/Ngata Block 5/170 for farming and thereby adding value to it, it is argued that constructive trust is established more so in view of the provisions of **Section 27 of the Registered Land Act** (repealed) which was in force at the material time. The cases of **M W K v M W K [2013] eKLR** and **Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR** are cited in support of those submissions. It is further argued that the transaction of exchange of Njoro/Ngata Block 5/170 was marred by lack of consent of the land control board or even the plaintiff's consent as wife and mother of the 1st defendant's several children. That removal of the restriction in Njoro/Ngata Block 5/170 was effected on 1st April 2009 and transfer in favour of the 1st defendant registered on 8th April 2009 during the pendency of this matter, thereby demonstrating mischief and concealment of material facts. Consequently, the plaintiff urges the court to find that the 1st defendant held the suit properties as a trustee for the plaintiff, that the transfer to the 2nd defendant was in breach of the said trust and that the plaintiff is thus entitled to the reliefs sought.

12. For the defendants, it is argued that the 1st defendant's ownership of Ndundori/Mugwathi Block 2/321 (Murunyu) is not contested and that this is demonstrated by the fact that the plaintiff only lodged a restriction against Njoro/Ngata Block 5/170. Further, that it has not been shown that the 1st defendant has any intention of disposing of Ndundori/Mugwathi Block 2/321 (Murunyu). It is also argued that the plaintiff has not proven her allegations in the originating summons that there was an intention to sell Njoro/Ngata Block 5/170 and that instead what has emerged is that there was an exchange. That the plaintiff did not adduce any evidence to prove that they lived on or constructed any structures on Njoro/Ngata Block 5/170, thereby failing to discharge the burden of proof as required by **sections 107 and 109 of the Evidence Act**. It is further argued that the document referred to as 'Refunding Land Transaction' which the plaintiff produced does not bear the defendants' names or signatures and does not therefore constitute a contract since there was no offer and acceptance. A quote of the

American Jurist Oliver Wendell Holmes Jr. on 'meeting of minds' as reproduced in the case of **Vincent M. Kimwele v Diamond Shield International Limited** [2018] eKLR is relied on in support of the submission.

13. It is also argued that as the registered owner of Njoro/Ngata Block 5/87 and Njoro/Ngata Block 5/170, the 1st defendant and 2nd defendants respectively are protected by the provisions of **section 26** of the **Land Registration Act** since no challenge to the validity of the titles has been presented and no proof of illegality or fraud has been provided. It is further argued that the plaintiff's claim that she and her children will be deprived of their livelihoods has no basis since they still have Njoro/Ngata Block 5/87 which the 1st defendant acquired pursuant to the exchange. That the plaintiff is not deserving of equitable relief since she failed to honour the summons from the land registrar thus permitting the removal of the restriction which she had lodged.

14. Regarding the issue of constructive trust, citing the case of **Juletabi African Adventure Limited & another v Christopher Michael Lockley** (supra), it is argued that the transaction of exchange was not for the personal benefit of the defendants but was instead for the safety of the 1st defendant as breadwinner and in the best interest of his family. The case of **In Re Eunice Wanjeri Njenga** [2013] eKLR is cited to buttress that contention. The defendants therefore urge the court to dismiss the originating summons with costs.

15. I have considered the originating summons, the evidence on record and the submissions. As previously noted, the plaintiff is the wife of the 1st defendant. The two of them are blessed with 8 children. The 1st defendant has 8 other children with another wife. A reading of the prayers in the originating summons shows that relief is only sought as against the 1st defendant. Two issues arise for determination. Whether the 1st defendant holds parcels of land known as Njoro/Ngata Block 5/170 and Ndundori/Mugwathi Block 2/321 (Murunyu) in trust for the plaintiff and her children and whether the reliefs sought are available.

16. From the material on record and as demonstrated by the copy of certificate of official search dated 30th December 2008 produced by the plaintiff and confirmed by the certified extract of title or green card produced by the defence, the 1st defendant became registered owner of the parcel of land known as Njoro/Ngata Block 5/170 on 26th August 1991. The property was later transferred to the 2nd defendant who became registered proprietor thereof on 8th April 2009 and who remains the registered proprietor to date. Regarding the parcel of land known as Ndundori/Mugwathi Block 2/321 (Murunyu), the plaintiff produced a copy of certificate of official search dated 2nd September 2010 which shows that the 1st defendant owns it and became registered proprietor thereof on 25th February 1997. Both the plaintiff and the 1st defendant confirmed in their testimonies that the 1st defendant remains the registered proprietor of the said parcel.

17. Although the plaintiff claimed in the originating summons that the 1st defendant was in the process of selling Njoro/Ngata Block 5/170, she did not adduce any evidence to support that contention. Instead, she admitted under cross examination that what happened is that the 1st defendant exchanged Njoro/Ngata Block 5/170 with the 2nd defendant's Njoro/Ngata Block 5/87. That the two plots were exchanged is also confirmed by the testimonies of both defendants. Additionally, the 2nd defendant produced certified extract of title or green card which shows that he became registered owner of Njoro/Ngata Block 5/87 on 30th November 1995 and that the property was later transferred to the 1st defendant who became registered proprietor thereof on 19th November 2008 and who remains the registered proprietor.

18. As long as the defendants remain the registered proprietors of the respective properties, **Article 40** of the **Constitution** protects their right to property. Their proprietorship can only be challenged in accordance with the law. In that regard, **Section 24** of the **Land Registration Act** makes provision on interest conferred by registration of a proprietor of land as follows:

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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

19. Under **section 26** of the **Land Registration Act**, to nullify a title it must be shown that registration was procured through fraud or misrepresentation to which the registered proprietor is proved to have been a party. Alternatively, it has to be shown that the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. The section provides:

(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.

20. As noted earlier, the 2nd defendant is the registered proprietor of Njoro/Ngata Block 5/170. There is no prayer for nullification of his title. I cannot therefore make any orders which affect his rights as a registered proprietor in the absence of a specific claim to that effect and proof of the requirements for nullification of title under **section 26** of the **Land Registration Act**.

21. The plaintiff is seeking a declaration that the 1st defendant is holding the parcels of land known as Njoro/Ngata Block 5/170 and Ndundori/Mugwathi Block 2/321 (Murunyu) in trust for her and her children. Trust is an equitable relief. The Court of Appeal discussed the essentials of a trust in *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR as follows:

According to the Black's Law Dictionary, 9th Edition; a trust is defined as

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.

22. The plaintiff's claim is on the basis that the 1st defendant holds Njoro/Ngata Block 5/170 in trust for her and her 8 children. As we have seen, that is not the case; the 1st defendant no longer owns Njoro/Ngata Block 5/170. Instead, the 2nd defendant now owns the property. Neither the plaintiff nor her children have no family claims or family rights as against the 2nd defendant that would form a basis on any relationship of trust. In any case, the plaintiff admits that the 1st defendant has another plot being Ndundori/Mugwathi Block 2/321 (Murunyu) in addition to Njoro/Ngata Block 5/87. The 1st defendant himself admitted in his testimony that the said plots are available to his family including the plaintiff and her children to use, occupy and develop. I note that Njoro/Ngata Block 5/87 and Njoro/Ngata Block 5/170 are roughly the same size of slightly over 4 hectares.

23. The plaintiff's rights over Ndundori/Mugwathi Block 2/321 (Murunyu) in addition to Njoro/Ngata Block 5/87 as a spouse are recognised as overriding interests at **sections 28 (b) and 66** of the **Land Registration Act**. There are additional provisions under the **Matrimonial Property Act, 2013** which govern the rights and responsibilities of spouses in relation to matrimonial property. All these have express provisions that recognise trust arising from the marital relationship. In those circumstances, I see no reason to impose an equitable remedy in the form declaring a resulting trust when in fact there are statutory provisions that address the situation. Further, the plaintiff has not tendered any evidence to show that the 1st defendant has handled his ownership of Ndundori/Mugwathi Block 2/321 (Murunyu) in a manner that poses any threat to the plaintiff's and her children's interest in it. Consequently, the first issue for determination is answered as follows: the 1st defendant is not the registered proprietor of the parcel of land known as Njoro/Ngata Block 5/170 and therefore he cannot hold it in trust for the plaintiff and her children. As regards, the parcel known as Ndundori/Mugwathi Block 2/321 (Murunyu), the plaintiff holds it in trust for the plaintiff and her children in line with the prevailing statutory provisions.

24. There is thus no need for the court to issue any declaration defining the extent and scope of the 1st defendant's obligations as a trustee in regard to the parcel known as Ndundori/Mugwathi Block 2/321 (Murunyu) since that is a matter addressed by the relevant statutory provisions. In any case, no evidence has been tendered to show that the 1st defendant intends to dispose of the parcel known as Ndundori/Mugwathi Block 2/321 (Murunyu) either at all or in a manner inconsistent with his statutory obligations.

25. In the result, I find no merit in this suit. I dismiss it. In view of the relationship between the parties and the circumstances giving rise to the claim, I make no order as to costs.

26. 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 18th day of June 2020.

D. O. OHUNGO

JUDGE