



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

HCCC NO. 45 OF 2007

SILAS MBURUNG'A MATHIUPLAINTIFF

JULIUS KIJOGI MATHIUPLAINTIFF

VERSUS

MATHIU MUGANE.....DEFENDANT

J U D G M E N T

BACKGROUND:

The Plaintiffs are brothers. They are also sons of defendant. They stay on one piece of land, the same being land parcel No. Abothuguchi/ Kariene/ 1029 which is now apparently divided into five portions. The trial has taken many years the initial Plaint was filed on 08:05:07. The trial eventually started when the first witness (for Plaintiff) testified on 18:02:2011 with the last testifying on 20:02:17.

Plaintiff's Case:

The two brothers have pleaded that their father is the registered owner of Land Parcel No. 1029 which was subdivided into Parcel No's 3210, 3211, 3212, 3213 and 3214 (4.44 hectares),

Another parcel is No. 955 measuring 0.70 acres and 935 which is 3 acres.

They also aver that their father gave them each 4 acres from the parcel No. 1029 which land they have extensively developed.

Further , Plaintiff have stated that the aforementioned parcels of land is family land and that their father is holding the land in trust for himself, the plaintiff and other family members.

The Plaintiff's prayer is for:-

- (a) An order of permanent injunction restraining the defendant, his servants, agents and/or employees from interfering with their quiet and peaceful enjoyment of 4 acres each out land parcel NO. ABOTHUGUCHI/KARIENE/1029 now sub-divided into ABOTHUGUCHI /KARIENE/3210, 3211, 3212, 3213, 3214.
- (b) Costs of this suit.
- (c) Any other relief that this Honourable Court may deem fit and just to grant.

During the trial 1st Plaintiff testified averring that he was born in 1954 whereof his brother, 2nd Plaintiff was born in 1963. He initially stated that he has five sisters but admitted during cross examination that he has six sisters. He averred that him and his brother were given the land in 1999 by their father, each of them getting 4 acres. The land was gifted to them during a clan meeting where PW 2, 3, 4 appear to have been present. PW 2 and 4 are a Chief and an Assistant Chief respectively. PW 3 stated that he is a friend of defendant. 1st Plaintiff stated that his father had sold the portion No. 935 and used all the money to drink.

Defence case

Defendant on the other hand, had filed a defence, an amended defence and eventually a further amended defence with, a counter claim on 28:10:10. He admits he is the registered owner of land No. 1029 now sub divided into 5 portions namely 3210, 3211, 3212, 3213 and 3214. He however denies that he is holding the land in trust from the Plaintiffs. He also avers that Plaintiffs are occupying each 2 acres and not 4 acres. He has stated that he wants each plaintiff to get 2 acres of land and the two unmarried daughters also to get 2 acres each. In the Counter Claim, his prayer is :-

- (a) Declaration that the Defendants are only entitled to portions of land measuring 2 acres each.
- (b) An order of permanent injunction restraining the Defendants from interfering with the portions meant for the plaintiff, Amaria Kanyua and Hellen Wanja being LR. Nos ABOTHUGUCHI/KARIENE 3211, 3213 and 3212 respectively.
- (c) Costs of the main suit and the counter-claim.

In his evidence (Contained in the statement filed on 10:07:12), defendant states that for the portion 1029, he had bought some of the land where as others, he gathered. He states that in 2006, he obtained consent to subdivide the land into five portions of two acres each in order to give his two sons (both Plaintiffs) two acres each, then two acres to the two unmarried daughters and he was to remain with the balance. He denies having attended any meeting where he allegedly gave the sons 4 acres each.

Issues and determination.

The undisputed facts are:

- (1) That the Plaintiff are sons of defendant.
- (2) That defendant has other children (six daughters).
- (3) That defendant is the registered proprietor of Parcel No. 1029 now sub-divided into five portions namely 3210, 3211, 3212, 3213 and 3214

The issues for determination are:-

- (1) Whether defendant is holding land parcel No 1029 in trust for the plaintiffs.
- (2) Whether defendant gave each Plaintiff 4 acres of land in 1999 or thereabout.

Customary Trust Claim

The Plaintiff's claim is that for parcel No. 1029, it is family land and defendant holds the same in trust for the Plaintiffs. He who alleges must prove. That is Trite Law. It was incumbent upon the Plaintiffs to establish that the land was family land. All that 1st Plaintiff told the Court was that the land belonged to their grand father and that he got this information from his grandmother. None of the other witnesses on the side of the Plaintiff commented on this issue. However, defendant during cross examination had confirmed that land parcel 1029 is ancestral land. The court considers that piece of evidence as **an**

admission that the land is family land and the defendant) is holding it in trust for other family members.

Who then are those other family members? The 1st Plaintiff wants 4 acres for himself and 4 acres for his brother 2nd Plaintiff. The two brothers have however not laid a basis as to why they want larger portions than even their father. It is clear that the two brothers have sisters, 6 of them. The fact that they are married (according to the Plaintiffs is not a legal basis to deny them the family land).

The case cited by Plaintiff's in their submission; **the Court of Appeal at Nyeri coram: O'kubasu, Githinji & Waki, J.J.A. Civil Appeal No. 281 of 2000 MBUI MUKANGU -VS- GERALD MUTWIRI MBUI** can be distinguished from the present case in that in Mbui Mukangu case, the father had filed a case wanting to evict his son. That is not so in the present case. As rightly submitted by the defence, this is a case where a father wants to share the ancestral land equally between his two sons and the two unmarried daughters. I am in agreement with defence submissions that gender equality is provided for under Article 27 of the Constitution; "**Every person is equal before the law and has the right to equal protection and benefit of the law**".

The Defendant is an old man. He desires to see his children provided for in terms of having a share of the family land. To this end, I am again in agreement with defence that the intergenerational equity does not deny daughters (married or otherwise) a share of the family land.

The Plaintiff claim on the basis of trust fails whereas the counterclaim of the defendant succeeds.

Claim on basis of a gift

I now come to the second issue, that is whether the Plaintiffs claim can succeed on the basis that defendant is the one who gave plaintiffs the land in 1999 as a gift. If the 8 acres were gifted to the two Plaintiffs, **the process did not crystallize into rights of proprietorship capable of being protected.** As it is, defendant has denied that he ever gave the Plaintiffs land. I find that Plaintiff's claim fails on this ground.

Conclusion

All in all, I do find that defendant has proved his counterclaim, I therefore proceed to enter judgment for the defendant as against the Plaintiff whereby:-

?The Plaintiffs are entitled to two acres of land each from the suit land the same being parcel Nos. 3210 and 3214 (respectively).

?An order of Permanent Injunction is hereby issued restraining the two Plaintiffs from interfering with parcel Nos. 3211, 3213 and 3212 which parcels are reserved for the defendant and his two daughters namely Amaria Kanyua and Hellen Wanja.

This being a family matter, each party is to bear their own costs of the suit.

DELIVERED, DATED AND SIGNED AT MERU THIS 19TH DAY OF JULY, 2017 IN THE PRESENCE OF:

C:A Janet

E. Mwangi for Plaintiff

Both Plaintiffs present

Defendant present

Mutegi for defendant present

HON. L. N. MBUGUA

ELC JUDGE