



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 256 OF 2014

WAIRIMU KIMANI.....PLAINTIFF

VERSUS

JOSEPH MBURU KIMANI.....DEFENDANT

JUDGMENT

The plaintiff is the mother to the defendant. By an amended plaint filed herein on 17th October 2014, she sought judgment against him in the following terms:-

(a) That the Kirinyaga Land Registrar be ordered to cancel the land register in respect of the following nine (9) parcels of land namely:-

1. GICHUGU/SETTLEMENT SCHEME/4806

2. GICHUGU/SETTLEMENT SCHEME/4807

3. GICHUGU/SETTLEMENT SCHEME/4808

4. GICHUGU/SETTLEMENT SCHEME/4809

5. GICHUGU/SETTLEMENT SCHEME/4810

6. GICHUGU/SETTLEMENT SCHEME/4811

7. GICHUGU/SETTLEMENT SCHEME/4812

8. GICHUGU/SETTLEMENT SCHEME/4813

9. GICHUGU/SETTLEMENT SCHEME/4814 and a consolidation of the same into the original land parcel No. GICHUGU/SETTLEMENT SCHEME/835.

(b) That 3½ acres out of land parcel No. GICHUGU/SETTLEMENT SCHEME/835 to be transferred to the plaintiff as per the decree dated 10th June 2010 and the Deputy Registrar of this Court do sign the necessary transfer documents in place of the defendant in order to facilitate the said transfer.

(c) That a permanent injunction be issued against the defendant, his agents, servants or anybody who has bought the said resultant sub-division from working on, entering, selling, alienating or interfering with the said land parcels.

(d) Costs and interests of this suit.

(e) Any further relief which this Honourable Court may deem fit and just to grant.

The plaintiff's claim is premised on the pleadings that the defendant was registered as owner of the land parcel **No. GICHUGU/SETTLEMENT SCHEME/835** (the suit land) as trustee for the whole family and an award of the Mwea East Division Land Disputes Tribunal which was subsequently adopted as an order of the Wanguru Senior Resident Magistrate's Court in Case No. 8 of 2010 had decreed that the defendant gives the plaintiff 3 ½ acres out of the suit land. However, the defendant has now un-lawfully and secretly sub-divided the suit land into the above mentioned nine (9) parcels.

The defendant's defence is that he was not registered as proprietor of the suit land as a trustee of the family or anyone else. He also pleaded that this suit is res-judicata in view of Wanguru Senior Resident Magistrate's Court Case No. 8 of 2010.

In a reply to that defence, the plaintiff pleaded that the suit is not res-judicata as she merely seeks to implement the award in the Wanguru Senior Resident Magistrate's Court Case No. 8 of 2010. She adds that the sub-division of the suit land was illegal hence this suit.

The plaintiff's testimony is that the suit land was originally registered in the names of her husband **KIMANI KARUMBA** who had another wife called **NDUNGE**. The suit land measured 15 acres in size and was to be shared equally between the two wives with each getting 7 ½ acres. However, she did not have an Identity Card and so her share was registered in the defendant's names to hold in trust for the family. The defendant declined to allow her to work on the land and so she moved to the Land Disputes Tribunal which awarded her 3 ½ acres with the defendant retaining 4 acres. The defendant did not comply with that award but instead sub-divided the land into nine (9) portions with the intention of selling them. It is her case that this sub-division was done illegally hence this suit.

The defendant testified that his father who had two wives died in May 1966 after which the plaintiff abandoned them and was married elsewhere. His uncles therefore decided to share the suit land between the defendant and his step-brother. The plaintiff then filed a suit at the Wanguru Court yet his father had directed that the land be shared between him and his step-brother.

In 1994, the plaintiff disagreed with her new husband and returned home and the defendant gave her a portion to cultivate and also built a house for her.

After 15 years, she took him to the tribunal at Wanguru. He gave her a portion L.R No. GICHUGU/SETTLEMENT SCHEME/4808. He had appealed against the decision at the Wanguru Court at Nyeri but it was never heard.

The defendant called three (3) witnesses in his defence namely:-

- 1. MBURU MWANGI - DW2**
- 2. PETER MBURU KIMANI - DW3**
- 3. BERNARD MBURU THIONGO - DW4**

The evidence of **MBURU MWANGI** (DW2) was that the plaintiff wants the suit land sub-divided between the two but the defendant has refused.

PETER MBURU KIMANI (DW3) asked the Court to adopt his statement. In that statement, he confirms that he is an elder brother to the defendant and the eldest son in the family. He adds that the plaintiff left her matrimonial home in 1967 and married another man with whom they lived for 30 years before returning. Upon her return, she found that her former husband's brother had sub-divided the suit land into two portions each measuring 7 ½ acre one of which was registered in the plaintiff's names and

the other in the witness's names.

BERNARD MBURU THIONGO (DW4) who is a cousin to the defendant also asked the Court to adopt his statement in which he had stated that the late **KIMANI MBURU**, father to the defendant, had two wives namely the plaintiff and **NDUNGE**. However, the plaintiff walked out of the matrimonial home in 1967 to marry another man after her husband died. Her husband had gifted the suit land to the defendant and another portion to **PETER MBURU KIMANI**. Only recently did the plaintiff return to claim her share.

At the end of the trial, submissions were filed by the firm of **LEE MAINA** Advocate for the plaintiff while the defendant who was acting in person also filed his submissions.

I have considered the evidence by both parties and the submissions filed.

The following are the un-disputed facts:-

1. The plaintiff is the mother to the defendant
2. The suit land was registered in the defendant's names before the subsequent sub-division into nine (9) parcels.
3. The parties are wife and son respectively of the late **KIMANI MBURU**
4. The parties have previously litigated over the suit land at the **MWEA EAST LAND DISPUTES TRIBUNAL** which directed that the suit land be shared between the two with the plaintiff getting 3 ½ acres and the defendant 4 acres.
5. The award was adopted as a judgment of the Court in **WANGURU SENIOR RESIDENT MAGISTRATE'S COURT CASE No. 8 of 2010** and a decree followed.

The defendant has submitted therefore that in view of the decree in **WANGURU SENIOR RESIDENT MAGISTRATE'S COURT CASE No. 8 of 2010**, this suit is res-judicata. This may be the proper point to interrogate the issue of res-judicata.

The doctrine of res-judicata is provided for under ***Section 7 of the Civil Procedure Rules*** in the following terms:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”

It is not disputed that this suit was previously heard by the then Mwea East Division Land Disputes Tribunal and an award dated 9th April 2010 was arrived at ordering that the suit land be shared between the parties with the plaintiff getting 3 ½ acres and the defendant 4 acres. That award was subsequently made an order of Wanguru Senior Resident Magistrate's Court in Civil Case No. 8 of 2010. It is clear from the certificate of official search that the suit land is registered under the now repealed ***Registered Land Act***. A Tribunal exercising its powers under the ***repealed Land Disputes Tribunal Act*** had no jurisdiction to determine a dispute involving ownership of registered land – ***JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL No. 256 of 2002***. It follows therefore that since the said Mwea East Land Disputes Tribunal had no jurisdiction to make the orders that it did, its award and the subsequent decree drawn by the Court at Wanguru are all null and void and cannot operate as res-judicata. In ***MULLA, THE CODE OF CIVIL PROCEDURE 18th EDITION 2012 at page 285***, the author observes as follows:-

“A judgment delivered by a Court not competent to deliver it cannot operate as res-judicata since such a judgment is not of any effect. It is a well settled position in law that if a decision has been rendered between the same parties by a Court which had no jurisdiction to entertain and decide the suit, it does not operate as res-judicata between the same parties in subsequent proceedings”

The plea of res-judicata is therefore not available to the defendant in the circumstances of this case and must be rejected which I hereby do.

I shall now consider the plaintiff’s case on its merits. From the plaintiff’s pleadings and her testimony in Court, she appears to seek to enforce the award of the Mwea East Land Disputes Tribunal as adopted by an order of the Court at Wanguru. Indeed in the submissions, counsel for the plaintiff has stated as follows:-

“Given that the said decree was never set aside and/or varied, the same remains in force and is thus enforceable especially in light of the fact that orders of the Court are not granted in vain”

It is not clear to me why the plaintiff opted to file this suit to enforce a decree issued in 2010. Section **7 (2) of the repealed Land Disputes Tribunals Act** provided for how the decision of Tribunals could be enforced. It states as follows:-

“The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act”

As there was no appeal against the decision of the Mwea East Land Disputes Tribunal, the plaintiff ought to have enforced it as provided for in the law then applicable. It is not therefore open to her to move this Court as she has done to have an award arrived at by an incompetent Tribunal enforced.

The plaintiff’s claim is also based on fraud on the part of the defendant in the manner in which he sub-divided the suit land. I say so because in paragraphs 6, 7 and 8 of her amended plaint, she has pleaded as follows:-

6: “That despite the said decree, the defendant secretly and without the knowledge of the defendant (sic) went ahead to sub-divide the suit property into 9 portions and is currently in the process of transferring the same to third parties”

7: “That the plaintiffs claim against the defendant is for sub-dividing aforesaid parcel of land number GICHUGU/SETTLEMENT SCHEME/835 into 9 portions unlawfully and/or secretly namely GICHUGU/SETTLEMENT SCHEME/4806, GICHUGU/SETTLEMENT SCHEME/4806, GICHUGU/SETTLEMENT SCHEME/4807, GICHUGU/SETTLEMENT SCHEME/4808, GICHUGU/SETTLEMENT SCHEME/4809, GICHUGU SETTLEMENT SCHEME/4810, GICHUGU SETTLEMENT SCHEME/4811, GICHUGU SETTLEMENT SCHEME/4812, GICHUGU SETTLEMENT SCHEME/44813 and GICHUGU SETTLEMENT SCHEME/4814”

8: The plaintiff shall content that the defendant action were illegal, unjustifiable and of no consequence in any event”

The use of the words “***unlawfully***”, “***secretly***” and “***unjustifiable***” clearly connote that the sub-division of the suit land was done fraudulently. It is well settled that in a claim founded upon allegations of fraud, such allegations must be pleaded and proved – ***R.G PATEL VS LALJI MAKANJA 1957 E.A 314***. See also ***CENTRAL BANK OF KENYA LIMITED VS TRUST BANK LIMITED & FOUR OTHERS 1996 e K.L.R.*** No particulars of fraud were specifically pleaded as required and more significantly, the plaintiff did not lead any evidence of fraud on the part of the defendant to the required standard which is “***more than a mere balance of probabilities***” – ***PATEL VS MAKANJA*** (supra). It follows therefore that

the plaintiff's claim against the defendant in as much as it is premised on the defendant's fraudulent subdivision of the suit land cannot be sustained.

Finally, the plaintiff's case is premised on a claim of trust. In paragraph 3 of her amended plaint, she has pleaded as follows:-

“That at all material times relevant to this suit, the defendant is the son of the plaintiff and the defendant who was the registered owner of parcel of land number GICHUGU/SETTLEMENT SCHEME/835 as trustee of the entire family”

The law is that a trust must be proved by evidence. In **MBOTHO & OTHERS VS WAITIMU & OTHERS 1986 K.L.R 171**, the Court of Appeal held as follows:-

“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”

Since the plaintiff pleaded that the defendant holds the suit land in trust for the entire family, the onus was on her to lead evidence to that effect because the law is that he who asserts must prove. It is the plaintiff's case that since the defendant was her first son and she did not have an Identity Card, the suit land was registered in the defendant's names to hold in trust for the family. Although she told the Court that she has three other children other than the defendant, she did not call any of them as witnesses to support her case. The defendant's case is that following the death of his father in 1966, the plaintiff abandoned him and his sister Margaret Wanjiru and went to get married elsewhere. In her absence, his uncles decided to share their father's land between him and his step-brother. The suit land was therefore given to him in 1979 when he became of age. In 1994 the plaintiff returned home after a disagreement with her new husband and after consulting with her father, the defendant gave her a portion being GICHUGU/SETTLEMENT SCHEME/4808 to cultivate and built a house for her. His evidence is supported by that of his brother **PETER MBURU KIMANI (DW2)** and his cousin **BERNARD MBURU THIONGO (DW3)**. Both have stated in their statements that the suit land was registered in the defendant's names when the plaintiff had left the matrimonial home to be married elsewhere.

Although the green card of the suit land was not availed for this Court's inspection, what is clear from the evidence is that at the time the land was being registered in the defendant's names, the plaintiff had long deserted the matrimonial home to be married elsewhere. Her co-wife remained behind. This evidence was not rebutted. It cannot therefore have been the intention of the defendant's uncles, who registered the suit land in the defendant's names, to have him hold it in trust for the plaintiff who had long left the matrimonial home following her husband's death in 1966 and was married elsewhere. The defendant could only have been registered as owner of the suit land in trust for his three sisters who have not even been called to support the plaintiff's case. The fact that the plaintiff did not call her daughters in support of her case can only lead to the conclusion that they would not have supported her claim to the suit land. I am not persuaded in the circumstances of this case that there was any intention on the part of the defendant's uncles or indeed of any of the parties herein, to have the suit land registered in the defendant's names to hold in trust for the plaintiff. Having left the matrimonial home to start a family elsewhere, it would be stretching imagination too far to presume that the plaintiff was still part of the family of her late husband for whom her son could still hold the suit land in trust. I think the plaintiff missed the boat when she did not pursue the execution of the decree gratuitously issued to her by the Wanguru Court following the award of the Mwea East Division Land Disputes Tribunal in 2010. However, on the evidence before me, she has not proved that the defendant holds the suit land in trust for her.

Ultimately therefore, the plaintiff's suit is dismissed with an order that each party meet their own costs as the parties are a mother and her son.

It is so ordered.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2016

Judgment delivered, dated and signed in open Court this 4th day of November 2016.

Mr. Miano for Mr. Maina for the Plaintiff present

Defendant present in person

Right of appeal explained.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2016