



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 397 OF 2017

(FORMERLY KISII ELC CASE NO. 253 OF 2011)

ZILPA ATIENO OGONJI.....PLAINTIFF

VERSUS

TOBIAS O. OGONJI.....DEFENDANT

JUDGMENT

A. INTRODUCTION

1. The property in dispute in the instant suit is title number Suna East/Manyatta/2156 measuring approximately zero point seven nine hectares (0.79 Ha) in area (The suit property herein). The same is a subdivision of title number Suna East/Manyatta/707 that measured approximately eighteen point eight hectares (18.8 Ha) in area (The original property herein). The suit property is in Registry Map Index number 14 within Migori County.

2. The 1st and 2nd plaintiffs namely Zilpa Akeyo Ogonji and **Sheth Ochieng Ogonji-deceased?** respectively are represented by Oguttu, Ochwangi, Ochwal and Company Advocates formerly Oguttu Mboya and Company Advocates.

3. The current defendant, Tobias Atieno Ogonji substituted one Julia Atieno Ogonji (now deceased, the original defendant herein) pursuant to court order of 5th march, 2019 and a Limited Grant of Administration Ad Litem issued on 23rd July 2019 in Migori Chief Magistrate's court Succession cause number 167 of 2019. He is represented by Agure Odero and Company Advocates.

4. Originally, the present suit was lodged at Kisii Environment and Land Court. However, on 30th July 2017, the suit was transferred to this court upon it's constitution, for hearing and determination.

5. On 10th November 2016, the court (Mutungi J) observed, ordered and directed thus:

“Given the nature of this case I would however implore the parties to reconsider their positions and attempt to mediate and have the matter settled out of court. The parties are one family and they cannot lose anything by settling the matter amicably. I take the unusual step to request that the Assistant County Commissioner of the area do attempt to reconcile the parties with a view of seeing if they can reach a settlement within a period of 90 days from today and failing which the case will proceed for hearing on the date fixed” (Emphasis added)

6. The foregone attempt was in the spirit of Article 159(2) (c) of the Constitution of Kenya, 2010 regarding Alternative Dispute Resolution (ADR) methods. Accordingly, on 6th June 2018, the County Commissioner, Migori filed herein a report Ref No. L & O.17/1 VOL 1 (263) dated 14th March 2018.

B. THE GIST OF THE PLAINTIFF'S CASE

7. By a plaint dated 7th November 2011 and lodged in court on 8th November 2011, the plaintiffs have sued the defendant for;

i. Declaration that the defendant holds the suit property on trust for the plaintiffs and the entire estate of Johnson Ogonji Rutha (Hereinafter referred to as Deceased 1).

ii. Rectification of the register of the suit property, to delete the name of the defendant and reflect the name of the plaintiffs, on behalf of the estate of Deceased 1.

iii. Permanent injunction restraining the defendant by herself, agents, servants and/or anyone claiming under the defendant, from trespassing onto, interfering with and/or in any other manner, whatsoever, dealing with suit property, contrary to the interest of the estate of Deceased 1.

iv. Costs of this suit be borne by the defendant.

v. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.

8. The plaintiffs allege that the 1st plaintiff and the original defendant are both widows of Deceased 1 while the 2nd plaintiff is a son of the Deceased 1 hence the plaintiffs and the defendant are all beneficiaries of the estate of the Deceased 1. That in the year 1972, Deceased 1 bought a portion of land measuring two (2) acres out of the original property by way of a sale agreement from Onduto Onditi (Deceased 2), Bebe Onditi (Deceased 3) and Opondo Onditi. As a result, Deceased 1 took possession of the portion of the original property but died in the year 2003 before the property could be transferred and registered in his name. Subsequently, the defendant who was to hold the suit property on trust for herself and the plaintiffs, secretly caused the same to be subdivided, transferred and registered in her name thus provoking the instant suit.

9. In their reply to defence and defence to counterclaim dated 25th November 2011 filed on even date, the plaintiffs adopted and reiterated most paragraphs of the plaintiff. They stated that the original property is still registered in the name of Deceased 1 and the same is awaiting succession hence the defendant has no locus standi to address its ownership. That the registration of the suit property in the name of the defendant is calculated to defraud the estate of Deceased 1.

10. The plaintiffs denied the defendant's counterclaim as noted herein-below, termed the same premature, misconceived, bad in law and that it contravenes the mandatory provision of Order 7 Rule 5 of the Civil Procedure Rules, 2010. They prayed that the statement of defence and counterclaim be struck out and or dismissed with costs and that judgment be entered in terms of the plaintiff.

11. On 23rd June 2015, the 1st plaintiff (PW1) testified in favour of the orders sought in the plaintiff. To fortify her testimony, she relied on exhibits including a copy of certificate of death in respect of Deceased 1 (PEXhibit 1), copies of certificates of official search in regard to the suit property (PEXhibits 5 and 6), a copy of land certificate thereof (PEXhibit 7) and photographs of houses of the 2nd plaintiff on the suit property (PEXhibits 9 (a) to (h)).

12. In their submissions dated 18th March 2020 and filed in court on 9th June 2020, learned counsel for the plaintiffs made reference to the reliefs sought in the plaintiff including particulars of trust set out therein, evidence adduced during hearing, and argued that this suit has been proved against the defendant for the grant of the said reliefs. To reinforce the submissions, counsel cited authorities, among them, **Giella -vs- Cassman Brown and company Ltd (1973) EA 358 and Martha Thairora Gikundi-vs-Elizabeth Kananu and another (2019)eKLR.**

C. THE DEFENDANT'S CASE IN BRIEF

13. In her statement of defence and counterclaim of 11th November 2011 and amended on 23rd July 2019, the defendant denied the plaintiffs' claim, sought its dismissal and that judgment be entered in his favour against the plaintiffs for:

i. An order of declaration that the defendant is the sole proprietor of the whole of suit property and the plaintiffs be evicted from encroaching/building on the said property.

ii. An order of declaration that the original defendant's title be transferred and registered vide succession to the current defendant, and the plaintiff, her agents, children, assigns who have the suit property, be evicted.

14. The defendant stated that Deceased 1 and the original defendant jointly bought a parcel of land measuring two (2) acres in size out of the original property which parcel of land upon the death of Deceased 1, was transferred to his wives, Elizabeth Ajowi (**Deceased 4**), **Truphesa Olal (Deceased 5)**, Hellen Jabuya and the original defendant who did succession through Migori CMC Succession Cause No. 256 of 2009. That subsequently, the suit land was transferred to the original defendant thus the defendant is entitled to the suit property.

15. Notably, the defendant's case was deemed closed on 13th December 2019. This followed his absence and that of his counsel who was aware of the hearing date and in the Spirit of **Article 159 (2)(b) of the Constitution (supra).**

16. On his part, learned counsel for the defendant filed submissions dated 17th April 2020 whereby he termed the transfer and registration of the suit property in favour of the defendant, lawful. That the present dispute has been resolved through ADR. To buttress the submissions, he cited Articles 159 (2) (supra), Section 71 (1), 58(1) and (2) of the Law of Succession Act chapter 160 of the Laws of Kenya and craved for dismissal of the suit and entry of Judgment in terms of the counterclaim.

D. ISSUES FOR DETERMINATION

17. I have carefully considered the parties' respective pleadings and submissions as well as the evidence of PW1 herein. Being guided by the Court of Appeal decision in **Great Lakes Company (U) Ltd -vs- Kenya Revenue Authority (2009) KLR 720**, what are the central issues for determination in this suit?

18. In view of the foregoing, the following issues fall for determination;

- a. Is the defendant the lawful registered proprietor of the suit property?
- b. Does the defendant hold the suit property on trust for the plaintiffs?
- c. Have the parties established their respective cases herein to entitle them to the reliefs sought accordingly?

E. ANALYSIS AND DISPOSITION

19. In regard to the first issue, it is discernable from paragraphs 8, 10 and 12 of the plaint that the suit property is registered in the name of the original defendant. Quite plainly, the suit property was transferred to her by Hellen Jabuya in Migori Succession Cause No. 256 of 2009 as also disclosed at paragraphs 7, 8 and 11 of the amended statement of defence and counter claim.

20. During cross examination, PW1 stated that:

“...the defendant had also caused herself to be registered as owner of the suit property...”

21. The plaintiffs' claim is over the entire suit property. The defendant claims that he is the sole proprietor of the property which he occupies as revealed in the counter claim. Furthermore, PW1 affirmed that very position during cross examination.

22. At paragraph 8 of the plaint, it is alleged that the original defendant as the 2nd widow of Deceased 1, fraudulently caused the suit property which had been purchased by Deceased 1 out of the original property to be subdivided, transferred and registered in her name. However, the plaintiffs failed to distinctly plead and prove the allegations of fraud as observed in the case of **Kuria Kiarie and 2 others -vs- Sammy Magera (2018)eKLR**, and **Ndolo -vs-Ndolo (2008)IKLR (G & F)742**. So, was the original defendant's registration as the proprietor of the suit property valid?

23. By the defendant's list of documents dated 16th November 2011 duly filed in court on 17th November 2011 especially numbers 3, 5 and 6, the defendant followed due process to obtain document listed as number 4 (title deed) thereof under Sections 27 and 28 of the repealed Registered Land Act Chapter 300 Laws of Kenya; see also **Sections 24, 25 and 26 of the Land Registration Act, 2016 (2012)**.

24. It is trite law that the estate of the deceased person is vested in the legal representative; see **Trouistik Union International and another -vs- Jane Mbeyu and another (1993)eKLR**.

25. As already noted at paragraphs 3, 14 and 23 hereinabove, the original defendant and the current defendant did obtain the requisite grants. Accordingly, they are clothed with necessary powers herein under Section 82 (a) of the Law of Succession Act Chapter 160 Laws of Kenya and Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya.

26. It therefore follows that the original defendant's acquisition of title to the suit property was formal, legal and free from any encumbrances are held by the Court of Appeal in the case of **Munyu Maina v Hiram Gathiha Maina (2013)eKLR**. On that basis, the current defendant is entitled to the suit property, under **Article 40 (1) of the Constitution (supra)**.

27. As regards the issue of trust as alleged at paragraphs 12 and 13 of the plaint, I am guided by the Black's Law Dictionary **10th Edition at page 1740** wherein the term **“trust”** is defined. I note the same accordingly.

28. This court is aware that trusts including customary trusts envisaged under Sections 28 (a) of the Land Registration Act is a question of fact to be proved by evidence; see **Mumo -vs- Makau (2002)1EA 170** as well as **Ernest Kimani-vs- Muiru Gikanga and another (1965) EA 735**.

29. During examination in chief, PW1 told the court that the original defendant and herself, among other beneficiaries of the estate of Deceased 1, are shown in God Jobe Location chief's letter dated 28th September 2011 (PEXhibit 11). That the court urged them to apply for a grant of letters of administration in respect of the said estate.

30. PW1 testified further as follows:

“...The defendant got registered later as owner of a portion of Plot No. 707 that the deceased had purchased. That portion was registered as LR No. Suna East/Manyatta/2156 (“the suit property”). Her homestead is now on the suit property. I wish to produce the certificates of official search on the registers for the suit property and Plot No. 707. The same are marked as PExh5 and PExh6 respectively...”

31. PW1 proceeded and stated in cross examination, inter alia;

“My husband (deceased) died in the year 2003. He owned 3 parcels of land as at the date of his death namely, Plot No. 705 measuring 1.5 ha, Plot No. 1135 measuring 1.1 ha, and the suit land measuring 0.79 hectares (2 acres). The suit property was a portion of Plot No. 707j...”

32. In further cross examination, PW1 stated that:

“The Migori Court had directed that we do succession. The defendant did succession in respect of the suit property while I did succession in respect of Plot No. 705. The defendant was given the suit property by the deceased...”

33. Concerning the original defendant, PW1 also testified thus:

“She is not entitled to any interest on Plot No. 750. The defendant has five children. She has 4 sons who are alive. The defendant at the moment owns 0.79 hectares (2 acres)...”

34. In the case of **M’Inanga Kiebia-vs-Isaaya Theuri M’Lintari and another (2018)eKLR**, the Supreme Court of Kenya held, that some of the elements that would qualify a claimant as a trustee were, inter alia, that the land in question before registration was a family, clan or group land and the claimant belonged to that family, clan or group. That the claim was directed against a registered proprietor who is a member of the family, clan or group.

35. It is discernable from item No. 5 of the defendant’s list of documents dated 16th November 2011, that the original defendant is named as a purchaser of a portion of the original property. Thus, this court is not precluded from giving effect to equitable principles and in particular, the doctrine of constructive trust, in favour of the defendant as opposed to the plaintiff; see the Court of Appeal decision in **Willy Kimutai Kilitit-vs-Michael Kibet (2018) eKLR** and **Article 10 (2)(b) of the Constitution** (supra) regarding the application of the principles of equity. In the present case, the plaintiffs have failed to demonstrate that the defendant holds the suit property on trust as alleged herein.

36. Mr Agure Odera, earned counsel for the defendant urged this court takes into account the defendant’s pleadings, statement and list of documents duly filed and forming part of the record in this suit. I consider all the said documents alongside the County commissioner’s report duly filed in court in consonant with **Articles 48, 50(1), 25(c) and 159 (2)(b)(c) and (e) of the Constitution (supra)**.

37. The County Commissioner’s report reveals that further to the court order as shown at paragraphs 5 and 6 hereinabove, a visit to the suit property was made on 20th February, 2017. That PW1 and the original defendant together with their respective son were present during the visit and a report was prepared upon deliberation of the instant dispute thereat.

38. The said report is very sound and determinative of the instant dispute. It has twin recommendations namely;

a. That PW1 referred therein as the 1st widow to live in LR No. Suna East/Manyatta/705 while the original defendant referred therein as the 2nd widow to live in the suit property.

b. That the court issue eviction order for Moses Okinyi and the late Seth Ochieng to vacate the land parcel 2156 of Suna East/Manyatta to their mother’s piece or parcel 705 of Suna East/Manyatta to pave ways for Julia’s sons to have a place to build and plough.

39. In the result, the County Commissioner’s report is hereby adopted unreservedly and find that the plaintiffs’ claim is devoid of proof to the requisite standards. On the other hand, in view of the foregone analysis, the defendant’s counter claim has been proved against the plaintiffs on a balance of probabilities.

40. A fortiori, the instant suit be and is hereby determined thus. The plaintiffs’ suit originated by way of a plaint dated 7th November 2011 and lodged in court on 8th November 2011 is hereby dismissed.

a. Judgment is entered for the defendant against the plaintiffs jointly and severally in terms of orders (i) and (ii) sought in the defendant’s counter claim amended on 23rd July 2019 and filed in court on 25th July 2019.

b. By dint of the proviso to Section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya and the decision in **Rai –vs- Rai (2014) eKLR**, the plaintiffs shall bear costs of the entire suit inclusive of the counter claim.

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 Corona Virus pandemic challenge this 8TH day of JULY , 2020.

G.M.A ONGONDO

JUDGE

In resence of :-

Mr. D. Adawo learned counsel for the plaintiff

Court Assistant – Tom Maurice

G.M.A ONGONDO –

JUDGE