



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELC CASE NO. 624 OF 2013

PIUS MUGO NJOGU PLAINTIFF

VERSUS

KIRWERE NJOGU DEFENDANT

JUDGMENT

The plaintiff filed this suit seeking judgment against the defendant in the following terms:-

- a. ***A declaration that the defendant holds the parcel No. MWEA/TEBERE/ B/1297 in trust for himself and the plaintiff***
- b. ***Vesting ownership of 3.295 Ha of the said land to the plaintiff***
- c. ***Costs of this suit.***

The plaintiff who is a brother of the defendant pleaded that during the land adjudication their father was allocated two parcels of land being land parcel No. KABARE/NYANGATI/524 and MWEA/TEBERE/B/4 measuring 15 and 30 acres respectively and that the defendant being the eldest son was registered as proprietor of the land parcel No. MWEA/TEBERE/B/4 to hold in trust for himself and the plaintiff and that the parcel of land MWEA/TEBERE/B/1297 (herein the suit land) is a resultant subdivision of the original MWEA/TEBERE/B/4 measuring 30 acres which defendant holds in trust for himself and the plaintiff. That trust should therefore be determined and the suit land be sub-divided equally between plaintiff and defendant.

The defendant filed a defence and counter claim in which he denied the plaintiff's averments adding that he was allocated the land MWEA/TEBERE/B/4 absolutely and not to hold in trust for the plaintiff who was allocated his own land in Lamu County where he has lived since the 1970's. He also pleaded that this suit is res-judicata having been the subject matter in Wanguru Senior Resident Magistrate Arbitration Case No. 7 of 2011 and also Kerugoya High Court Judicial Review Case No. 6 of 2012. The defendant therefore counter-claimed for orders that he is the legal owner of land parcel No. MWEA/TEBERE/1297 and that the caution placed thereon by the plaintiff is unlawful, illegal and ought to be lifted and the plaintiff do pay general damages for the un-lawful caution placed on the suit land and costs of the suit.

The trial commenced before me on 10th March 2015 when the plaintiff testified and called four (4) witnesses while the defendant testified but called no other witness.

The plaintiff's case is that he and defendant are brothers being sons of the late NJOGU MWANIKI who had three wives namely WARUGURU, WANJA and WANJIRA who was their mother and only WANJA is alive. He added that the defendant who is the eldest of the two was registered to hold land parcel No. MWEA/TEBERE/B/4 measuring 30 acres in trust for the house of WANJIRA because during the time of demarcation, women were not allocated land. Apart from land parcel No. MWEA/TEBERE/B/4, their

late father was also allocated land parcel No. KABARE/NYANGATI/524 measuring 15 acres. Plaintiff testified that both he and defendant lived on land parcel MWEA/TEBERE/B/4 together with their mother and he even got married while at that land in 1969 before re-locating to Lamu in 1974 where he got other land. While in Lamu, his father died and when he returned home, he found that the defendant has sold part of the land and given another portion to his children. When he asked the plaintiff for his share of the land, the defendant promised that he would discuss the matter and even promised him land and on 22nd March 2000, the defendant agreed in writing that he would give the plaintiff four (4) acres (Plaintiff's Exhibit 1). However, he did not give the plaintiff the four (4) acres and on 16th December 2010, another agreement was made this time before the chief (Plaintiff's Exhibit 2). Plaintiff testified further that prior to his death, their father had told him that he was entitled to ten (10) acres out of the land MWEA/TEBERE/B/4 but defendant has sold part of it and what now remains is the suit land measuring sixteen (16) acres out of which the plaintiff seeks 3.295 Ha.

In support of his case, the plaintiff called as witnesses his step mother WANJA NJOGU (PW2), DANIEL NJAGI NGURI (PW3) who drafted the agreement dated 22nd March 2000 between the parties (Plaintiff's Exhibit 1) and his step brother JOSEPH GICHIRA NJOGU (PW4). It was the evidence of WANJA NJOGU (PW2) that the land in MWEA was to be registered in the names of the defendant to hold for the house of WANJIRA. She added that it was also the wish of the parties' father that the defendant gives the plaintiff ten (10) acres and retain twenty (20) acres.

On his part, DANIEL NJAGI NGURI (PW3) testified that he wrote down the agreement dated 22nd March 2000 (Plaintiff's Exhibit 1) in which the defendant agreed to give the plaintiff ten (10) acres. JOSEPH GICHIRA NJOGU (PW4) who is a step-brother of the parties and the son to WANJA (PW2) corroborated the evidence of his mother to the effect that the house of WANJIRA who was mother to the parties herein was given the MWEA/TEBERE/land where they settled.

On his part, the defendant testified that he lives on the land MWEA/TEBERE/B/4 which was originally measuring 30 acres and that his father had other land at Nyangati measuring 15 acres. He confirmed that his father had three wives one being WANJIRA who is the mother to both he and the plaintiff and that he was given the land MWEA/TEBERE/B/4 by the clan and does not hold it in trust for the plaintiff and only invited him to put up a home before he relocated to Lamu where he has his own land. He denied that the plaintiff has a house on that land adding that he (plaintiff) can only be given land at Nyangati and that he only gave plaintiff land when he said he had been chased from Lamu. He urged the Court to remove the caution which plaintiff has placed on the land adding that although the plaintiff put up a house on that land, the house collapsed and his wife came and took away the iron-sheets.

Submissions were filed by both Mr. Nduku Njuki Advocate for the plaintiff and Mr. Kiguru Kahiga Advocate for the defendant.

I have considered the evidence by both parties, the witnesses called, the documentary exhibits and the submissions by counsels.

Although the defendant pleaded issues of res-judicata in his defence, no evidence was led on that and from what I have on record, that plea of res-judicata would not have succeeded because the only time the dispute between the parties herein was adjudicated upon was in the Kirinyaga South District Land Tribunal in Case No. 7 of 2011 (Defendant's Exhibit 4) which ordered the defendant to give four (4) acres to the plaintiff out of the suit land. As such Tribunal could not order the sub-division of registered land, res-judicata cannot apply since the Tribunal had no jurisdiction to make such an order. That explains why the Tribunal's decision was quashed by the Court in Kerugoya High Court Judicial Review Case No. 6 of 2012 (Defendant's Exhibit 6).

Having said so, it is not in dispute that the plaintiff and defendant are both children of the late NJOGU MWANIKI who had four wives and one of whom WANJIRA was the mother of the two. The defendant is the elder of the two and is the registered owner of the suit land as per Certificate of search (Defendant's Exhibit 2). It is also clear from the Green Card (Defendant's Exhibit 1) that the original MWEA/TEBERE/B/4 out of which the suit land was registered is in the names of the defendant. While

the plaintiff claims that the defendant was registered as owner of the original MWEA/TEBERE/B/4 in trust for the house of WANJIRA, the defendant's case is that in fact he was given that land by the clan and it is his property which he does not hold in trust for the plaintiff.

The issues for determination therefore are whether in fact the defendant holds the suit land in trust for himself and the plaintiff who is therefore entitled to 3.29 Ha out of the same or whether in fact the suit land is the property of the defendant and the plaintiff should accordingly be ordered to remove the caution thereon and pay damages accordingly.

Trust is a matter to be determined from the evidence on record – see **MBOTHU & OTHERS VS WAITIMU & OTHERS 1986 K.L.R 173** where it was held that the Court never implies a trust save in cases of absolute necessity. A party relying on the existence of a trust must lead evidence to prove the same. In this respect, the evidence of WANJA (PW2) who is step-mother of the parties herein was crucial. She was emphatic that it was the intention of her late husband that the land in MWEA (from which the suit land was carved) be registered in the defendant's names to hold in trust for the family of her co-wife WANJIRA who was the mother of the parties herein. This was also confirmed by the parties' step-brother JOSEPH GICHIRA NJOGU who stated as follows in his evidence in chief:-

“The family of the eldest wife WANJIRA were to settle in the MWEA/TEBERE land. She was the mother of the plaintiff and the defendant and they settled on that land”

The defendant himself did confirm in his evidence in chief that the plaintiff put up a home on that land. In his evidence in chief, he said:-

“It is true that when the plaintiff became an adult, I invited him to live on my land and I gave him a portion on which he put up a house. Then he went to Lamu”

Although the defendant later on in his evidence denied that the plaintiff put up a home on the suit land, it is clear even from the proceedings before the Tribunal that the plaintiff did indeed have a home on the suit land. There is also evidence from the agreement dated 16th December 2010 (Plaintiff's Exhibit 2) witnessed by the chief that the defendant agreed to give the plaintiff four (4) acres out of the suit land and although the agreement does not identify the land as

MWEA/TEBERE, there can be no doubt in my mind that the land in reference was the suit land because even the case in the Tribunal related to this land. In any case, there is nothing to suggest that the parties did litigate over any other land other than the suit land. Mr. Kahiga counsel for the defendant referred to the two agreements signed by the defendant (Plaintiff's Exhibit 1 and 2) as not being enforceable as no consideration passed and neither was the Land Control Board's consent obtained. The purpose of those agreements was not to create any contract between the parties. Rather, it was simply an acknowledgment by the defendant that the plaintiff was indeed entitled to a share of land from the suit land. And although in cross-examination by Mr. Nduku the defendant denied having agreed to give plaintiff four (4) acres of land, the agreement bears both his signature and Identity Card numbers. The only reason he signed the agreement was because he knew that the plaintiff was entitled to a portion of the suit land and that is evidence upon which a trust can be established.

Further, the defendant acknowledges that the suit land was in fact given to him by the clan. It was not land that he purchased. According to the plaintiff, this land was registered in the defendant's names because at that time, women were not being given land and secondly, their father had already been given land elsewhere and he could not be given two portions of land and so this suit land was to be held by the defendant in trust for the house of their mother WANJIRA. In cross-examination by Mr. Nduku, the defendant said:-

“I was given that land by the clan. My father was still alive. My father was part of the Committee members that was allocating the land to the clan. At that time, no person could be allocated two parcels of land”

Further, on in cross-examination, the defendant conceded that the plaintiff did live on the land when he became of age. He said:-

“When the plaintiff became of age, he built his first house on the land subject of this suit. When he got married, he brought his wife to the land. It is true that he had children on the land”

The defendant did also admit that if the plaintiff had not moved to Lamu, he would have settled on the suit land. He also admitted that when the plaintiff came back from Lamu, he gave him a portion of the suit land. All this again is evidence upon which a trust can be proved in favour of the plaintiff. The fact that the plaintiff moved to Lamu before returning to the suit land is really of no consequence because that in itself did not amount to relinquishing his right in the suit land which right was recognized by the defendant by agreeing to give him a portion of the same before renegeing on the agreement.

It is also clear from the evidence that the defendant was the

eldest in the house of WANJIRA and as was recognized in the case of **HENRY MWANGI VS CHARLES MWANGI C.A CIVIL APPEAL NO. 245 of 2004 NYERI**, under Kikuyu Customary Law, the eldest son inherits land as a Muramati to hold in trust for himself and the other heirs. As a Muramati, such son has a duty to distribute such land in accordance with the wishes of their deceased father. The evidence of WANJA was clear about the wishes of the late father to the parties herein. While it is true that the original land MWEA/TEBERE/B/4 was registered in the defendant’s names and so too the suit land, it is clear from the Court of Appeal’s decision in **KANYI VS MUTHORA 1984 K.L.R 712** that such registration does not extinguish right under customary law nor relieves the registered proprietor of his duties as a trustee.

Considering all the above, it is clear to me that the defendant holds the suit land in trust for himself and the plaintiff. Further, it is clear that the caution placed on the suit land by the plaintiff was within the law as the defendant had in fact already abused his duties and responsibilities as trustee by disposing off part of the suit land. The plaintiff cannot be ordered to pay damages for placing a caution on that land. The defendant’s counter-claim is therefore devoid of merit and must be dismissed which I hereby do. On the other hand, the plaintiff has proved that the defendant holds the suit land in trust for him and that he is entitled a portion thereof.

Ultimately therefore, judgment is entered for the plaintiff against the defendant as prayed in the plaint save that each party shall meet their own costs as they are family.

It is so ordered.

B.N. OLAO

JUDGE

9TH OCTOBER, 2015

9/10/2015

Before

B.N. Olao – Judge

Gichia – CC

Abubakar for Nduku for Plaintiff – present

Mr. Githuka for Kiguru Kahigah for Defendant – present

COURT: Judgment delivered this 9th day of October, 2015 in open Court

Mr. Abubakar for Mr. Nduku for Plaintiff present

Mr. Githuka for Mr. Kahigah for Defendant present

Right of appeal explained.

B.N. OLAO

JUDGE

9TH OCTOBER, 2015