



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C APPEAL NO. 31 OF 2019**

**MONICAH THOMAS**

**ALEKIZINA ONSONGO**

**MORANDAE MORANDE**

**JUSTUS MONGUMBU OMITI**

**STEPHENE NYAKUNDI OMWORO**

**NYABOKE MORANDE.....APPELLANTS**

**VERSUS**

**HENRY NYAKOE KASORA.....RESPONDENT**

**(Appeal from the judgment of the Chief Magistrate's Court at Kisii (Hon. E. A Obina-P.M) dated 3.12. 2019 in C.M ELC Case No. 16 "B" of 2018)**

**JUDGMENT**

**INTRODUCTION**

1. This is an appeal from the judgment of the Chief Magistrate's Court at Kisii by Hon. E.A Obina P.M in Kisii CMELC No. 16 "B" of 2018 delivered on 12<sup>th</sup> December 2019, in which judgment was entered in favour of the Plaintiff declaring that the Defendants are trespassers on the Plaintiff's land parcel number WEST KITUTU/MWAKIBAGENDI/1680 while the Defendant's counterclaim was dismissed.

**BACKGROUND.**

2. In a suit filed by the Respondent against the Appellants in the Chief Magistrate's Court at Kisii the Respondent pleaded that he was the administrator of the estate of his late father Bernard Kasola Tangali alias Bernard Gesora Tagare who was the registered owner of land parcel number WEST KITUTU/MWAKIBAGENDI/1680 measuring 2.3 acres. He pleaded that in or about the year 2017, the Defendants jointly and/or severally trespassed into the suit property and are unlawfully occupying the same without the Respondent's consent. He sought judgment against the Appellants for a declaration that Appellants are trespassers on the suit property and an eviction order against the Appellants.

3. In their statement of defence and Counterclaim the Defendants denied the Respondent's claim and prayed that the Respondent's claim be dismissed with costs. In their Counterclaim they pleaded that they had been in occupation of land parcel number WEST KITUTU/MWAKIBAGENDI/1655 which was later sub-divided into land parcel number WEST KITUTU/MWAKIBAGENDI/1680 and 1681. Land parcel number 1680 was registered in the name of Bernard Kasola Tangali alias Bernard Tangare to hold the same in trust for Thomas Tangare and Andrew Tangare. Andrew Tangare died without leaving a family. They further plead that the suit property is ancestral land that the Respondent obtained registration thereof fraudulently without disclosing material facts and without obtaining a Grant of Letters of Administration. Some of the Appellants claim that they have been on the suit land from time immemorial while others claim to have purchased a portion of the land for valuable consideration with the knowledge of the Respondent. Consequently, the Appellants sought judgment on the counterclaim for:

a) A declaration that the Appellants are the rightful owners of the suit property.

b) An order for reversion and cancellation of the sub-division, transfer and registration of land parcel number WEST KITUTU/MWAKIBAGENDI/1680 into the names of the Appellants and that the same revert to its original state.

- c) A declaration that the registration of the Respondent as the proprietor of the suit property was fraudulent and therefore null and void.
- d) A permanent injunction to restrain the Respondent from evicting the Appellants from the suit property.
- e) A declaration that the Respondent is holding part of the suit property in trust for the Appellants and other family members.

4. The matter proceeded for trial and both parties testified and called their witnesses.

The Respondent testified and called one witness in support of his case. It was his testimony that he was the registered owner of land parcel number WEST KITUTU/MWAKIBAGENDI/1680 measuring 2.3 hectares. The suit property was initially registered in the name of his father Bernard Kasora Tagare –deceased who died in 2005 and the Respondent had the same transferred to him in 2017 after obtaining a Grant of Letters of Administration vide Kisii CM Succession Cause No. 363 of 2016. He stated that he was holding the said title in trust for himself and his two brothers namely David Kibaki Gesora and John Gesora Tagare. He produced a copy of the title and the Certificate of Confirmation of Grant as Plaintiff's exhibits 1 and 2 respectively.

5. He told the court that land parcel number 1680 was derived from land parcel number WEST KITUTU/MWAKIBAGENDI/1655 which was registered in the name of his grandfather Tagare Ongao. The said Tagare Ongao sub-divided land parcel number 1655 into three portions 1679, 1680 and 1681 and gave them to his three surviving sons as follows: Morande Tagare was given parcel No. 1679; Bernard Gesora Tagare got parcel number 1680 while Thomas Tagare was given parcel No. 1681. Andrew Tagare who was one of Tagare Ongao's sons died without leaving any heirs and he was therefore not given any land. It was his further testimony that the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants are his cousins while the 6<sup>th</sup> Defendant is the wife of his uncle Morande Tagare. He testified that the 1<sup>st</sup> and 6<sup>th</sup> Defendants had sold their parcels of land to third parties and had encroached on the Respondent's land, put up structures and were now claiming portions of the suit land. The 2<sup>nd</sup> and 5<sup>th</sup> Defendants had sub-divided the suit property and obtained two title deeds without the Respondent's consent but the said titles were cancelled by the Land Registrar.

6. The Respondent's only witness Mary Kwamboka Omae corroborated his evidence to the effect that their grandfather divided his land among his three sons including her father. She maintained that the suit property was given to their late father and it was later inherited by the Respondent.

7. On their part the Appellants called five witnesses. Anne Mokeira (DW1) testified that she was married to Thomas Ongao and the Defendant was her nephew. She stated that her father-in law, Tagare Ongao had 4 sons namely Thomas Ongaro, Bernard Gesore, Andrew Tagare and Agostino Morande. Each of the sons was given a portion of land. In her statement she stated that the upper part of the land which comprises land parcel number WEST KITUTU/MWAKIBAGENDI/1680 was allocated to the Bernard (the Plaintiff's father), Thomas and Andrew while the lower part was allocated to Agostino and a portion of it remained in her father-in-law's possession. Her father-in-law then sold a small portion of his land to third parties who had taken possession thereof. It is her testimony that after Andrew's death, the family held a meeting where it was agreed that his portion be divided among the surviving brothers and this was done with the help of a Surveyor. She states that each of them is occupying the portion they were allocated with clear boundaries and the Plaintiff's contention that the suit property belongs exclusively to him is incorrect.

8. The evidence of DW1 was corroborated by DW2, DW3 and DW5 who all stated that the upper portion of the suit property was divided among the three sons of Tagare Ongao and each of them is in occupation of the portion they were given. They also stated that Andrew's portion was divided among the 3 surviving brothers. They testified that the Plaintiff had secretly applied for Letters of Administration and transferred the suit property in his name without informing them.

9. Steve Mokaya, the County Land Registrar Kisii testified as DW4. He told the court that the original parcel of land known as WEST KITUTU/MWAKIBAGENDI/1655 measuring 4.9 acres was registered in the name of Tagare Ongao on 9.12. 1983. The said parcel was sub-divided into 3 parcels 1679, 1680 and 1681. He confirmed that land parcel number 1680 was registered in the name of Bernard Gesora on 16.5.1986 by way of sale at a consideration of Kshs. 3,000. The Plaintiff was subsequently registered as the owner of the suit property on 28.8.2017 pursuant to a grant issued to him in Succession Cause no. 363 of 2016. He produced the green cards in respect of land parcels number 1655 and 1680.

10. The trial court framed ten issues for determination which can be collapsed as follows

- i. Whether the court has jurisdiction to hear and determine the suit.
- ii. Whether the Defendants have trespassed on the Plaintiff's land and are illegally thereon
- iii. Whether the Plaintiff is the administrator of the estate of his father's estate and whether he has locus standi to institute the suit.
- iv. Whether the particulars or any of the particulars of fraud pleaded in the counterclaim have been proved
- v. Whether the Plaintiff proved his case against the Defendants on a balance of probabilities
- vi. Whether the Defendants proved their counterclaim against the Plaintiff on a balance of probabilities

11. In his judgment the trial magistrate dismissed the Appellants' Counterclaim and entered judgment in favour of the Respondent as prayed in the plaint.

12. Being aggrieved by the said judgment, the Appellants filed this appeal citing 8 grounds.

In the first, second, third, fifth and sixth grounds of appeal, the Appellants have complained that the trial magistrate relied on the Respondent's evidence and failed to consider the Appellants' evidence and submissions in support of their counterclaim. The Appellants have also complained that the trial magistrate disregarded their evidence that the Respondent holds the suit property in trust for the Appellants.

#### APPELLANT'S SUBMISSIONS

13. In his submissions counsel for the Appellant framed two main issues for determination;

- i) Whether the Appellants proved the existence of a trust in respect of the suit property
- ii) Whether the trial magistrate erred in dismissing the Appellant's counterclaim.

14. He faulted the trial magistrate for holding that the Appellants had no locus standi to bring the counterclaim since they had not taken out letters of administration in respect of the estate of Tagare Ongao. He submitted that the land in dispute is parcel number WEST KITUTU/MWAKIBAGENDI/1680 which is registered in the Respondent's name. The Appellants claim that the suit property was divided into 4 portions and allocated to the 4 sons of Tagare Ongao. It is their contention that they have occupied the suit property for many years and they were not aware that same had been transferred to the Respondent. It is therefore counsel's submission that the Appellants did not need to take out Letters of Administration in order to file the counterclaim as they were not claiming the suit property in a representative capacity.

15. With regard to the issue of trust, counsel submitted that trial magistrate erred in holding that the Appellants ought to have raised the same in the Succession proceedings. It was his contention that this court is the one clothed with the jurisdiction to determine matter touching on trust. He cited the cases of **Julius Wachira Maina & 2 Others v Christopher Murathe Muraguri (2017) eKLR** and **In Re Estate of Mbai Wainaina –Deceased (2015) eKLR** where it was held that the Probate court has no jurisdiction to determine proprietary interest in land based on trust and such matters can only be determined by the Environment and Land Court.

16. It was counsel's submission that the trial court failed to consider the Appellant's evidence that the transfer of the suit property from Tangare Ongao to the Respondent's father by way of sale was fraudulent. He cited that case of **Wilson Kaiga Gidion Gudahi (Suing as the legal representative of the estate of the Late Gideon Gudahi Kahiga) v Daniel Livoi Gideon**. He faulted the court for proposing that the Land Registrar visits the suit land to correct any errors with regard to the acreage as he was of the view that this could not be done after judgment had been delivered since the court was functus officio.

#### RESPONDENT'S SUBMISSIONS

17. On the other hand, counsel for the Respondent submitted that the father of the Respondent obtained title to land parcel number WEST KITUTU/MWAKIBAGENDI/1680 as a result of the sub-division of land parcel number WEST KITUTU/MWAKIBAGENDI/1655 during the lifetime of Respondent's Grandfather Tagare Ongao. The Respondent subsequently obtained registration by way of transmission after his father's demise upon obtaining a grant and his title is therefore indefeasible. It is his submission that since the Appellants did not lay their claim to the suit property during the Succession proceedings, they had no locus to do so in the Counterclaim.

18. On the issue of trust Counsel submitted that the Appellants did not plead the existence of a trust as required by Order 2 Rule 10 of the Civil Procedure Rules as no particulars were provided in their Counterclaim. Furthermore, the Appellants did not discharge the burden of proving that the Respondent was holding the suit property in trust for them as required by section 107 of the Evidence Act which provides that he who alleges must prove. He cited the case of **Isack M'Inanga Kieba v Isaaya Theuri M'Lintari & Another (2018) eKLR** where Supreme Court held as follows:

*“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in **Kiarie v. Kinuthia**, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:*

1. *The land in question was before registration, family, clan or group land*
2. *The claimant belongs to such family, clan, or group*
3. *The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.*
4. *The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*
5. *The claim is directed against the registered proprietor who is a member of the family, clan or group”*

19. He also cited the cases of **Paul Kirinya v Delfina Kathiri (2019) eKLR** where Okong'o J held that the existence of a trust must be pleaded, particularized and proved and **Re Estate of the late Jonathan Kinyua Waititu (2017) eKLR** where the court held that the courts will only imply a trust to give effect to the intention of the parties. It is counsel's contention that there was no reason for the Respondent's father to hold the suit property in trust for his two brothers as they were adults at the time he was registered as the owner of the suit property. Counsel submitted that even if it was to be presumed that the suit property was held in trust for some of the Appellants, they did apply for the trust to be dissolved so that they could be given their shares.

20. It was counsel's contention that the prayers in the counterclaim could not be granted as they were not supported by the pleadings or evidence. The Appellants who were the counter claimants could not be declared to be the rightful owners of the suit property as it was not clear what rights they were claiming. He submitted that the allegations of fraud had not been proved. It was his contention that the Respondent obtained the title to the suit property by virtue of succession in Kisii CM Succession Cause No. 363 of 2016 as the land was previously registered in the name of his father.

## ISSUES FOR DETERMINATION

21. Having considered the Memorandum of Appeal, the proceedings of the lower court and rival submissions this appeal turns on three main issues:

- i. Whether the Appellants proved the existence of a trust in respect of the suit property
- ii. Whether the trial magistrate erred in dismissing the Appellant's counterclaim.
- iii. Whether the appeal should be allowed.

## ANALYSIS AND DETERMINATION

22. From the outset I must state that I do not agree with the position taken by the trial magistrate that matters relating to interests in land based on trust ought to be dealt with in the Succession proceedings, as the Environment and Land Court has jurisdiction to hear and determine such cases. I associate myself with the observation by Musyoka J in **Re Estate of Mbai Wainaina (Deceased) 2015 eKLR**. Customary trust is one of the overriding interests recognized under section 28 of the Land Registration Act. The said section provides as follows:

Unless the contrary is expressed in the register, all registered land is subject to the following overriding interests as may for the time being subsist and affect the same without being noted on the register:

- a) .....
- b) Trusts including customary trusts

23. It is not in dispute that land parcel number WEST KITUTU/MWAKIBAGENDI/1655 was initially registered in the name of Tagare Ongao (deceased) who was the grandfather of the Respondent, the father of the 3<sup>rd</sup> Defendant and the father-in-law of the 1<sup>st</sup> and 6<sup>th</sup> Appellants. It is also not in dispute that the said parcel of land was sub-divided into land parcels No. 1679, 1680 and 1681. According to the green card produced by the Land Registrar, land parcel number 1679 and 1681 remained in the name of the deceased while land parcel number 1680 was transferred to the Respondent's father, Bernard Gesora in 1986 during the lifetime of Tangare Ongao. The Respondent subsequently had it transferred to his name after obtaining a grant in respect of his late father.

24. Even though the Appellants allege that parcel No. 1680 was held by the late Bernard Gesora in trust for his brothers, no explanation has been given why the said brothers Thomas Ongaro and Agostino Morande could not be registered as joint owners of the suit property or why they did not seek to have it sub-divided so that each of them could get their respective share. It is trite law that he who alleges must prove. Having alleged that the suit property was held in trust for them, the Appellants ought to have sufficiently demonstrated how the trust was created in respect of each one of them. This was not done.

25. In the circumstances and in line with the principle in the case of **Re Estate of the late Jonathan Kinyua Waititu (supra)**, I am not persuaded that there was an intention to create a trust. It is therefore my finding that the Appellants failed to prove the existence of a trust in respect of the suit property.

26. The second issue is whether the trial magistrate erred in dismissing the Appellants' counterclaim. In their counterclaim, the Appellants raised the issue of trust as well as fraud. I have already arrived at the finding, the Appellants did not prove the existence of a trust. I now move on to examine the allegations of fraud levelled against the Respondent. It is trite law that fraud must not only be pleaded but must also be proved.

27. In the case of **Gichinga Kibutha v Carolyne Nduku (2018) eKLR** the court observed as follows:

*"It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 Bullen & Leake & Jacobs, Precedents of Pleadings 13<sup>th</sup> Edition quoting with approval the cases of Wallingford v Mutual Society (1880) 5 App Case 685, 697, 701, 709, Garden Neptune v accident (1989) 1 Lloyd's Rep 305, 308, Lawrence v Lord Norrey (1880) 15 App. Cas 210a 2t 221 and Davy v Garret (1878) 7 Ch*

**D. 473 at 489** it is stated that :

*“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, though it not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved. (1) “General allegations, however strong may be the words in which they are stated are insufficient to amount to an averment of fraud of which any court ought to take notice.”*

**28.** At paragraph 8 of the Counterclaim, the Appellants pleaded fraud and set out the particulars of fraud as follows:

**“PARTICULARS OF FRAUD**

- a) Causing land registered in a deceased person’s name to be registered in his name
- b) Causing the suit land to be transferred in his favour without the knowledge and/or consent of the other beneficiaries.
- c) Causing the suit land to be registered in his names when they knew of ought to have known that the same belonged to the counter-claimers (sic)
- d) Having family land transferred to him without the knowledge of the other family members
- e) Transferring land from the deceased while knowing the same belongs to the family and that no succession proceedings had been done.”

**29.** I have evaluated the evidence on record and what is apparent is that the Respondent was registered as the owner of parcel No. 1680 after obtaining a grant of letters of administration in respect of the estate of his late father (Bernard Gesora) who was the previous owner. Although it has been submitted that the Respondent obtained the grant in respect of his late father’s estate without involving the Respondents, it is clear that the Respondents are not beneficiaries of the estate of Bernard Gesora –deceased. The suit property does not form part of the estate of the late Tagare Ongao as it was transferred to Bernard during the lifetime of Tagare Ongao (deceased). Even though the Respondents have taken issue with the manner in which the said transfer took place (by way of sale), Tagare Ongao never complained that his land had been fraudulently transferred to Bernard.

**30.** In view of the foregoing, I find and hold that the Appellants failed to prove fraud to the required standard and I cannot fault the trial magistrate for dismissing the counterclaim.

**31.** I agree with counsel for the Respondent that the Appellants could not be granted the prayers sought in the Counterclaim as none of them was proved. The upshot is that the appeal lacks merit and it is hereby dismissed with costs to the Respondents.

**Dated, signed and delivered at Kisii via video link this 22<sup>nd</sup> day of September 2020.**

**J.M ONYANGO**

**JUDGE**