



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
E.L.C. NO.10 OF 2012

NGUNJIRI MACHARIA.....1ST PLAINTIFF

FRANCIS MWANGI MACHARIA.....2ND PLAINTIFF

VERSUS

JOSEPH MWANIKI MACHARIA.....DEFENDANT

J U D G M E N T

The 1st plaintiff is a step brother to the defendant whilst the second plaintiff is the latter's real brother. According to the plaintiffs, during land demarcation and registration the fragments of their deceased father's land which they had been allocated by their grandfather were consolidated and formed land parcel No.KIRIMUKUYU/GACHIRO/292 measuring 1.01 hectares and the same was registered in the name of the defendant in trust for the family of their deceased father who was then living in Mombasa. They pleaded that their deceased father was married to two wives who are also deceased. They prayed that the said family land should be shared amongst the two houses of their deceased father in equal shares and each of the plaintiffs is supposed to get his share out of the share of their respective houses.

They also stated that upon sharing equally the suit land, each house is entitled to a share of 1.25 acres out of the said piece of land. The 1st plaintiff on behalf of his mother's house is entitled to a share of 1.25 acres which is half share of the suit land. The plaintiffs claim that the defendant's mother was entitled to a share of 1.25 acres which is supposed to be shared equally between the 2nd plaintiff and the defendant whereupon the 2nd plaintiff and the defendant are each entitled to a share of 0.625 of an acre.

The plaintiffs complaint is that in total disregard of the trust bestowed upon the defendant by the family of the plaintiffs' deceased father, the defendant has breached the trust by refusing to share out the suit land among the plaintiffs herein who are beneficiaries of the suit land. The plaintiffs aver that there has been no other suit or proceedings in any court between the plaintiffs and the defendant over the same subject matter. In the premises, the plaintiffs' claim against the defendant is for determination of the said trust and the defendant be ordered to sub-divide and transfer a portion of 1.25 acres to the 1st plaintiff and a portion of 0.625 of an acre to the 2nd defendant out of the suit land.

The plaintiffs have come to this court for orders that:

- a. A declaration that the defendant is the registered proprietor of land parcel No.KIRIMUKUYU/GACHUIRO/292 in trust of himself and the plaintiffs herein.
- b. An order that the defendant do sub-divide and transfer a share of 1.25 acres to the 1st plaintiff out of the suit land.

- c. An order that the defendant do sub-divide and transfer a portion of 0.625 of an acre to the 2nd plaintiff out of the suit land.
- d. Costs of the suit with interest at court rates and any further or better relief the Honorable Court may deem fit to grant.

The defendant was served with summons but he never entered appearance hence interlocutory judgment was entered. The matter came for formal proof on the 23/4/2013.

The 1st plaintiff testified that the 2nd plaintiff and the defendant are his step brothers. The 2nd plaintiff is a brother of the defendant. Their late father Macharia Ngunjiri had married two wives who are both deceased. The mother of the 2nd plaintiff and the defendant was called Mumbi Macharia while his mother was called Muthoni Macharia. During land consolidation, demarcation and registration, their late grandfather Ngunjiri Macharia had fragments of land which he shared among his three sons. The fragments which were allocated to their father Macharia Ngunjiri formed land parcel No.KIRIMUKUYU/GACHUIRO/292 measuring 1.0Ha. and as their father was living in Mombasa, their grandfather registered the same in the name of the defendant to hold the same in trust of the family of their father.

After registration the family occupied the suit land and it was shared by elders into two portions with each family being allocated its portion and its members are in occupation and cultivates up to and including to date.

The suit land belongs to the two families of their late father and the same should be shared equally among the two families. The house of the the 1st plaintiff's late mother is entitled to a share of 1.25 acres and the house of the defendant and the 2nd plaintiff's late mother is entitled to a share of 1.25 acres.

The portion of the 1st plaintiff's mother's house is supposed to be shared among himself, his brother Munyeki Macharia and his sister Mary Wanjiku Macharia. The 1st plaintiff has their blessings to file this case on his behalf and on their behalf. The share of the mother of the defendant is supposed to be shared among the 2nd plaintiff and the defendant in equal shares so that each should get 0.625 of an acre. The 1st plaintiff's sister Mary Wanjiku Macharia has been occupying their mother's half share of the suit land since 1958 to date and has built thereon and lives on the suit land together with her four sons. She has buried the remains of one of her sons in their half share.

The other half share is occupied by the 2nd plaintiff and the defendant and they have shared the same. The 2nd plaintiff has been on his portion since 1958 and has built thereon with his five sons. He has buried the remains of his wife in their half share and in his portion.

They have had several meetings to discuss the sharing of the family land but the defendant has always been reluctant to share the family land as explained above. The defendant has betrayed the trust they had bestowed upon him and they need the said trust determined so that the said family land can be shared among the family members.

The 1st plaintiff is praying for an order to be made against the defendant that the defendant is the registered proprietor of the suit land parcel No.KIRIMUKUYU/GACHUIRO/292 in trust of the two families of their late father Macharia Ngunjiri and a further order that the defendant do sub-divide and transfer to the 1st plaintiff a half share of the suit land on his behalf and on behalf of his brother and sister and the defendant to share the remaining half share with the 2nd plaintiff in equal shares and each to get a share of 0.625 of an acre.

This court finds that the plaintiffs have proved on a balance of probabilities that the defendant was registered as proprietor of the parcel of land No.KIRIMUKUYU/GACHUIRO/292 measuring 1.01 hectares in trust for the entire family. The defendant acquired the land in fiduciary capacity though he was not registered as such. There was no need to register him as trustee as he was registered as the eldest son of the family in accordance with Kikuyu custom which has an inherent notion of trust. The the upshot of the foregoing is that Judgment is entered for the plaintiffs in the following terms

(a) a declaration is hereby issued that the defendant is a registered proprietor of the land parcel no KIRIMUKUYU/GACHUIRO/292 in trust of himself the plaintiffs herein.

(b) An order is hereby issued that the defendant do subdivide and transfer a share of 1.25 acres to the 1st plaintiff out of the suit land to be shared between the 1st plaintiff with his brother and sister.

(c) An order is hereby issued that the defendant do subdivide and transfer a portion of 0.625 of an acre to the 2nd plaintiff out of the suit land. There will be no order as to costs as this is a family dispute. Orders accordingly.

Dated, signed and delivered on 14th day of March 2014.

A. OMBWAYO

JUDGE