



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 204 OF 2013

DAVID MURIMI MURIUKI 1ST PLAINTIFF

PETER MURIITHI MURIUKI2ND PLAINTIFF

VERSUS

MWATHI KABA 1ST RESPONDENT

JUSTIN MURIUKI 2ND RESPONDENT

JUDGMENT

By their plaint filed herein on 16th March 2012, the plaintiffs sought the following substantive remedy against the 1st defendant:-

- a. ***“A declaration that the 1st defendant holds land parcel No. NGARIAMA/THIRIKWA/50 in trust for himself, the plaintiffs and his other children and declaration of trust in land parcel No. NGARIAMA/THIRIKWA/50 i.e. The plaintiffs get 1 acre out of land parcel No. NGARIAMA/THIRIKWA/50 and/or any other portion this Honourable Court may deem fit and just to grant”.***

A defence was filed in which the 1st defendant, while admitting being the registered owner of the parcel of land No. NGARIAMA/THIRIKWA/50 (hereinafter referred to as the suit land), denied that he holds the same in trust for the plaintiffs or anybody. The 2nd defendant on his part stated that he has infact bought other parcels of land being L.R No. NGARIAMA/THIRIKWA/1144 and 1145 which are registered in the names of the plaintiffs mother one MARY WAMBUI KARUGA for their up-keep.

The trial commenced on 20th June 2013 when the 2nd plaintiff (PETER MURIITHI MURIUKI) testified that he and 1st plaintiff are brothers while the 1st defendant is their paternal grandfather and the 2nd defendant is their father. He added that the 1st defendant has two wives namely SELINA MWATHI who had three children one being the 2nd defendant and AGNES MWATHI. He added that the 1st defendant is the registered owner of the suit land and has given two acres to the 2nd defendant who has refused to give them their share forcing them to live with their grandmother and he (2nd defendant) has married a second wife with whom he has three children and has chased away the plaintiffs from the land. He added that their mother bought her own land elsewhere. He produced the Green Card and search in respect of the suit land as well as their birth certificates – see plaintiffs Exhibit 1, 2, 3A and 3B. He added that the dispute was initially before

the Land Disputes Tribunal which ordered that they be given an acre out of the suit land but the defendant refused. That decision was however later quashed following a Judicial Review application - see plaintiffs Exhibits 4 and 5. The plaintiffs therefore filed this suit.

ALBERT MUCHIRA LUKA (PW2) is a Village elder who knows all the parties herein and he testified that the 1st defendant has sub-divided the suit land between his two wives i.e SELINA and AGNES who have in-turn allocated their children their shares and that SELINA who is the mother of 2nd defendant has given him 2 acres. 2nd defendant also has two wives namely NJOKI and WANJIRU. Njoki is the mother of the plaintiffs. He added that the land belonged to the clan and was registered in 1st defendant's names in 1957.

MARY WAMBO KARUGA (PW3) is the plaintiff's mother. She said the 2nd defendant chased her away in 1986 and that she bought her own land being NGARIAMA/THIRIKWA/1144 and 1145 which is however being utilized by her mother, her sister and other relatives. She denied that the 2nd defendant bought that property for her and she produced the agreements of sale and receipts to confirm that she bought the property herself - see plaintiffs Exhibits 6A, 6B, 6C and 7. She added that it is the responsibility of the 2nd defendants to give the plaintiffs land out of the two acres that he has been given by 1st defendant and which she used to plough before she was chased away by the 2nd defendant.

DAVID MURIMI (PW4) and who is the 1st plaintiff herein adopted the testimony of the 2nd plaintiff.

In his defence, the 1st defendant confirmed that the 2nd defendant is his son and the plaintiffs are his grandchildren and were born on the suit land but left and have never returned. He added that he has not sub-divided his land although he has two wives who live on the land with their children. He confirmed that the suit land is 8 ½ acres but added that he has not been sued in any tribunal. He said he has no land to give the plaintiffs.

The 2nd defendant confirmed that the plaintiffs are his children and left his home in 1987 and live with their grandmother. He added that he gave their mother (PW3) money to purchase land for herself and her children and she bought the property NGARIAMA/THIRIKWA/1144 and 1145 so she could settle there with the plaintiffs and he produced the search certificates in respect of the said property – see Defence Exhibits 1 and 2. He stated further that he lives on the suit land with his father who has not sub-divided the land although he has a portion which he cultivates. He urged the Court to dismiss the case as he has no land to give the plaintiffs.

Counsels for both sides made written submissions which I have considered together with the evidence on record.

The following are really not in issue:-

1. ***That the 1st defendant is the registered proprietor of the suit land i.e. NGARIAMA/THIRIKWA/50***
2. ***That the plaintiffs are children of the 2nd defendant and grandchildren of the 1st defendant***
3. ***That the 1st defendant, has two wives SELINA and AGNES together with their children live on the suit land***
4. ***That the 2nd defendant also has another wife, apart from the plaintiffs' mother who also -----***
5. ***Both the plaintiffs and their mother (PW3) do not live on the suit land.***

The plaintiffs claim is that the 1st defendant holds the suit land in trust for them and should give them one acre out of the eight acres. The case for the 1st defendant is that the land is registered in his names and no one can claim it. This is reinforced by the submissions of his counsel Mr. Mwai who has stated that the suit land is not available for sub-division and in that regard, counsel has cited

the Court of Appeal decision in **MURIUKI MARIGI VS RICHARD MARIGI MURIUKI & OTHERS C.A. CIVIL APPEAL NO. 189 OF 1996 NYERI** which was decided in 1997. Mr. Mwai has also submitted that there is no evidence of trust since the plaintiffs are not in possession. Ms Wangechi for the plaintiffs is of the contrary view and urges me to follow the decision in **MBUI MUKANGU VS GERALD MBUI C.A. CIVIL APPEAL NO. 231 OF 2000 NYERI** which was decided in 2004 and which held that the registration of a parcel of land in one's name does not relieve the registered proprietor of his duties or obligations as a trustee. On my part, I will be guided by the latest decision of the Court of Appeal in **MUKANGU VS MBUI** (supra) which is more in keeping with equity and protects the value and principles enshrined in the new Land Act of 2012 and also the principle of intergenerational and introgenerational equity which is also one of the guiding principles under **Section 18 of the Environment and Land Court Act**. The same principles are found in **Article 60 (1) of the Constitution**.

Mr. Mwai for the defendants has submitted strongly that there is no evidence of any trust on the part of the 1st defendant in so far as his proprietorship of the suit land is concerned. Ms Wangechi is of different opinion. Of course a party alleging a trust must lead evidence to prove the same. What is the evidence in this case?

During cross-examination, the 1st defendant conceded that the suit land was originally clan land. He said:-

“True I obtained the land from the clan”

In his testimony during cross-examination, ALBERT MUCHIRA LUKA (PW2) who lives in the same village as the parties herein confirmed the same. He said:-

“I am 68 years of age. I know the land belonged to the clan. The 1st defendant was registered as owner in 1957”.

The 1st defendant did confirm during cross-examination that he has other land elsewhere other than the suit land. He said:-

I also have other land and a plot. I have plots which I own with other companies”.

Clearly therefore, the suit land, though registered in the 1st defendant's names, was given to him by the clan in trust for him and his family. His family includes the 2nd defendant and his children. Indeed that explains why the 1st defendant has decided, selectively as it is, to allow one part of his family to work on the land yet excluded the plaintiffs. That is not equity. He has conceded that he owns land elsewhere and it is therefore not proper that he should exclude the plaintiffs from land that was given to him by the clan to hold in trust for himself and his family.

The 2nd defendant testified that he gave the plaintiffs' mother money to buy land elsewhere for her and the plaintiffs and he identified the land as NGARIAMA/THIRIKWA/1144 and 1145. However, it became clear in

cross-examination that he was not even sure of when the land was bought and he was unable to rebut the cogent evidence of the plaintiffs' mother (PW3), as supported by the Sale agreement and receipts (plaintiff's Exhibit 6A, 6B, 6C and 7) to the effect that the plaintiffs' mother did in fact purchase the property herself and therefore the 2nd defendant's assertion that he bought the land to settle the plaintiffs cannot be true and is for rejection.

It is abundantly clear from the evidence before me that the 1st defendant was registered as proprietor of the suit land in trust for himself and his family and that the plaintiffs are part of that family. This suit land was originally clan land and its registration in his names did not relieve him

of his obligation as a trustee. Section 28 and 30 of the Registered Land Act (now repealed), under which the suit land was registered and also Section 28 of the new Land Registration Act state as much.

Having considered the evidence as a whole, I am satisfied that the plaintiffs have proved that the 2nd defendant holds the suit property in trust for himself and the rest of the family. There is evidence that the 2nd defendant has allowed other family members use of part of the suit land. The whole land is

8 ½ acres and the plaintiffs' mother (PW3) stated that before she was chased away by the 2nd defendant in 1987, she used to work on two acres of land. The plaintiffs seek orders that this Court declares that the 1st defendant holds the suit land in trust for them and apportions them one (1) acre. That is not asking for too much and I find it fair and just to grant them that declaration. All the parties herein hail from the Kikuyu Community and as held in KANYI VS MUTHIORA 1984 K.L.R 712 (C.A), registration of land in the name of one proprietor under the Registered Land Act does not extinguish rights under Kikuyu Customary Law and neither does it relieve the proprietor of his duties or obligations as a trustee. The Court further stated that the trustee referred to in Section 28 of the Registered Land Act includes a trustee under Customary Law. From the evidence on record, it is clear in my mind that the 1st defendant is aware that he holds the suit land as trustee for himself and his family and it is in recognition of this obligation that he has allowed the 2nd defendant and his other wife and children part of the suit land. It is therefore un-just and not in keeping with equity that the 1st defendant should allow some of his heirs use of the land and deny others. Equity is about fairness. It is also the responsibility of the Court to ensure that parties are not rendered landless or destitute – see MAROA GATIMWA VS SABINA GATIMWA & OTHERS C.A CIVIL APPEAL NO. 331 of 2003 KSM. It is in keeping with the above principles that I enter judgment for the plaintiffs as per prayer (a) of their plaint. And to protect their interest, I also injunct the 1st defendant, his servants, agents and any other person acting on his behalf from selling, alienating or disposing of the suit land until the plaintiffs' portion has been sub-divided and registered in their names.

This being a family dispute, each party shall bear their own costs.

It is so ordered.

B.N. OLAO

JUDGE

1ST OCTOBER, 2013

1/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Ms Munene for Plaintiff – present

Mr. Ngigi for Mwai for Defendant – present

COURT: Judgment delivered this 1st day of October 2013 in open Court.

B.N. OLAO

JUDGE

1ST OCTOBER, 2013