



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 127 OF 2015

NYAGA NJAI.....PLAINTIFF

VERSUS

ANTONY MUNENE NYAGA.....1ST DEFENDANT

AMOS KINYUA NYAGA.....2ND DEFENDANT

ALBERT NJAI NYAGA.....3RD DEFENDANT

MARY NJERI NYAGA.....4TH DEFENDANT

LUCY MURINGO NYAGA.....5TH DEFENDANT

WINNIE WANJIRA NYAGA.....6TH DEFENDANT

ANN ROSE WAKUTHII NYAGA.....7TH DEFENDANT

JUDGMENT

Introduction

The plaintiff vide a plaint dated 10th February 2015 filed in Wanguru Law Courts sought the following reliefs:-

a. That a permanent order of injunction restraining the defendants/respondents their servants, assignees and/or anyone claiming under them from cultivating, trespassing, blocking access, leasing, alienating to or any unlawful way interfering with the plaintiff/applicant's control, management, grief possession and enjoyment of all his properties registered under his name.

b. Costs of the suit with interest.

The suit was filed simultaneously with a Notice of Motion seeking temporary injunction orders pending the hearing and determination of the application and the suit. On 25th February 2015, the defendant Entered Appearance. On 10th March 2015, the 4th defendant/respondent filed a replying affidavit on behalf of all her co-respondents. On the same 10th March 2015, the 1st, 2nd, 3rd, 4th, 5th and 7th defendants also filed joint statement of defence and counter-claim. On 20th March 2015, the plaintiff filed a reply to defence and Defence to Counter-claim.

Plaintiff's Case

During the hearing, the plaintiff stated that he is the registered owner of the parcels of land in dispute. He stated that the defendants are his biological children through his first wife who is now deceased. He testified that the defendants on several occasions attempted to unlawfully evict his 2nd wife from their matrimonial home and even used abusive language which is contrary and against the Kikuyu culture thereby subjecting him to mental anguish. The plaintiff also stated that the defendants have lodged caveats, cautions and restrictions against his parcels of land hence he cannot obtain any financial assistance using his titles from any financial institution. He testified that he educated all the defendants who are now working with their respective families in their respective homes. He seeks an order restraining the defendants from interfering with the parcels of land, his control, management, grief possession and enjoyment of all his properties as the sole registered

proprietor. The plaintiff adopted his written statement dated 19th April 2017 and a further statement dated 5th January 2019. He produced a list of documents dated 10th February 2015 and another dated 19th April 2017 as Plaintiff's Exhibits 1 to 12 respectively. He did not call any witness.

Defendants Case

The 4th defendant Mary Njeri Nyaga who testified on behalf of the other defendants stated that she is the one who has put the cautions and restrictions together with her siblings. She told the Court that they do not need land now but want the Court to declare a trust and have the plaintiff restrained from selling, charging or interfering with the suit properties. The 4th defendant adopted her witness statement dated 7th March 2018, 20th June 2018 and 9th May 2019. She also referred to her list of documents dated 7th July 2020 which she also produced in evidence as Defence Exhibit No. 1 – 7 respectively.

Issues for determination

The appropriate issues for determination from the pleadings are as follows:-

1. Whether the existence of customary trust has been established in favour of the defendants over the suit properties?
2. Whether the plaintiff has established the principles of injunction against the defendants?
3. Who will bear the costs of this suit?

Analysis and Decision

It is not in dispute that all the parcels of land in dispute are registered in the name of the plaintiff as the sole and absolute proprietor. It is not also in dispute that the defendants are the sons and daughters of the plaintiff and that they were all educated by the plaintiff and are currently working and/or well settled elsewhere. It is not further in dispute that the defendants have cautioned and filed restrictions over the parcels of land in dispute.

Whether the existence of a trust has been established in favour of the Defendants over the suit properties?

It is trite law that trust including customary trust must be proved as was stated in the case of *MUMO VS MAKAU (2002) 1 E.A. 170* where it was held thus:

“Trust was a question of fact to be proved by evidence”.

Section 28 of the Land Registration Act which is the applicable law states as follows:

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

- a. Spousal rights over matrimonial property;**
- b. Trust including customary trust”.**

In the case of *Salesio M' Itonga Vs M' Ithara & 3 others (2015) e K.L.R.*, the Court of Appeal pronounced itself as follows:-

“It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki Vs Gichuki – Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust We concur with the following findings by the High Court:

“Trust must be proved by credible evidence adduced by the person claiming that a trust exists. See Wambugu Vs Kimani (supra)”.

The question I now pose is whether the evidence adduced by the defendant in support of their counter-claim meets the threshold for proof of existence of a trust relationship between themselves and the plaintiff? My answer to this question is negative. First, the suit properties have not been proved as family or ancestral land. Secondly, it is not in dispute that it is the plaintiff who acquired the suit properties and thirdly, the defendants have failed to lead cogent evidence capable of proving an account of the alleged contribution in acquisition of the same and therefore entitled to a share of the properties. In fact from their pleadings and evidence, the defendants are seeking an order of declaration to be made *ipso facto* that the plaintiff being the father to the defendants hold the suit properties L.R. No. MWEA/TEBERE/B/346, 347, 348 and 1186, Rice Holding No. 2602, Thiba Section, Unit 6, Plot No. 74 A NGURUBANI TOWN, LAIKIPIA/SOSIOIN/SOSION/D 2528, L.R. No. INOI/KARIKO/2742, MWEA/MAKIMA/644 and EMBAKASI SHARE No. 5576 in trust for himself and the defendants.

Trust cannot be inferred but can only be established by prove of evidence. In the case of *SUSAN MUMBI WAITITU VS MUKURU NDATA & 4 OTHERS (19 of 2007) e K.L.R.*, the Court held:-

“As for trust, the plaintiff must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. The 1st defendant has deponed that he purchased the suit premises for value. Accordingly, it is not family land passed over through the ages. I have no reason to cast doubts over this averment.

The plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1st defendant in favour of the plaintiff”.

In the same vein, the defendants cannot claim entitlement of the plaintiff’s properties for being their father. There is no custom, not even the Kikuyu customary law or any other law that compels a father to give land to his children other than that which is proved to be trust land. In the case of *Edward Kipkosgei Chemurbii & Another Vs Charles K. Kosgei & Another (2014) e K.L.R*, the Court held as follows:-

“A case whose facts are not far from those in this suit is that of Marigi Vs Muriuki & 2 others (2008) 1 K.L.R. 1073. This was a suit by sons and grandsons to the appellant, who wanted the appellant to distribute his land in a certain way. The Court of Appeal held that since the appellant as owner of the suit property was still alive, there was no law upon which he could be compelled to distribute his property. The Court of Appeal held that his property was not available for sub-division and distribution among his wives and children except if he personally on his own free will, decided to sub-divide and distribute it. He could not be urged, directed or ordered to do it against his own will. The rights of the respondents to the property could only accrue after the death of the proprietor”.

I agree with the learned Judge. By putting cautions, restrictions and prohibitions on the suit properties, the defendants are restricting the plaintiff from enjoying the full benefits of his properties which he is the absolute registered owner. The plaintiff acquired the suit properties for value while the defendants had not even been born. He educated them using his other resources without selling the suit properties. There is no iota of evidence that after the passing on of their mother, the plaintiff re-married and is now likely to dispose of his properties. As the absolute registered owner, the plaintiff has the absolute right to enjoy the full rights and benefits of his properties as he wishes including offering the same as collateral security to secure financial assistance from banks and financial institutions as he wishes and no law can stop him from doing so.

The defendants have not shown any legal and justifiable reason why they should be interfering with the plaintiff’s right to his land. The defendants who are able bodied men and women should be grateful to the plaintiff who educated them and are now engaged in gainful employment and should strive to get their own land. The defendants have not demonstrated any right over the suit properties which are vested in the plaintiff as the sole registered owner.

In the final result, the plaintiff’s claim succeeds and the same is allowed as prayed. On the other hand, the defendants counter-claim fails and the same is hereby dismissed. In view of the close relation between the plaintiff and the defendants, I order each party to bear her own costs. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 2nd day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Plaintiff – present
2. Mr. Munene for the Defendant
3. Mbogo – Court clerk – present