



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. NO. 240 OF 2014

ERASTUS NDEGE MACHUKE.....1ST PLAINTIFF

JONATHAN NYAGA NJERUH.....2ND PLAINTIFF

BENSON NTHIGA MACHUKE.....3RD PLAINTIFF

JOHN MURIUKI MACHUKE.....4TH PLAINTIFF

VERSUS

JOHN KIURA NGARE.....1ST DEFENDANT

JOHN NJIRU JULIUS.....2ND DEFENDANT

GISOVI WA MUNYI.....3RD DEFENDANT

EZEKIEL NYAGA.....4TH DEFENDANT

DAVID MWANIKI NGUKU.....5TH DEFENDANT

DANSON KIURA NGUTA.....6TH DEFENDANT

JACOB NJUE MUTEMBEL.....7TH DEFENDANT

JUDGMENT

A. INTRODUCTION

1. By a plaint dated 27th August, 2013 and amended on 3rd September, 2014, the Plaintiffs sought the following reliefs against the Defendants jointly and severally:

a. A declaration that parcels of land Nos. Mbeere/Kirima/3684, Mbeere/Kirima/3683, Mbeere/Kirima/3685, Mbeere/Kirima/3686, Mbeere/Kirima/3687, Mbeere/Kirima/3698, Mbeere/Kirima/3697, Mbeere/Kirima/3679, and Mbeere/Kirima/3688 are registered in the names of the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th Defendants respectively in trust for the 1st, 2nd, 3rd, and 4th Plaintiffs.

b. An order that the trust held by the 1st Defendant in respect of parcel of land Nos. Mbeere/Kirima/3683 and 3684, 2nd Defendant in respect of parcel No. Mbeere/Kirima/3685, 3rd Defendant in respect Mbeere/Kirima/3686, 4th Defendant in respect of Mbeere/Kirima/3687, 5th Defendant in respect of parcels of land Nos. Mbeere/Kirima/3698 and 3697, 6th Defendant in respect of parcel of land No. Mbeere/Kirima/3679 and 7th Defendant in respect of Mbeere/Kirima/3688 be determined and the said parcels of land be registered in the names of 1st, 2nd, 3rd, and 4th Plaintiffs jointly.

c. The 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants be permanently restrained from interfering with the 1st, 2nd, 3rd and 4th Plaintiffs' peaceful occupation of parcels of land Nos. Mbeere/Kirima/3684, Mbeere/Kirima/3683, Mbeere/Kirima/3685, Mbeere/Kirima/3686, Mbeere/Kirima/3687, Mbeere/Kirima/3698, Mbeere/Kirima/3697, Mbeere/Kirima/3679 and Mbeere/Kirima/3688.

d. Costs of the suit.

B. THE PLAINTIFFS' CASE

2. The Plaintiffs pleaded that the suit properties once formed part and parcel of Title No. Mbeere/Kirima/2244 (parcel 2244) which was shared amongst 17 clans of the Mbeere tribe including the Plaintiffs' Ikambi Clan. It was further pleaded that it was agreed by the 17 clans that members who had already settled outside the land allocated to their clan would be allocated land where they had already settled.

3. It was pleaded that the portions where the Plaintiffs had settled fell into a block allocated to the Defendants' Marigu Clan and that contrary to the agreement amongst the 17 clans the 7th Defendant who was the Chairman of Marigu Clan refused to allocate the Plaintiffs the land on which they had already settled but awarded the same to his fellow clansmen who were sued as the 1st – 6th Defendants. The Plaintiffs, therefore, considered that there was a breach of trust and that the Defendants were holding the suit properties in trust for them hence the suit.

C. THE DEFENDANTS' RESPONSE

4. The 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants filed defences to the action denying the Plaintiffs' claim in its entirety. The Defendants pleaded that parcel 2244 was shared amongst the 17 clans of the Mbeere tribe and that the Plaintiffs who belonged to Ikambi Clan should seek allocation of their portions from their clan and not Marigu Clan.

5. The Defendants denied that there was an agreement amongst the clans that members should be allocated land where they had already settled regardless of where their clan was allocated land and put the Plaintiffs to strict proof thereof. The Defendants further pleaded that they were not holding the suit properties on behalf of the Plaintiffs. The Defendants contended that the Plaintiffs' Ikambi Clan was allocated over 1700 acres out of parcel 2244 hence the Plaintiffs should seek their land from Ikambi Clan.

6. The Defendants further pleaded that the Plaintiffs were not resident on the suit properties and that they each resided about 5 Km away. The 3rd Defendant on his part pleaded that he was an innocent purchaser for value of parcel Nos. 3685 and 3686 and that he had no prior notice of the Plaintiffs' claim.

D. THE PLAINTIFFS' REPLY

7. The Plaintiffs filed a reply to defence dated 30th October, 2013 joining issue with the 1st, 2nd, 4th, 5th, 6th and 7th Defendants' defences. They reiterated the contents of their plaint and pleaded that they were in actual occupation of the suit properties. The Plaintiffs' also filed a reply to defence dated 30th October, 2013 to the 3rd Defendant's defence in which they similarly reiterated the contents of their plaint and contended that the 3rd Defendant was all along aware of their claim to the suit properties.

E. SUMMARY OF EVIDENCE AT THE TRIAL

a. The Plaintiffs' Evidence

8. At the trial hereof, 7 witnesses gave evidence for the Plaintiffs including the Plaintiffs. The evidence revealed that the Plaintiffs were all members of Ikambi Clan whereas the Defendants were members of Marigu Clan save the 3rd Defendant who appeared to have been a purchaser for value. The evidence followed the Plaintiffs' script as contained in the plaint. They relied on longevity of occupation of the suit properties and the alleged agreement amongst the clans that members were to be allocated land where they had settled and not necessarily on the portions of land allocated to their respective clans.

9. The Plaintiffs claimed that they were not allocated land by their clan during the distribution of parcel 2244 and that they were left out of the land adjudication process. They claimed to have complained to their clan chairman to no avail. Some of the Plaintiffs indicated that there was a pending court case on the distribution of Ikambi Clan land. It transpired at the trial that only one of the Plaintiffs (the 1st Plaintiff) was actually residing on some of the suit properties.

b. The Defendants' Evidence

10. The Defendants called only 2 witnesses at the trial. The 6th Defendant stated that he acquired his property through the land adjudication process after an appeal to the Minister under the **Land Adjudication Act**. He further stated that parcel 2244 was to be shared amongst the 17 clans of the Mbeere tribe and that each member was to get his allocation from his own clan land.

11. The 1st Defendant also testified at the trial. He associated himself with the evidence of the 6th Defendant and stated that since the Plaintiffs were members of Ikambi Clan, they had no business seeking allocation of a portion of land which was allocated to Marigu Clan during the distribution of parcel 2244. The Defendants denied that they were holding the suit properties in trust for the Plaintiffs or knowledge of the agreement for their settlement on land belonging to Marigu Clan.

F. DIRECTIONS ON SUBMISSIONS

12. When the trial was concluded on 24th September, 2020 the Plaintiffs were granted 30 days within which to file and serve their written submissions whereas the Defendants were granted 30 days upon the lapse of the Plaintiffs' period to do likewise. The record shows that the Plaintiffs filed their submissions on 23rd October, 2020 whereas the Plaintiffs' submissions were not on record by the time of preparation of the judgment.

G. THE ISSUES FOR DETERMINATION

13. The court has noted that the parties did not file agreed issues for determination. Accordingly, the court shall frame the issues for determination in accordance with the law. Under **Order 15 Rule 2** of the **Civil Procedure Rules** a court may frame issues from any of the following:

- a. The allegations contained in the pleadings.
- b. The contents of documents produced by the parties.
- c. The statements made on oath by or on behalf of the parties.

14. The court has considered the pleadings, documents and evidence in this suit and is of the opinion that the following issues arise for determination herein:

- a. Whether there was an agreement amongst members of the 17 clans of Mbeere tribe for their members to be allocated land where they had settled, and if so, what was the consequence thereof.
- b. Whether the Defendants were holding the suit properties in trust for the Plaintiffs as alleged or at all.
- c. Whether the Plaintiffs are entitled to the reliefs sought in the amended plaint.
- d. Who shall bear costs of the suit.

H. ANALYSIS AND DETERMINATION

a. Whether there was an agreement amongst the 17 clans for their members to be allocated land where they had settled

15. The court has considered the evidence and submissions on record on this issue. Although the Plaintiffs asserted the existence of such agreement amongst the leaders of the 17 clans, the Defendants denied its existence. The Plaintiffs relied on a letter dated 19th October, 2004 from various clan chairmen of the Mbeere tribe addressed to the District Commissioner – Mbeere District indicating such agreement had been reached.

16. It would appear from the material on record that there was such a gentleman's agreement amongst the clan leaders reached in a meeting held on 19th October, 2004. It would further appear that the agreement was communicated to the District Commissioner Mbeere vide a letter dated 19th October, 2004. It was not contended at the trial that no such meeting of clan leaders took place or that the letter was a forgery. The court is, therefore, inclined to believe the Plaintiffs' evidence that, indeed, there was such understanding amongst the clan leaders.

17. The next question which arises is the legal consequence of such understanding and in particular the legal consequence for breach thereof. It would appear that the leaders of Marigu Clan allocated the suit properties to the members of their own clan and left out the Plaintiffs. They paid no attention to the gentleman's agreement that members of other clans who had already settled on their portion were to be allocated land there.

18. The court is of the opinion that the agreement amongst the clan chairmen on the distribution of the land allocated to the 17 clans was essentially a gentleman's agreement which was not legally binding. Even if it were to be taken as legally binding, the Plaintiffs were not privy thereto hence they would have no legal standing to enforce the agreement through legal proceedings. The court is further of the opinion that since the Defendants have already acquired legal rights over the suit properties, the clan leaders' agreement cannot take priority over the Defendants' legal interest in the suit properties. In the premises, it shall be up to the Plaintiffs to pursue allocation of their clan land from their clan leaders. Indeed, some of the Plaintiffs indicated at the trial that some members of Ikambi Clan had already filed suit against their chairman in relation to distribution of the land allocated to Ikambi Clan.

b. Whether the Defendants are holding the suit properties in trust for the Plaintiffs

19. The court has considered the material and submissions on record on this issue. There is no dispute that the Plaintiffs have never had any dealings with the Defendants with respect to the suit properties. The Defendants, except the one who was a purchaser, were simply allocated clan land after their Marigu Clan got their allocation out of parcel 2244. They simply got what was part of Marigu Clan land and not Ikambi Clan land. The court is unable to conclude from the material on record that the Defendants were holding the suit properties on behalf of the Plaintiffs or any one of them.

20. Even though the Plaintiffs relied upon the case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another [2018] eKLR**, the court is not persuaded that on the facts and evidence of the instant suit the Plaintiffs have demonstrated any customary trust as described by the Supreme Court in that case. It must be remembered that the Plaintiffs and the Defendants belong to two different clans. The court is unable to discern any evidence of either existence of a customary trust or of its breach by the Defendants.

c. Whether the Plaintiffs are entitled to the reliefs sought in the suit

21. The court has already found and held that the Plaintiffs have failed to prove their case against the Defendants to the required standard. The Plaintiffs have failed to prove the existence of the alleged trust against the Defendants. It would, therefore, follow that the Plaintiffs are

not entitled to the reliefs sought, or any one of them, against the Defendants.

d. Who shall bear costs of the suit

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigants should not be awarded costs of the suit. Accordingly, the Defendants shall be awarded costs of the suit to be borne by the Plaintiffs jointly and severally.

I. CONCLUSION AND DISPOSAL ORDER

23. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have failed to prove their case against the Defendants to the required standard. Accordingly, the Plaintiffs' suit is hereby dismissed with costs to the Defendants.

It is so ordered.

JUDGMENT DATED and SIGNED NYAHURURU and DELIVERED via Microsoft Teams Platform this **18th of December, 2020**.

In the presence of:

Ms. Rose Njeru for the Plaintiff

Ms. Nzekele holding brief for Mr. Okwaro for the Defendants

Court Assistant – Carol

Y.M. ANGIMA

JUDGE

18.12.2020