



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 13 of 2013**

**HARRISON MAINA JOSPHAT.....PLAINTIFF**

**VERSUS**

**ELIAS KAMAU JOSPHAT.....DEFENDANT**

**JUDGMENT**

**Introduction**

By an amended plaint dated 14th June 2011, the plaintiff sought the following orders:-

*(a) A determination of trust and 3 acres of the land be transferred to the plaintiff of the suit land KIINE/GACHARO/157.*

*(b) Costs and interest of the suit.*

By way of defence, the defendant denied the plaintiff's claim and sought to have the suit dismissed with costs.

**Statement of Facts**

The plaintiff testified on oath and stated that the defendant is his elder brother who is also known by the name MWANGI JOSPHAT. He stated that their father is called JOSPHAT MUKONO and that they are the only surviving sons. However, he stated that they have three sisters namely; WANJIKU, NYAWIRA and WAIRIMU. He stated that he comes from MUITHIRANDU clan and that in the year 1960, the suit land parcel No. KIINE/GACHARO/157 was registered in the name of his elder brother the defendant herein being the eldest son to hold in trust for himself and the family. The suit property was registered in the name of MWANGI JOSPHAT but the defendant later changed his name to ELIAS KAMAU JOSPHAT on 8th May 1979 as reflected in the green card produced as Plaintiff's Exhibit No. 1. The plaintiff stated that he was born in 1956 while his brother the defendant herein was born in 1953. They all used to live in a place known as Gathithi Village. They moved to the suit land from 1969 and started cultivating on it from 1980 to-date. He stated that he has planted trees, avocado, coffee, maize and beans. The plaintiff further stated that he lived on the suit land upto about 2010 when the defendant and his sons demolished his house following a misunderstanding. He then moved to the local market where he is residing.

He stated that he took the defendant to the Land Disputes Tribunal being LDT No. 30 of 2010 where the defendant said the he would give him ½ acre of the suit land. The Land Disputes Tribunal awarded him 2 ½ acres but the award was not adopted as an order of the Court by Baricho Court who ruled that it did not have the jurisdiction. The proceedings of the Land Disputes Tribunal and the decision by the Magistrate's Court at Baricho were produced as Plaintiff's Exhibits 2 & 3 respectively. The plaintiff admitted owning another land parcel No. KIBINGOTI/NGUNGUINI/1200 which he bought from a bank loan in 1977 and finished paying the loan in 1978 or thereabouts.

The plaintiff stated that he has coffee on a portion of the suit land which he still utilizes to-date. He also stated that the defendant is utilizing half of the land. He said that the suit land was registered in the name of the defendant to hold in trust for himself and the rest of the family. He stated that the defendant is his elder brother and that they buried their parents in the suit land. He said that the suit land is 6 acres and that he wants to be given 3 acres which is half. The plaintiff called one witness namely Muthigani Mutugi Gichege who stated that he knew one JOSPHAT MUKONO who was father to the plaintiff and the defendant. He said that Josphat Mukono was his uncle and that the plaintiff and the defendant are his cousins. He stated that they come from the MUITHIRANDU CLAN and that the suit land parcel No. KIINE/GACHARO 157 is a clan land registered in the name of the defendant to hold in trust for the family. He stated that, that was what was happening at that time because the defendant was the eldest son and that under the Kikuyu Customary Law, land would be registered in the name of the first son in trust for the family. He said that both the parties in this suit and their parents were cultivating the suit land and when their parents died, they were both buried on that land. He said that the plaintiff also used to cultivate a portion of the suit land and their parents too during their live time.

**Defendant's Statement of Facts**

The defendant testified as DW1 and stated that the suit land is registered in his name. He stated that the land was given to him by the clan when he was a young man. He stated that by the time he was given land by the clan, his father was still alive. He stated that his father came to live on the suit land around 1968. The defendant also admitted that his brother who is the plaintiff in this case also came to live on the suit land in 1982. He said that he gave him a portion of the land to cultivate but that he did not plant trees or coffee. He said that the suit should be dismissed. The defendant called Lucy Nyawira Mukono (DW2) who testified and stated that she is sister to the plaintiff and the defendant herein. She said that the suit land parcel No. KIINE/GACHORO/157 is registered in the name of the defendant Elias Kamau Josphat. She said that they did not live in the suit land but that they lived in a land belonging to a man known as Zakayo. However, they left that land and settled in the suit land. She said that the plaintiff later moved to another land in Kibingoti which he bought with the assistance of their father and the defendant. She stated that the plaintiff burnt a house he had constructed on the suit land parcel No. KIINE/GACHARO/157. She stated that the plaintiff demolished the house and took away the building materials and that the plaintiff is still cultivating a portion of the suit land which is about a quarter of an acre or a half and that he has not planted trees in the portion he is utilizing.

The defendant called the second witness namely Irene Wanjiku Mukono (DW3) who testified and stated that the plaintiff and the defendant are her brothers. She said that the suit land parcel No. KIINE/GACHARO/157 is registered in the name of the defendant after he was given by the clan while he was young during the land demarcation period. She stated that they did not live in the suit land initially but they lived in the land of one Zakayo but were forced to leave after his children started harassing their parents. They decided to leave and their parents requested their brother Elias Kamau Josphat (defendant) to accommodate them in the suit land. They also requested to be given a portion to plant coffee. Harrison Maina Josphat who is the plaintiff around 1979 built a semi-permanent house which he later demolished and took the building materials to his new land which he bought in Kibingoti. Their father and Elias assisted Harrison to buy the land. She stated that the trees in the suit land were planted by Elias (defendant) after he sent money for buying the seedlings. She said that the plaintiff is utilizing about ¼ of an acre of the suit land.

The third witness was Erastus Kariuki Muriithi (DW4). The witness stated that they are neighbours with the defendant and they come from the same clan known as WAITHERANDU CLAN. He said that during land demarcation period, the clan gave land to Elder family members. He also stated that the clan would give land to young members of the family especially in cases where land is big and where land is given to a person, it becomes his own. He said that in his family, his elder brother was given land but he was also given land as his own and not to hold in trust for the family. He adopted his statement which he recorded on 16th July 2013.

### **Undisputed Facts**

The following are undisputed facts:-

- (i) That plaintiff and the defendant are brothers.
- (ii) That the defendant is the Eldest.
- (iii) The suit property land parcel No. KIINE/GACHARO/157 is a clan land.
- (iv) The suit property was given to the defendant by the clan during the land demarcation in 1960.
- (v) The plaintiff and the defendant's parents lived in the land of one Zakayo before settling in the suit land in 1968 where they raised their children including the plaintiff and the defendant herein.
- (vi) The plaintiff's and the defendant's parents were buried in the suit land.
- (vii) The plaintiff constructed a house in the suit land which was later demolished but he is cultivating a portion of the suit land to-date.
- (viii) There is no other sibling given land during the land demarcation period except the defendant.

### **Issues for Determination**

The one single issue for determination in this suit is whether a trust has been determined in the suit land No. KIINE/GACHARO/157?

### **Analysis and Decision**

I have considered the evidence adduced by the plaintiff and the defendant. I have also considered the testimony by their witnesses, the submissions by counsels and the applicable law. **Section 28 of the Land Registration Act No. 3 of 2012** recognizes trust or customary trust as overriding interests in property. Customary trust is an encumbrance on land which are non-registrable rights which run with the land and are overriding on land.

The suit property was registered under the **Registered Land Act Cap. 300** (now repealed). **Section 30(g)** of the said **Registered Act** provided for customary trust. In the same vein, **Section 28 (b) of the Land Registration Act, No. 3 of 2012** also provides for overriding interests as may subsist on the land and affect it without being noted on the register such as customary trusts. In the case of **Kanyi Vs Muthiora, (1984) K.L.R 712**, the Court held as follows:-

*“The registration of the land in the name of the appellant under the Registered Land Act (Cap. 300) did not extinguish the respondent's right under Kikuyu Customary Law and neither did it relieve the appellant of her duties or obligation under Section 28*

as trustee ..... The trustees referred to in Section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary Law. If the Act had intended to exclude Customary Law rights, it would have been clearly stated”.

The Supreme Court in the case of **Isack M’ Inanga Kiebia Vs Isaaya Theuri M’ Lintari & Another (2018) e K.L.R** prescribed sound principles which determine whether a trust exists as follows:-

- (a) *That the land in question was before registration, family clan or group land.*
- (b) *The claimant belongs to such family, clan or group;*
- (c) *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;*
- (d) *The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and*
- (e) *The claim is directed against the registered proprietor who is a member of the family, clan or group.*

The Court of Appeal in the case of **George Mbiti Kiebia & another Vs Isaya Theuri M’ Lintari & another (2014) e K.L.R** were of the view that possession or occupation of such land is not a necessity to prove a trust.

From the facts of this case, I find that the suit property fits the principles set out by the Supreme Court in the case of **Isack M’ Inanga Kiebia Vs Isaaya Theuri M’ Lintari & another** (supra). The suit land was clan land prior to adjudication and demarcation. The parents of the parties herein lived and were eventually buried in the suit land. The suit land was allocated to the defendant as the eldest son in the family in accordance with the Kikuyu Customary Law. I do not believe that the intention of the Waitherandu Clan was to allocate land to the defendant for his own benefit, but to hold in trust for him and the rest of the family members. From the analysis above, I find that the plaintiff has established the existence of a customary trust in the suit property.

#### **Decision**

The upshot of my findings is that this suit is merited and the same is allowed as follows:-

- (a) ***A declaration that land parcel No. KIINE/GACHARO/157 is registered in the name of Elias Kamau Josphat, the defendant herein to hold in trust for himself and the plaintiff herein.***
- (b) ***An order compelling the defendant to sub-divide the suit land into two equal portions and to register the sub-divisions and transfers in favour of the plaintiff and the defendant respectively.***
- (c) ***The Deputy Registrar of this Court should be at liberty to execute the transfer on behalf of the defendant should he fails to do so, upon application by the plaintiff.***
- (d) ***Since the parties are family, I order each to bear their own costs of this suit.***

**READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 11<sup>th</sup> day of December, 2020.**

.....

**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

1. **Mr. Ngigi**
2. **Ms. Wambui holding brief for Kebuka Wachira**
3. **Mbogo, Court clerk.**