



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL CASE NO 222 OF 1978 (OS)

EDWARD SAMUEL LIMULIAPPLICANT

VERSUS

MARKO SABAYI.....RESPONDENT

JUDGMENT

The respondent, Marko Sabayi, is the uncle of the applicant, Edward and is the registered proprietor of parcel No Butsotso/Ngotse/298 (the area of which is 20 acres). It is not in dispute that this is a first registration which, therefore, cannot be rectified or cancelled by the Court pursuant to section 143 of the Registered Land Act. However, by his originating summons, Edward does not seek rectification but a declaration that Marko holds part of plot 298 on trust for him and an order that Marko transfers to him half the plot.

The history of the matter is as follows. Edward's father, Samuel, was the elder half-brother of Marko, the respondent. When Samuel died in 1947, he left two young sons, Edward and an older brother (Isaak). Their mother died shortly after their father and, according to them, was buried in the plot now known as 298. Marko also lived on what is now known as plot 298. According to Edward and Isaak, plot 298 was family land which their father (Samuel) and their uncle (Marko) had inherited from their father. They also say that their father, (Samuel) also had a smaller plot nearby which he had bought personally. It is not in dispute that, at the time of land adjudication and registration, both Edward and Isaak were minors and both the larger family plot 298 of 20 acres and the smaller plot (now known as plot 217, measuring 4.5 acres) were registered in the name of Marko. The date of first registration of both plots in the name of Marko was 7th October 1968.

When Edward and Isaak achieved majority they naturally went to Marko and demanded what they regarded as their land. Isaak seems to have had no difficulty. Marko agreed to give him plot 217 and, after the necessary formalities of obtaining land control board consent, the land was transferred to Isaak by way of "gift" and was registered in his name on 21st July 1976.

Next came the turn of Edward. He says that he went to Marko in 1977 and demanded a portion of plot 298. According to him, Marko agreed to give him one half of the plot, ie 10 acres out of 20. Pursuant to this agreement, an application was made to the Lurambi Land Control Board to subdivide the plot into two equal portions. The land control board gave consent on 26th September, 1977. Pursuant to this consent, the mutation forms for sub-division were prepared and signed by the Land Registrar and plot 298 was physically subdivided into two 10-acre plots, known as plot 1145 and plot 1146. Marko has, however, refused to execute the transfer documents; hence this suit.

Marko's case is that plot 298 was not family land shared with his brother Samuel, but his own. Although he was younger than Samuel he got what is known as plot 298 because his mother cultivated it. Samuel's

mother cultivated what is known as plot 217 and that is why Samuel got plot 217. For this reason, he was prepared to give plot 217 to Isaak. He says that he never agreed to give half of plot 298 to Edward. He was simply summoned to the land control board and forced to sign documents which he did not understand. Further, he says that he has eight sons of his own; and for this reason cannot possibly give Edward half of his land.

I deal first with the issues of fact in this case. I do not believe for one moment that Marko owned plot 298 individually because his mother cultivated it. The fact is that when the father of Marko and Samuel died, he left them as the only two sons; Samuel being the elder. It is difficult to believe that in such a situation the elder brother would have got the small piece of land (ie plot 217 which is 4½ acres only) and the younger brother Marko would have got the 20-acre plot. I am satisfied that what is now plot 298 was family land jointly held by Samuel and Marko. Although it is said that plot 217 was individually bought by Samuel, it is probable that plot 217 was also family land.

I am not also unimpressed by Marko's allegation that he was forced into signing away half of plot 298 to Edward. Indeed, he attempted to appeal against the land control board decision contending that he was coerced into signing the documents; but, in a letter written to his advocates by the Provincial Commissioner dated 6th December 1977, it is stated that a thorough investigation had been carried out; and its outcome does not support Marko's allegation of coercion.

On the evidence before me (as given by the land control board officials) I have come to the same conclusion. The truth, it seems to me, is that although Marko was obviously reluctant to give as much as half of plot 298 to Edward, he was clearly prepared to give him some part of it. His eight sons were probably up in arms against him when they discovered that he had signed away half of the plot; hence his subsequent repudiation.

This leaves the issue of law, namely does Marko hold part of plot 298 on trust for Edward; and, if so, how much of it?

I have already held that what are now known as plots 298 and 217 were family land jointly held by Samuel and Marko under customary law. When Samuel died in 1947 leaving his two minor sons (Edward and Isaak), Marko was the trustee under customary law for the shares of Samuel's sons in their father's land, during their minority. When he registered the plots in his own name on 7th October 1968, he was still the trustee.

It is now generally accepted by the Courts of Kenya that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration; and there is nothing to prevent giving effect to such a trust by requiring the trustee to do his duty by executing transfer documents (see in particular *Zephania Nthiga v Wanjiru Nthiga* (unreported), *Mwangi Muguthu v Maina Muguthu* (unreported) and *Wamathai v Mugweru* (unreported)).

I hold that Marko, who holds part of plot 298 on trust for Edward and Isaak should be so ordered. He has already fulfilled his duty to Isaak by transferring plot 217 consisting of 4.5 acres. He is under a similar duty to Edward, the applicant.

On the other hand, I do not think that Edward's share of plot 298 is onehalf. It is equitable and in accordance with Maragoli customary law (which is the customary law applicable to the parties and to the trust created in this case) that one should look to the whole land (ie plots 217 and 298) and not only to the latter. The total acreage is 24.5 acres. One must also consider the fact that Samuel only had two sons while Marko has eight.

I consider that Edward should receive a little less than his brother (Isaak) of the total family land. Consequently, I hold that Marko holds 3.5 acres of plot 298 on trust for Edward and I order him to execute transfer documents to Edward to that extent. Marko will pay the costs of this suit.

Order accordingly.

Dated and delivered at Kisumu this 23rd day of July 1979.

E. COTRAN

JUDGE