



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 784 OF 2015

(FORMERLY KSM HCCA NO. 144 OF 2005)

FREDRICK OTIENO OBONYO.....PLAINTIFF

VERSUS

JOSEPHINE AKINYI ODUOL.....DEFENDANT

JUDGMENT

By a plaint dated 10th November 2005 the plaintiff herein sued the defendant seeking for the following reliefs:

- a) An order directing the defendant to subdivide land parcel No. WEST ALEGO/SIGOMA URANGA/2551 and excise thereof 1.50 Ha to the plaintiff.
- b) Costs of the suit and interest.
- c) Any other remedy this honourable court shall deem fit and just to grant.

The plaintiff further amended his plaint with the leave of the court to include particulars of breach of trust. The defendant filed a statement of defence and denied the plaintiff's allegations. It is unfortunate that this matter took too long to be finalized having been filed in 2005.

Plaintiff's Case

The plaintiff gave evidence and stated that the late Lucas Aduol who was the husband of the defendant held the suit land in trust for him as he was away in Tanzania during the adjudication process. That the said Lucas Aduol Oloo had himself registered in parcel no. **WEST ALEGO/SIGOMA/URANGA/2490** (measuring approximately 3.0Ha), as a trustee for the plaintiff and as the step brother to the defendant's father, at the time when the defendant was in Tanzania.

The plaintiff also testified that upon the demise of the said Lucas Aduol Oloo the defendant registered herself as the sole proprietor of the suit property on 25th February 2003, without due consideration of the interests of the plaintiff. He further averred that the defendant blatantly disregarded the provisions of the Law of succession Cap 160 laws of Kenya by un-procedurally having herself registered as the sole owner of the suit property without following the due process as required by the law. .

PW1 testified that the subdivision, transfer and the subsequent sale of a portion of land parcel No. **WEST ALEGO/SIGOMA/URANGA/2490**, by the defendant, was done through concealment of the material facts and false representation further breach of trust thus rendering the whole process null and void. PW 1 relied on a meeting held by elders of which he stated that those in attendance recognized that he was entitled to a portion of the suit land.

The plaintiff called two witnesses who reiterated his evidence. Counsel agreed to adopt the statement of the chief. The evidence of the witnesses confirmed that the plaintiff is not and has never been in occupation of the suit land. They also confirmed that the plaintiff was away for many years and that land adjudication was done in his absence. They however did not confirm that the defendant's deceased husband held the land in trust for the plaintiff.

The plaintiff therefore closed his case and urged the court to grant orders as prayed in the plaint.

Defence Case

The defendant gave evidence and denied the allegations of the plaintiff. She stated that her late husband Lucas Aduol Oloo was the

registered proprietor of all **Land Parcel No. West Alego/Sigoma Uranga/1209** measuring approximately 4.2 ha as at 28th October 1986 and that on the 2nd November 1995 he proceeded to subdivide the said land into **Land Parcel No. West Alego/Sigoma Uranga/2490** measuring approximately 3.0 ha and Land Parcel No. West Alego/Sigoma Uranga/2491 measuring approximately 1.2 ha.

It was her evidence that her together with her family occupied and used Land Parcel No. West Alego/Sigoma Uranga/2490 measuring approximately 3.0 ha while Land Parcel No. West Alego/Sigoma Uranga/2491 measuring approximately 1.2 ha was disposed off to a third party.

DW1 testified that her late husband Lucas Aduol Oloo died on the 13th October 1999 leaving the Defendant and her children in occupation and use of Land Parcel No. West Alego/Sigoma Uranga/2490 measuring approximately 3.0 ha. It was the defendant's evidence that she filed a Succession Cause and the suit land was subdivided further into Land Parcel No. West Alego/Sigoma Uranga/2551 measuring approximately 2.53 ha and Land Parcel Number West Alego/Sigoma Uranga/2552 measuring approximately 0.47 ha.

The defendant also stated that she sold Land Parcel No. West Alego/Sigoma Uranga/2552 measuring approximately 0.47 ha to a third party purchaser one James Jaoko Odhiambo of which he has a title. She therefore urged the court to dismiss the plaintiff's claim as he is a stranger and has no claim over the suit parcels of land.

Counsel agreed to file submissions to advance their clients cases.

Plaintiff's submission

Counsel for the plaintiff reiterated the plaintiff's evidence and listed the issues for determination by the court. Counsel listed many issues for the court to determine as follows:

- (a) Whether the land was left by the plaintiff's father to be held in trust upon his death for the plaintiff.
- (b) Whether the defendant conducted the purported registrations of the land parcel no. **WEST ALEGO/SIGOMA/URANGA/249** to her sole ownership after the demise of her husband without inclusion of the plaintiff who would be a person of interest in the matter.
- (c) Whether the registration purportedly done by the defendant is legal.
- (d) Whether the sale of a part of the land by the defendant have a legal standing.
- (e) Whether the defendant had any legal standing to conduct transactions over the suit property considering it was merely held in trust for the benefit of the plaintiff.
- (f) Whether the plaintiff is entitled to a portion of the suit property.

Counsel relied on the minutes of the elders meeting dated 4th October 2005, which purportedly unanimously agreed that the plaintiff is entitled to a share of the suit land Counsel therefore submitted that the defendant's late husband held land in trust for the plaintiff.

On the second issue as to whether the registration of the defendant to the suit land to the exclusion of the plaintiff was procedural, Counsel submitted that it was evident that the plaintiff was in Tanzania during the adjudication process therefore the defendant had no right to register herself as the sole owner of the land. It was further Counsel's submission that the registration was not done in accordance with the law as the suit land was held in trust.

It was Counsel's submission that the defendant did not have legal capacity to enter into a transaction of sale as the plaintiff was not consulted yet he has a share of the suit land. Counsel therefore urged the court to enter judgment as prayed in the plaint with costs to the plaintiff.

Defendant's Submissions

Counsel for the defendant also reiterated the defendant's evidence and submitted that the Plaintiff filed a Chamber Summons dated 18th October 2006 in an attempt to settle the matter out of court through arbitration on the ground that the matter involves customary law issues but the defendant declined as the same would be beyond the mandate of a DO as it involves registered land. The said application was withdrawn by the Plaintiff and the suit proceeded for full hearing with parties having an opportunity to present their evidence before this Honourable Court.

Counsel submitted that there are three issues to be determined by the court. The first is as to whether there existed any trust relationship between the Plaintiff and the late Lucas Aduol Oloo the previous registered owner of **Land Parcel No. West Alego/Sigoma Uranga/2490** measuring approximately 3.0 ha (currently closed on subdivision) and whether there results any breach thereof.

The second issue is as to whether the Defendant is the rightful owner of the suit **Land Parcel No. West Alego/Sigoma Uranga/2551** measuring approximately 2.53 ha. And finally whether the Defendant should then subdivide **Land Parcel No. West Alego/Sigoma Uranga/2551** and excise thereof 1.50 ha to the Plaintiff.

On the 1st issue on whether there existed a trust relationship between the plaintiff and the late Lucas Aduol, Counsel submitted that the

Defendant testified to have been the surviving widow of the late Lucas Aduol Oleo having been married at the age of 17 years and having been in occupation and use of the said land to date. She produced a copy of the letter from the Assistant Chief, Sigoma Uranga Sub Location dated 18th February 2011 indicating the same position and confirming that they had been blessed with four children. She testified that she knew the Plaintiff as a village mate who stayed in a totally different parcel of land and denied any blood relations. The Plaintiff on the other had alleged being related to the Defendant's late husband a fact which he was unable to prove thus cannot claim any customary trust interests in the suit land parcel under Section 28 of the Land Registration Act, No. 3 of 2012.

Counsel submitted that it is trite principle of law that the question of how a trust is created is a question of fact to be proved by evidence as was held in the case of **Mumo vs. Makau (2002) IEA 170 Court of Appeal**.

On the 2nd issue as to whether the defendant is the rightful owner of the suit land, Counsel submitted that the Defendant produced a green card indicating that as at 28th October 1986 Land Parcel No. West Alego/Sigoma Uranga/1209 measuring approximately 4.2 ha was registered in her late husband's name Lucas Aduol Oloo. By the 2nd November 1995, the said land was subdivided into Land Parcel No. West Alego/Sigoma Uranga/2490 measuring approximately 3.0 ha and Land Parcel No. West Alego/Sigoma Uranga/2491 measuring approximately 1.2 ha. That the plaintiff all along did not claim any rights because he did not possess such rights.

Counsel therefore urged the court to find that the plaintiff has not proved his case against the defendant as the defendant is protected by law as a registered owner whose title is indefeasible as it was acquired procedurally and legally. Further that the defendant has been in occupation of the suit land and part of it is registered in the name of a third party who bought the land. She urged the court to dismiss the plaintiff's case with costs to the defendant.

Analysis and determination

As I had mentioned earlier that it is unfortunate that this case took too long to be concluded as it was filed in 2005. Counsel for the plaintiff cited many issues for determination which were somehow repetitive. I will condense the issues to three issues.

The main issue here is whether the late Lucas Aduol Oloo the husband of the defendant herein held the suit land in trust for the plaintiff. The second issue is whether the plaintiff is entitled to a portion of the suit land as claimed.

From the evidence on record, it is not clear of the relationship between the plaintiff and the late Lucas Aduol the husband of the defendant herein. The relationship is far-fetched and would not entitle him to the defendant's land. It was his evidence that the deceased was related to his father. The plaintiff stated that he was away in Tanzania when adjudication was done in the 1970s and that the land was held in trust for him. If this was the case then it could have been noted in the register during adjudication and that upon coming back to Kenya as he alleged he could have taken up the issue so that he could get his rightful share. The elders' minutes that the plaintiff is clutching on had not been sanctioned by the court and as such were not binding if there was no consensus.

Was it a panel of elders constituted as per the Land Disputes Tribunal with a mandate to handle such disputes? Even if it was a Land Disputes tribunal, it would not have had jurisdiction to handle registered land and ownership issues. This was the only evidence that the plaintiff relied on to prove trust and relationship with the defendant's late husband. I find that there is no tangible evidence produced by the plaintiff to demonstrate that the defendant held land in trust for him.

The plaintiff and his witnesses also admitted that the plaintiff has never been in occupation of the suit land. They also confirmed that it is the defendant that has been in occupation with her family for a long period of time. The plaintiff also produced documents indicating that the land was previously registered in the name of the late Lucas Aduol and later in the name of the defendant and a third party one James Jaoko Odhiambo a purchaser whom the plaintiff did not sue. Even if the plaintiff was to be successful, how was he to enforce the order against an innocent purchaser for value without notice who was not a party to the suit.

The plaintiff had an uphill task to prove his case on the issue of trust. He also slept on his rights if he had any in the delay in asserting such rights. This case was bound to fail for lack of concrete evidence to prove the allegations of breach of trust. The breach of trust was pleaded in the amended plaint but the same was not proved. This is not a case where the court would use equitable principles of constructive trust or customary trust to find for the party alleging such.

Furthermore the plaintiff has not been in occupation which he admits including his witnesses. If he was in occupation then he would be in a position to explain how he got into occupation and how long he has been in such occupation, whether the occupation has been peaceful and uninterrupted. This is not the case in this matter.

I therefore find that the plaintiff has failed to prove his case against the defendant to the required standard and is therefore dismissed with costs.

DATED and DELIVERED at KISUMU this 25TH DAY OF JANUARY, 2019.

M. A. ODENY

JUDGE

JUDGMENT READ, and SIGNED in open court in the presence of;

M. A. ODENY

JUDGE

Deliver in the presence:-