



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 176 OF 2016

PASKWALINA GAICHUGI.....1ST PLAINTIFF

PAUL MBUGI THURANIRA.....2ND PLAINTIFF

FRIDAH KARIMI THURANIRA.....3RD PLAINTIFF

BONIFACE MUTHAURA THURANIRA.....4TH PLAINTIFF

ARION MURERWA THURANIRA.....5TH PLAINTIFF

LISPER KAGURI THURANIRA.....6TH PLAINTIFF

FLORENCE G. THURANIRA.....7TH PLAINTIFF

VERSUS

FRANCIS THURANIRA M'ARANDU.....1ST DEFENDANT

SAMUEL THURANIRA.....2ND DEFENDANT

JANE GACHERI SAMUEL.....3RD DEFENDANT

JUDGMENT

BACKGROUND

The plaintiffs commenced this suit by way of Originating Summons in which they posed the following questions:

(1) Whether land parcel number NYAKI/THUURA/498 registered in the name of M' ARANDU M'IKWINGA was trust land registered in his name for benefit of his family?

(2) Was the 1st defendant under an obligation to the plaintiffs in petitioning for a grant of letters of administration of the Estate of M'ARANDU M'IKWINGA vide 'Succession Cause No. 19 of 1996 (Meru)?

(3) Was the 1st defendant at liberty to alienate part of land parcel number NYAKI/THUURA/498?

(4) Ought the sale of land parcel numbers NYAKI/THUURA/4226 and 4227 to the 2nd defendant and 3rd defendants/respondents respectively be annulled?

(5) What ought to be the order for rectification of the registered relating to land parcel numbers NYAKI/THUURA/4226 and 4227?

(6) Which is the order as to costs?

In the supporting affidavit sworn by Paskwalina Gaichugi on 26th September 2016, the plaintiffs averred that they are siblings and the 7th plaintiff is their mother. They also contend that the 1st defendant is their father while the 2nd and 3rd defendants are strangers. The plaintiffs

also averred that M'ARANDU M'IKWINGA is their grandfather in whose land parcel number NYAKI/THUURA/498 was registered. The plaintiffs further contend that the said parcel of land is an ancestral land where they grew up on and that it is the only place they have known as their home. They further alleged that it has come to their knowledge that following the death of their grandfather, their father filed Succession Cause No. 19 of 1996 (Meru) and was subsequently issued with letters of administration. It is further alleged that the 1st defendant secretly had the suit land sub-divided and transferred to the 2nd and 3rd defendants. In view of the said state of affairs, the plaintiffs averred that the 1st defendant has disinherited them as they have no land and that they have been rendered destitute. Despite having been duly served with summons to enter appearance together with the suit documents, the defendants failed to enter appearance or file defence. The Court directed that the case do proceed for hearing and the defendants were again served with a hearing notice but they failed to attend Court. The case then proceeded ex-parte.

THE PLAINTIFFS CASE

The plaintiffs called Paskwalina Gaichugi to testify on their behalf. She stated on oath that the 2nd, 3rd, 4th, 5th and 6th plaintiffs are her siblings while the 7th plaintiff is her mother. The 1st plaintiff also stated that the 1st defendant is their father while the 2nd and 3rd defendants are land buyers. The witness averred that their father sold all their family land which is also ancestral land and now have nowhere to stay. She also stated that initially their father told them that he wanted to lease out a portion of the family land and the lessee planted beans. After a while, they learnt that their father had sold and transferred the entire land to people they did not know. Their father also disclosed to them that he had sold the land. They conducted a search and discovered that indeed the land had been transferred to the 2nd and 3rd defendants. Their father one day came with goons and demolished her brother's houses. They decided to file this case. Her family got scattered. Her brothers went to rent houses elsewhere. Their mother went to work as a maid as she had nowhere to stay. Their father also disappeared. The witness averred that the suit land is ancestral land and that they have lived in the land since they were born. She produced a copy of the green card, grant and certificate of search as Plaintiffs Exhibit No. 1 2 and 3 (a) & (b) respectively.

DEFENDANTS CASE

The defendants did not offer any evidence in their defence despite having been served.

SUBMISSIONS BY THE PLAINTIFFS

The plaintiffs through the firm of Gatari Ringera & Co. Advocates filed submissions on 22nd June 2018 to which he submitted that from the evidence adduced, the suit land was initially registered in the name of their grandfather and that after his death, their father filed succession cause in respect of his Estate and that upon conclusion of the succession cause, he secretly sold the entire land to the 2nd and 3rd defendants leaving the plaintiffs who had always lived on the land destitute and landless. He submitted that the 1st defendant had an obligation to seek the family consent before alienating the suit land. The learned counsel also submitted that the plaintiff's evidence tendered on oath has not been challenged or controverted as the defendants never filed any defence as a rejoinder.

DECISION

I have considered the averments contained in the Originating Summons and the affidavit in support thereof. I have also considered the evidence adduced by the 1st plaintiff and the submissions by their advocate on record. The plaintiffs have averred that the suit property is an ancestral land in which the 1st defendant was registered to hold in trust for them. Those averments have not been controverted as no defence was filed. From the green card produced as Plaintiffs Exhibit No. 1 indicates that the original owner of land parcel No. NYAKI/THUURA/498 was ARANDU IKWINGA who was registered on 22nd March 1973. The suit land was sub-divided and later transferred to the 2nd and 3rd defendants under land parcel numbers NYAKI/THUURA/4226 and 4227 respectively. Under **Section 25 of the Land Registration act of 2012**, the law provides as follows:

“25 (1) The rights of a proprietor, whether acquired on first registration or subsequent for valuable consideration by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:

(1)

(2)

(3) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

The evidence adduced shows that the suit property is an ancestral land in which the 1st defendant was registered to hold in trust for the plaintiffs. The 1st defendant breached that obligation when he purported to transfer the suit property to the 2nd and 3rd defendants herein. The occupation and possession of the suit land by the plaintiffs before their houses were unlawfully demolished is a clear indication of trust over the suit land. That was the same observation reached by the Court in the case of **MUKANGU VS MBUI K.L.R (EXL) 1 at Page 622** where it was held as follows:

“..... However, since the same registration recognized trusts in general terms without specifically excluding trust originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the Customary Laws has the piece of land registered in his name under the Act with the relevant instrument of an acquisition either describing him or not describing him

by the fiduciary capacity, that registration signifies recognition by the Registered Land Act, of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Act because, according to the proviso to Section 28, such registration does not “relieve a proprietor from any duty of obligation to which he is subject as a trustee”.

Again in GEORGE MBITE KIEBIA, & ANOTHER VS ISAYA THEURI M'LINTARI & ANOTHER (2014) e K.L.R., the Court of Appeal held as follows:

“The legal burden to prove the existence of the trust vests with the respondents

It is our considered view that the appellants did not rebut and dislodge the testimony of the respondents who are not only in occupation and possession of parcel No. 86 but also claim entitlement to parcel No. 70 pursuant to their being members of the family that owned the ancestral clan land. We state that when a registered proprietor of title is under challenge, it is not sufficient to dangle the instrument of title and proof of ownership. It is the instrument of title that is in challenge and the registered proprietor must go beyond the instrument and rebut the nature that the property is not free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the appellant did not go this extra mile that is required of him in relation to land parcel No. 70 and no evidence was led to rebut the respondents testimony.....”

The same facts obtained in that case are at all fours with those obtained in the instant case. It is my considered view that the defendants did not offer any defence beyond the instrument of title to rebut the evidence given on oath that the two parcels of land number NYAKI/THUURA/4226 and 4227 are free from any encumbrances including any and all interests which need not be noted on the register.

In the upshot, I find and hold that the plaintiffs have proved the existence of a trust over land parcel number NYAKI/THUURA/4227 and 4227. Having found that a trust existed over the said properties, I make the following orders:

- (1) The sale of land parcel numbers NYAKI/THUURA/4226 and 4227 to the 2nd and 3rd defendants be and are hereby annulled.*
- (2) The two parcels of land numbers NYAKI/THUURA/4226 and 4227 to be rectified and the two parcels of land to be consolidated to its original parcel No. NYAKI/THUURA/498 and the same registered in the names of all the plaintiffs and the 1st defendant as joint owners.*
- (3) A permanent injunction shall be issued against the transfer of the consolidated parcel of land from any dealings until further orders of this Honourable Court.*
- (4) Since this suit was not defended I make no order as to costs.*

READ, DELIVERED and SIGNED in the Open Court at Meru this 28th day of February, 2019.

E.C. CHERONO

ELC JUDGE - KERUGOYA