



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 57 OF 2008

MATTHEW SICHANGI WAFULA.....1ST PLAINTIFF

FRED SIMIYU.....2ND PLAINTIFF

MUSA FRED.....3RD PLAINTIFF

PHILIP S/O JOHNSTONE MURUTU.....4TH PLAINTIFF

VERSUS

SIMON WAFULA WESUSA.....DEFENDANT

(Consolidated with KITALE HCCC No. 148/2007)

JUDGMENT

1. The above files were consolidated vide orders of the court of the 7/2/2018 when parties sought directions on the two files and the lead file was taken as **Civil Suit No. 57 of 2008 (O.S)**. The Court directed inter alia that;

(1) Plaintiffs shall be;

Matthew Sichangi Wafula

Fred Simiyu

Musa Fred

Philip s/o Johnstone Murutu

(2) The defendant shall be Simon Wafula Wesusa.

(3) The Amended Originating summons herein and supporting affidavits and the defence documents in ELC 148/2007 shall be the pleadings of the Plaintiff in the consolidated suit.

(4) The Replying Affidavit in the Originating Summons and the Plaintiff in KITALE HCCC No. 148/ 207 as well as the reply to the defence shall be the defendant's defence and counterclaim defence in the consolidated suit.

(5) The Originating Summons will proceed as if commenced by way of Plaintiff.

2. On the 25/4/2016, the Plaintiffs filed the suit against the defendant by way of an Amended Originating Summons seeking the following orders:-

(a) A declaration that SIMON WAFULA WESUSA holds parcel No. Saboti/Saboti/Block 3/ Chebukaka 3 in trust for the Plaintiff.

(b) An order that the trust herein be terminated and the defendant to transfer the three (3) acres out of Parcel No. Saboti/Saboti/Block 3/Chebukaka/3 to the Plaintiff as the owner of the said acres.

(c) Any order that the defendant be ordered to pay costs of this suit.

(d) Any other relief this Honourable court may deem fit to grant.

3. The Plaintiffs' claim is that the Defendant has while knowing very well that **Johnstone Murutu Situma** (their father), was in legal occupation fraudulently registered the suit land herein in his name.

Defendant's Defence

4. The Defendant, naturally, filed a defence denying the claims and a counterclaim. It is the defendant's claim that he has been and remains the sole registered owner of the land comprised in the **Title No. Saboti/Saboti/Block 3/ Chebukaka/3** measuring **3.238 hectares**.

5. He further avers that the suit land was registered in his name on **9/1/1998** pursuant to a sale of the same by **Chebukaka Co-operative Society Limited**. That at the time, the land comprised in **Title No. Saboti/Saboti/Block 3/ Chebukaka/3** was transferred to the Defendant herein, part thereof measuring about 3 acres was being cultivated by Johnstone Murutu Situma the father to the 1st, 2nd and 4th plaintiffs, and a grandfather to the 3rd plaintiff herein.

6. The defendant avers that vide **Kitale HCCC No. 15 of 1999 (OS) Johnstone Murutu Situma vs Chebukaka Co-operative Society and Simon Wafula Wesusa** and **Kitale HCCC No. 61/2003 Johnstone Murutu Situma vs Simon Wafula Wesusa**, the said Johnstone was claiming the three acres cultivated by him based on adverse possession and trust but that the 1st suit was struck out with costs and the second suit was withdrawn.

7. The defendant alleges further that the said Johnstone Murutu Situma owns the land comprised in **Title No. Saboti/Saboti/ Block 3/Chebukaka/1** which abuts the defendants land.

8. It is the defendant's claim that during or about the year **2003**, the plaintiffs moved into the three acres which form part of **Title No. Saboti/Saboti/Block 3/Chebukaka/3** and constructed semi-permanent structures herein besides forcefully cultivating the portion of land.

9. The hearing of this suit took place on **11/7/2018, 18/9/2018, 2/10/201** and **17/10/2018**.

10. **PW 1, Matthew Wafula Sichangi**, the 1st plaintiff produced a copy of the green card showing that the suit land was transferred to the defendant.

According to **PW1**, the late Johnstone Murutu Situma had parcels of land known as **Saboti 3/Chebukaka Farm/1** and **Saboti 3/Chebukaka Farm/3** being plots in **Chebukaka Farm**.

PW1 produced **PEXh (2a)** being the share certificate issued by the Society. He produced as were photographs (**PEXh 4 (a-i)**) showing how the suit land had been utilised by the plaintiffs herein.

11. **PW2 Fred Simiyu Murutu** testified that he and his family had lived on that land since **1965**. He denied that he entered the suit land in **2003** and that he built a house on the land in **1978**. He stated that there were crops on the suit land that he planted. He reiterated that the remains of their late father were buried in the suit land. Upon being cross examined, **PW2** stated that his father bought the land from Chebukaka Society in **1965**. However he did not know if there was a written agreement; he averred that the defendant has never lived on the land. He averred that the sale of the land to the defendant was done in a clandestine manner as a part of a plan to snatch the land from his father. He conceded the Society should have been sued in the current suit together with the defendant but that was not done.

12. **PW3, Philip Jumbe** denied having entered the land only recently in **2003** and averred that he has lived on the suit land since he was born and that he built his house on the suit land in **1978** on the spot where his late father showed him. The rest of his evidence matched that of both **PW1** and **PW2**. Upon cross examination he averred that his father had paid the entire purchase price. With that the plaintiffs closed their case.

13. **DW1, the defendant** maintained the position that he bought the suit land from Chebukaka Co-operative Society Limited. He produced a Green Card for **Title No. Saboti/Saboti/Block 3/Chebukaka/3**. His evidence was that he bought 5 acres from the said Society in **1990** and later after about 6 years bought 3 more acres and Mr. Johnstone Murutu never opposed the latter transaction. He produced an original agreement to this effect. He further averred that before the title was transferred to him, he attended a Land Control Board meeting where the said Johnstone Murutu Situma was in attendance together with **PW3** and when they raised an objection to the land being transferred to the defendant, the District Officer (D.O.) was ordered to investigate the matter. It is claimed by the Defendant that the D.O followed up the matter with Chebukaka Society where the position was confirmed to be that the defendant had bought the land from the said society. According to the defendant, it is after this confirmation by the D.O that the transfer was effected. The defendant alleges that he never engaged the plaintiffs until 3 years later when he was served with summons for **Kitale HCCC No. 15 of 1999**. He referred to an affidavit filed by the deceased in **Kitale HCCC No. 15 of 1999** to support this claim. On cross examination, he maintained that he took possession of the suit land in **1995** and in **2003**, the plaintiffs trespassed on the suit land.

14. **DW2, was Absolom Makokha Ngutuku**. In advancing the defendant's case, he stated that he was made the chairman of Chebukaka Co-operative Society Limited in **1995**. He testified that upon appointment, he was briefed of the land dispute between the plaintiff and the

defendant. His evidence was that, the society at some point decided to sell all its stony land to its members; that Mr. Murutu had paid **Kshs. 1900** for the **Plot No 3** but failed to pay the balance despite being requested on several occasions and it was on this basis that the suit land was sold to the defendant. He further stated that the society has never been summoned by the authorities regarding fraud issues.

Submissions

15. The plaintiffs subsequently filed their submissions on **31/10/2018** but the defendant did not file submissions. The plaintiff highlights of the plaintiff's submissions are that the plaintiffs have been in occupation of the suit land ever since they were born while the defendant has never occupied it; Ms Muniolo for the plaintiffs submitted that the plaintiff's father built his homestead on the suit land and even objected to the issuance of a land control board consent to transfer the same to the defendant; that the land control board consent was deferred and later issued clandestinely; that the defendant avoided filing suit against the plaintiffs' father in **2007** because he was aware that he was in occupation; she questioned why some Chebukaka Farmers Cooperative Society Ltd members never signed the agreement dated **25/10/1995**; she submitted that the court should not sanction the sale to the defendant; she cited the decisions in the cases of **Rose Nandwa Masinde Vs Lilian Nekesa Simiyu Mukopi Eldoret ELC No 151 Of 2011** and **Justus Maina Muruku Vs Kane Waithira Mwangi Muranga ELC No 5 Of 2017** and on their strength urged this court to find that the defendant holds the title to the land in trust for the plaintiffs. It was also submitted that the fact that the deceased father to the plaintiffs filed another case **Kitale HCCC 3 of 1999 (OS)** does not bar the filing of another case as that originating summons was merely struck out and not heard on the merits.

16. Citing **Gichuki Vs Gichuki - Civil Appeal No. 21 of 1981**, **Mumo Vs Makau - Civil Appeal No 56 of 2001**, **Salesio M'Itonga Vs M'arithi Mathara & 3 Others 2015 eKLR**, and **T.M.C. & Another vs E.W.T. 2014 eKLR**, the defendant's counsel on the other hand submitted that trust is a question of fact and has to be proved by way of evidence; that though the burden of proof lay on the plaintiffs they failed to produce credible evidence including a sale agreement to prove that their father bought the land comprising of 3 acres, or receipts to prove that the entire purchase price for the land had been paid in order to support the claim that the deceased's rights had crystallised and that the defendant held the land in trust; that **DExh 3** showed that **Johnston Murutu vs Chebukaka FC Society HCCC No. 15 of 1999 (OS)** had been dismissed for being incompetent; that in that case Johnston Murutu had admitted that he only paid **Kshs. 1900** deposit; that the plaintiffs never called any independent evidence to prove they were born on the suit land; that the photographic evidence of the plaintiffs does not aid in knowing the location of their houses; that there was no fraud proved as against the defendant and that the Land Control Board and Chebukaka Farmers Cooperative Society had not been enjoined in the suit, the former for issuing the defendant consent and the latter to answer as to how they transferred the suit land to the defendant and so the court may never know if the transfer was fraudulent or not; that having paid for the land the defendant's rights accrued over it; that the society acted on the approval of a simple majority and the want of signatures by some of its committee members does not matter.

DETERMINATION

Issues for determination

17. Upon an examination of the pleadings the issues that arise for determination in this suit are as follows:-

- (1) Whether the defendant holds the three acres part of Title No. Saboti/Saboti/Block 3/Chebukaka/3 in trust for the Plaintiff.**
- (2) What orders should issue on the counterclaim defence in the consolidated suit.**
- (1) Whether the defendant holds the three acres part of Title No. Saboti/Saboti/Block 3/Chebukaka/3 in trust for the Plaintiff**

18. It must be noted from the prayers in the Originating Summons that were set out verbatim at the beginning of this judgment that no express allegation of fraud is levelled against the defendant and this judgment will therefore not focus on the same notwithstanding that the defendant's submissions have dwelt to some extent on the issue.

It is common ground that the suit land is presently registered in the names of the Defendant. There is no doubt that the deceased was given his land parcel, which lies beside the disputed land, by the Chebukaka Co-operative Society by virtue of being a member, having become such a member in **1965**; However, from the evidence on record it is not certain that the society's leadership directed him to build his house on **Plot No. 3**;

19. If he became a member and settled in the area in the **1960's** he could not have been directed to a parcel other than his own, on which to build his house; besides, it is not credible that while he preceded others in settling in the area, he, in the midst of little competition, could have chosen, or agreed to be shown the suit land, a stony ground in a locality whose mainstay was presumably agricultural.

20. That when he died he was buried on that plot does not add any value to his descendant's claim to title for it has been stated before that burial on a piece of land *per se* does not entitle anyone to the land.

21. However it is credible that he may have built on the suit land after paying a deposit for it in **1990**, for in my view there is sufficient evidence that his house still stands on the plot to date hence the eviction orders the defendant has sought against him in **Kitale HCCC 148 of 2007**.

22. It is evident that that the defendant arrived in the area after the plaintiff's father, the deceased, had settled there in **1974**, that he became the registered owner of the land in **1998** and that by then the plaintiffs were adults with families and were settled on the suit land; that the deceased had not paid the whole of the purchase price; that the land is three acres and that the defendant has never lived on the suit land;

23. As regards the first argument as to whether the defendant held the three acres part of **Title No. Saboti/Saboti/Block 3/ Chebukaka/3** in

trust for the plaintiff it should be noted that the general rule with regards to trust has been clearly enumerated in **Section 28** of the new **Land Registration Act 2012** that, unless the contrary is expressed in the register, all registered land shall be subject to various overriding interest without being noted on the register.

24. Whereas the plaintiffs assert that the deceased paid the purchase price in full and took possession of the suit land DW 2 testified that Mr. Murutu had paid **Kshs. 1900** for the Plot No 3 but failed to pay the balance despite being requested on several occasions and it was on this basis that the suit land was sold to the defendant.

25. This is the plaintiff's case and the burden of proof lay on their shoulders to prove full payment of the consideration. However, no evidence of full payment was provided by the plaintiffs and no account was provided from Chebukaka Co-operative Society Limited to show that a balance remained.

26. There is therefore evidence on the record that the deceased began the process of buying the land from Chebukaka Cooperative Society Limited but he never got title to the land and he never went beyond payment of deposit, thus attracting the society's attention that led to sale of the suit land to the defendant.

27. **DW1's** agreement with Chebukaka is dated **25/10/1995** and there is no doubt that such an agreement is genuine. However I am convinced that the deceased had already been shown the land and had already settled himself and his family on it by the time that agreement was executed.

28. **DW2's** statement produced as **DExh 4** proved that the suit land was one of the remaining unallocated public stony lands which was, according to a resolution at a general meeting held in the year **1990**, to be sold. In the year **1990**, the defendant bought **5 acres** of that land at the cost of **Kshs. 22,500/=**. That left **3 acres**. The deceased applied for the remaining 3 acres in **1990** and deposited **Kshs. 1900/=** therefor. When **DW2** became chairman in June **1994** the committee asked for the balance from the deceased and he never paid. It was then that the committee decided to put up the suit land for sale and the defendant bought the land. At the Land Control Board meeting the deceased objected to the sale and the DO summoned the elders who established that the deceased delayed in paying the balance of the purchase price to the society. The witness never stated how much balance was owed by the deceased though. I am convinced that after the said money was paid by the deceased he took possession of the suit land just as the defendant took possession of the five acres that he had bought.

29. **DW2's** narrative brings to the fore the fact that the land that the defendant bought and the land that is being claimed by the plaintiffs in this suit was once a single undivided parcel. I have examined the map provided and found that it appears that that single parcel must have comprised of a long narrow belt before subdivision.

30. In **Kitale HCCC No. 148 of 2007** Simon Wafula Wesusa the defendant herein had admitted at **paragraph 5** that at the time the land was transferred into his name, the deceased was in possession of 3 acres thereof. The deceased had long since settled himself on the suit land by the time Chebukaka Farmers Co-operative Society Ltd purported to sell it to the defendant. Three **3 acres** out of the larger parcel of land available were sold to the deceased in **1990**. The society obtained title to the land in **1997** and sold the same land as a whole, including the portion occupied by the deceased and the plaintiffs, in the year **1998**. This court must then explore whether there was at any time created a trust over the land in favour of the plaintiffs who are his descendants. Evidence is needed to establish the existence of a trust.

31. In **Mwangi Vs Mwangi (1986) KLR 328**, the court held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and land title is subject to those rights. The court then observed that the plaintiff's equitable rights were binding on the land and the land was subject to those rights when it was registered in the defendant's name.

32. The suit land was successively registered in the name of Chebukaka Farmers Cooperative Society Ltd and the defendant respectively under the now repealed Registered Land act in 1997 and 1998 respectively. The provisions of **Sections 27 and 28** of the **Registered Land Act** (now repealed) read as follows:

"27. Subject to this Act -

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or 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

(a)

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee."

Section 30 of the Registered Land Act, now repealed, provided as follows:

“30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on register –

(a)

(b)

(c)

(d)

(f)

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

(h)

Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit.”

33. No entries were expressly made upon the register as to the plaintiff’s (or their father’s) interest but nevertheless it has to be some kind of trust they are claiming. The plaintiffs are not claiming a customary trust for this is not claimed to be ancestral land; there was no recorded involvement of the plaintiff in the acquisition of the land by the defendant and I do not also perceive any case for a resulting trust. If it had to be construed as a constructive trust then a consideration has to be made as to whether the plaintiffs or their father made full payment for the land to Chebukaka Farmers Cooperative Society. In the event that it was paid this court would have possibly upheld the claim of trust, first, as against the Society and by extension and through the sale, against the defendant. This reasoning would be in accord with the Court Of Appeal decision in the case of **Joseph Mathenge Kamutu -vs- Joseph Maina (2015) eKLR, Macharia Mwangi & 87 Others -vs- Davidson Kagiri (2014) eKLR** where the court held that the appellant’s action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent, dismissed the appellant’s claim and granted an order of specific performance in favour of the respondent. However according to the evidence in this case that full purchase price was not paid.

34. Further, in the case of **Civil Appeal No. 73 Of 1982 Between Public Trustee and Wanduru Ndegwa eKLR**, the court stated as follows:

“The position of a vendor and a purchaser of registered land is this. The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser cestui qui trust to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession.

The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it. See Harman J in Bridges v Mees, [1957] I Ch 475; and Simpson J (as he then was) in Hosea v Njiru Ors, [1974] EA 526 (K).”

35. By extrapolation, in this case where the claim is not for adverse possession, the above reasoning can be applied up to the extent that the whole of the purchase price was not paid in which case no trust was placed on the shoulders of the Society, and subsequently by extension upon the defendant, in favour of the deceased.

36. The conclusion here is that the plaintiffs have not established that any trust exists. The defendant can not be held as holding the land as trustee on their behalf. The plaintiffs’ claim as per the Originating Summons must fail.

37. The defendant is the present registered proprietor of the suit land. The next question is whether the orders sought in the plaint in **Kitale ELC 148 of 2007**, being one of the consolidated suits herein be granted.

38. In the light of **Sections 27 and 28 of the Registered Land Act** (now repealed) which was applicable to the land at all material times, there is no ground upon which the defendant may be denied the prayers he seeks. However, this is subject to this court’s observations herein further below. This court is duly cautioned by the decisions on unpleaded issues not least of them being the recent **Zacharia Orwa Ondoro v South Nyanza Sugar Co. Ltd [2018] eKLR** where the court, citing other cases stated thus:

“While setting the record straight on the essence of parties being bound by their pleadings and that a court can only decide on issues that arise from the filed pleadings, the Court of Appeal in Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Sylvester Umaru Onu, JSC stated that: -

‘...It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it....’

39. This court must therefore adjudicate only on the issues before it and only as between the parties before it. However, although no party has openly come out to state the fact in pleadings or in oral evidence, by a slip that **DW2** made in his written statement marked **DExh 4**, he has revealed that the same may have been unalienated *public* utility land that had been reserved when Chebukaka subdivided its land amongst its members in **1989**. **DExh4** reads in part that “*...in the year 1990 the Special General Meeting was held and a minute was passed that all public stony lands to be sold to the interested persons*”.

40. The plaintiffs and the defendants already had land by virtue of allocation by the society owing to their shareholding in the society. What they are seeking is additional land. It would appear that all the available land had already been allocated to individual shareholders by virtue of their holding share certificates and there were no shareholder’s claims pending. I think that the inadvertent revelation by **DW2** may in future become a matter of public interest and the issue may need to be determined substantively as was done in **Kitale Land Case No. 2 of 2011 Jimmy Gichuki Kiago Michael Nato Mukhebi Versus The County Government of Nzoia and others**.

41. However, in this case this court must grant judgment to the defendant herein subject to the comments above. I therefore enter judgment for the defendant and issue the following orders:

(a) The Amended Originating Summons dated 21/4/2016 is hereby dismissed.

(b) Judgment is hereby entered for the defendant as prayed in prayers No (a) and (b) in the plaint dated 8/10/2007 in Kitale HCCC No. 148 of 2007.

(c) Each party shall bear their own costs of each suit.

Dated, signed and delivered at Kitale on this 13th day of February, 2019.

MWANGI NJOROGÉ

JUDGE

13/2/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Teti for the defendant in the consolidated suit

N/A for the plaintiffs

COURT

Judgment read in open court.

MWANGI NJOROGÉ

JUDGE

13/2/2019