



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 738 OF 2015

(FORMERLY HCCC NO. 28 OF 2008)

JECONIA AGIMBA YONGA.....PLAINTIFF

VERSUS

OLIVA OTIENO MATARA.....DEFENDANT

JUDGEMENT

1. Jeconia Agimba Yonga, the Plaintiff, sued Oliva Otieno Matara, the Defendant, through the plaint dated and filed on 9th April 2008 seeking the following;

- a) **A declaration that the registration of the Defendant's father as proprietor of Kisumu/Koguta East/841, suit land, was in trust for the benefit of the Plaintiff and his descendants.**
- b) **A declaration that the sale of the suit land, if any, to the Defendant's father is null and void and the subsequent transfer to his name fraudulent.**
- c) **Costs and interests.**

2. The Plaintiff avers that he was the grandson of Patrick Gawo Alal, deceased, who was the original proprietor of the suit land. That in 1982, the Defendant's father named Robert Matara, deceased, was invited by the Plaintiff's grandfather to settle on a portion of the land and in return he build a house for him. That the Defendant's father erected the house for the Plaintiff's grandfather as agreed, but the Defendant's father did not take possession of the land. That during land adjudication, the Defendant's father caused himself to be registered as proprietor of the entire parcel, Kisumu/Koguta East/841 instead of ***"in trust and for the benefits of the descendants of Oliech and Gawo (deceased), who were the grandfathers of the Plaintiff."*** The Plaintiff has set out the particulars of trust under paragraph 6 of the plaint. The Plaintiff further averred that the Defendant's father had acknowledged the existence of the trust in his letters dated 4th September 1989 and 24th November 1989 in which he indicated his willingness to relinquish the title to the suit land upon being paid Kshs. 55,000/=, being costs of erecting the house for the Plaintiff's grandfather and developments thereon. That the Defendant has refused to relinquish the title or receive the refund of Kshs. 55,000/=, claiming the land belonged to his late father and that he is entitled to inherit the whole of it. That the Defendant's father had fraudulently registered the land in his name on the 23rd July 2005. The Plaintiff has set out the particulars of fraud attributed to the Defendant's father at paragraph 10 of the plaint.

3. The Plaintiff's claim is opposed by the Defendant through his statement of defence dated the 11th July 2012, in which he among others avers as follows;

- **That neither his late father nor himself had ever indicated that they were willing to receive the refund of Kshs. 55,000/=.**
- **That his late father bought the suit land and he is the one entitled to inherit it.**
- **That the Plaintiff's father had no link to the Defendant's father, or the estate of the person who sold the suit land to him, and therefore the Plaintiff is without capacity to bring this suit.**
- **That no trust exist over the suit land in favour of the father to the Plaintiff.**
- **The Defendant prays for the Plaintiff's suit to be dismissed with costs.**

4. The Plaintiff testified as PW1, and called Samuel Ochieng and Peter Oriendo Yoga, who testified as PW2 and PW3. The Defendant testified as DW1 and thereafter the learned Counsel for the Defendant filed their undated written submission on the 4th July 2018, after which the learned Counsel for the Plaintiff filed theirs dated the 21st January 2019.

5. The following are the issues for the court's determinations;

a) Whether the Plaintiff has the capacity to sue and prosecute this case.

b) Who was the first registered proprietor of the suit land.

c) Whether the late father to the Defendant was registered as proprietor to the suit land, and if so, whether the Plaintiff has proved the existence of trust in his favour over the land.

d) Whether the registration of the Defendant's father as proprietor of the suit land was through fraud.

e) Whether Plaintiff has availed sufficient evidence to show that he deserves any of the prayers sought to be issued in his favour.

f) Who pays the costs of the suit.

6. The Court has after carefully considering the pleadings, evidence tendered by PW1, PW2, PW3 and DW1, the submissions by Counsel, come to the following determinations;

a) That from the copy of the green card and title deed for Koguta East/841, produced by the Defendant, the land was first registered on the 14th May 1974 in the name of Gawo Alal under entry No. 1. That entry No. 2 of 29th May 1985 shows that Gawo Alal changed his name to Gao Patrice Alal, and that under entry No. 3 of 23rd July 1985, the land was registered in the name of Robert G. Awuor Matara as a gift. The title to the deceased was then issued on the same date. The Plaintiff did not avail any documents sourced from the Land Registrar's office, or any other Government office on the ownership of the suit land, and the court will take the position on the history of ownership of the said land to be as shown in the register produced by the Defendant as exhibit.

b) That though the Plaintiff has in his pleadings, testimony and submission referred to his grandfather as Patrick Gao Alal, whom he claimed was the registered proprietor of Kisumu/Koguta/841, he did not avail documentary evidence in proof thereof. The documentary evidence availed by the Defendant in the form of a register for Koguta East/841, which the court takes to be the parcel the Plaintiff refers to as Kisumu/ Koguta/841 do not have the name of Patrick Gao Alal as one of the registered proprietors. The name that look similar or close to Patrick Gao Alal is Gawo Alal, that later changed to Gao Patrice Alal. That notwithstanding, the pleadings and oral evidence by both the Plaintiff and Defendant are in agreement that the land initially belonged to the person the Plaintiff claims was his grandfather. That though the Plaintiff has not disclosed how that person was one of his grandfathers, and further has not stated what role his own parents have played to pursue the suit land, the court will take the name Patrick Gao Alal, Gao Patrice Alal and Patrice Gao Alal to be names of one and the same person who was the first registered proprietor of the suit land.

c) That it is clear from the pleadings and evidence tendered that the Defendant's father built a house for Gao Patrice Alal as part of the consideration to get the suit land. That though the date of death of the said Gao Patrice Alal has not been disclosed or the certificate of his death availed, it is clear the Defendant's father became the registered proprietor of the suit land during his lifetime. That the letters dated 4th September 1989 and 24th December 1989 produced by the Plaintiff as exhibits, had been written during his lifetime by the Defendant's father. The first letter at paragraphs 4 to 6 gives the background of the suit land transaction and the amount paid. The following extracts will suffice for the purposes of this judgment;

“Let me brief the concerned officers to whom you have copied your letter that you invited me as early as 1982 to come and stay with you on your land so that I can inherit it as a gift when you finally go since you have no heir.

You therefore arranged and agreed that the ownership be transferred to me while you are still alive- hence the transfer of the land to me. This wish of yours to have me inherit the land as a gift was later to change to a case of sale when you continuously demanded various sums of money from me for your upkeep.....

At one time around 1985 you also demanded and I obliged that I build you a semi-permanent house on this very land. Finally because I now considered this land to be mine, I have fenced it all round with cypress trees. I have therefore incurred expenses on you and on the said land as follows;

1. Money given to you in cash from 1982 to date

.....sh. 18,400/=

2. Construction of Semi-permanent building for you

...sh. 31,000/=

3. Money spent on planting and tending cypress trees

...sh. 6,100/=

TOTAL MONEY SPENT ON YOU AND THE LAND

...sh. 55,500/=

.....

It is only fair that when I withdraw from this land I get back all the above money that you have received from me in consideration for the land in total i.e. sh. 55,500/=.

To make the work of the administration officials easy I propose you deposit the said money to the assistant chief. Upon receipt of the money he will alert me and I will then send directly to him the land title deed for further handling and finally transfer back to your name.

.....”

That in the subsequent letter of 24th December 1989, the Court can discern that Gao Patrice Alal had not refunded the amount demanded to the Defendant’s father. That as the letter Gao Patrice Alal had written have not been availed on the parties, the court cannot know their contents, but it is clear the payment was not refunded and the ownership of the land did not change. The offer by the Defendant’s father was not accepted by the seller of the land.

d) That though the plaintiff alleged fraud in the process through which the Defendant’s father got registered with the suit land, he did not offer or tender proof of the allegations. That the Court of Appeal, in the case of **Urmila w/o Mahendra Shah vs Barclays Bank International Ltd [1979] eKLR**, held that to establish fraud, a higher standard of proof approaching proof beyond reasonable doubt is required.

e) That the extract of the letter dated 4th September 1989, which was done by the Defendant’s father to Gao Patrice Alal, and whose contents have not been disputed by the parties in the suit appear to suggest that the said Gao Patrice Alal had no apparent heir. That this then brings up the question as to whether the Plaintiff, and in that case his father, had any relationship with the late Gao Patrice Alal. That the Plaintiff did not offer evidence to show the relationship he or his parents had with Gao Patrice Alal. That in any case he has not availed before this court a grant obtained from the Succession Court under the **Law of Succession Act Chapter 160 of Laws of Kenya** clothing him with capacity to sue for and on behalf of the estate of the late Gao Patrice Alal. That the Plaintiff is therefore without capacity or locus to commence this suit over the suit land on behalf of Gao Patrice Alal alias Patrick Gao Alal.

f) That in view of the finding in (e) above, it is doubtful as to whether the transaction between the late Gao Patrice Alal and the Defendant’s father could have been meant to create or establish a trust in the Plaintiff’s favour and or descendants. That in the case of **Marie Ayoub & Others vs Standard Bank of South Africa Lt & Another [1963] E.A at page 623 paragraph A**, the Court held that **“The Court’s will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”** That in the pleadings, oral and documentary evidence availed by the parties herein, there is nothing to suggest, even remotely, that the arrangement over the suit land between the late Gao Patrice Alal and the Defendant’s father was with the intention to create a trust for the benefit of the Plaintiff or his lineage.

g) That had the engagement between the Defendant’s father and the late Goa Patrice Alal, as evidenced in the two letters produced by the Plaintiff been given effect, the court has no reason to doubt that the suit land would have been restored to the original owner. That engagement through correspondence does not in any way show that the suit land would have been given to the Plaintiff or held for his trust or benefit. That the failure by Gao Patrice Alal to refund the money required by the Defendant’s father as a pre-condition to having the land restored to him meant that the suit land remained in the name of Robert G. Awuor Matara, the late father to the Defendant. That as late Gao Patrice Alal did not take any legal steps to challenge the title of the late Robert G. Awuor Matara to the suit land in his lifetime, and in view of the finding above that the Plaintiff is without locus to bring this suit on behalf of his estate, the court is obligated by **Section 26 of the Land Registration Act No. 3 of 2012** to take the person named in the register of the suit land as the absolute and indefeasible owner. The Defendant has produced a copy of the Certificate of Confirmation of Grant dated the 24th May 2016, issued in Nairobi H.C. Succession Cause No. 675 of 2011, confirming that he is the administrator of the estate of Robert Awour Matara. The Certificate further shows that he is the one inheriting land parcel Koguta East/841 among others, and is therefore the person legally and beneficiary entitled to its use and occupation.

7. That flowing from the foregoing, the Court finds that the Plaintiff has failed to proof his claim against the Defendant to the standard required and his case is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 27TH DAY OF MARCH 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Okungo for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE