



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 87 OF 2015

NDWIGA MURUATHIKA.....PLAINTIFF

VERSUS

NJAGI KATHUITA.....DEFENDANT

AND

NJAGI M'THIKA.....INTERESTED PARTY

JUDGEMENT

1. By a plaint dated 6th December 2007 the Plaintiff sought the following reliefs against the Defendant;

- a. Land parcel No. Kagaari/Kanja/151 was registered in the name of the Defendant herein in trust for the exclusive benefit of the Plaintiff.*
- b. The said trust be terminated.*
- c. The Defendant be ordered to transfer the whole of land parcel Kagaari/Kanja/151 to the Plaintiff and in default the Executive Officer of this honourable court do execute all documents to facilitate and complete the said transfer.*
- d. Costs of this suit.*
- e. Any other relief this honourable court may deem fit and just to grant.*

2. It was pleaded that the Defendant was registered as proprietor of *Title No. Kagaari/Kanja/151* (hereinafter the *suit property*) in trust for the Plaintiff and that the Plaintiff and his family had settled on and developed the suit property since 1961 but the Defendant had refused to determine the trust transfer it to the Plaintiff.

3. It was further pleaded that in a bid to defeat the Plaintiff's interest in the suit property, the Defendant and the interested party had secretly conspired to have *Embu LDT Case No. 42 of 2005* filed with a view to having the suit property transferred to the latter. It was pleaded that an award was made in favour of the third party which was subsequently adopted as a decree by the *Chief Magistrate's Court in Embu CM Award No. 38 of 2007* without the knowledge of the Plaintiff.

4. The record shows that the Defendant filed neither a memorandum of appearance nor a defence to the action. He only filed a notice of appointment and a replying affidavit to the Plaintiff's application for interlocutory injunction dated 21st December 2007. He denied the Plaintiff's allegations in the said affidavit and stated that he was the absolute owner of the suit property. He further stated that there was an agreement for sale between him and the Plaintiff but the Plaintiff had defaulted on the payment of the purchase. The amount of the purchase price was not disclosed.

5. The record further shows that the interested party applied to be joined in the suit vide a notice of motion dated 9th June 2015 claiming an interest in the suit property by virtue of the decree issued in *CM's Award Case No. 38 of 2007*. The interested party did not file any form of pleading thereafter but he filed a witness statement, statement of issues and list of documents in support of his claim of 2 acres out of the suit property. The first issue he framed was whether the Defendant was registered as proprietor of the suit property in trust for him. The 2nd was whether the Defendant ought to transfer 2 acres to him in terms of the decree in *Embu CM's Award Case No. 38 of 2007*.

6. Although the Defendant did not file a statement of defence to the action, he filed witness statements and a list of documents. In his own statement, he stated that there was a sale agreement for the sale of 2 acres out of the suit property to the Plaintiff. He further stated that the

Plaintiff defaulted in making payment of the purchase price in consequence whereof the agreement was rescinded. Neither the date of the agreement nor the amount of the purchase price was disclosed.

7. When the suit was set down for hearing, only the Plaintiff and the interested party testified. The Defendant did not testify. The application for adjournment by his advocate was rejected since it was unmerited in a suit which had been pending in court for over ten (10) years.

8. The parties do not appear to have agreed on a common statement of issues for determination. The Plaintiff and the interested party filed separate statements of issues whereas the Defendant did not file any.

9. The court has considered the pleadings, the documents produced by the parties as well as the oral evidence tendered at the trial. The court is of the view that the following issues arise for determination;

- a. Whether the Defendant was holding the suit property in trust for the Plaintiff.
- b. Whether the interested party is entitled to be registered as proprietor of 2 acres out of the suit property on the basis of the decree in Embu CM Award Case No. 38 of 2007.
- c. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
- d. Who shall bear the costs of the suit.

10. The court has considered the Plaintiff's evidence and the submissions on record on the first issue. The evidence was to the effect that although the Defendant was registered as proprietor of the suit property, the elders of Marigu clan to which both parties belonged gave the Defendant an alternative land elsewhere with the intention that the Plaintiff would be given the suit property. The Defendant was apparently given *Title No. Kyeni/Mufu/564* (hereinafter *parcel 564*) where he ultimately settled. The Plaintiff then took possession and settled upon the suit property as from 1961.

11. The Plaintiff further stated that he was in possession of the original title deed for the suit property which the Defendant handed to him after obtaining alternative land from the clan. He also stated that at some point, the Defendant had co-operated and obtained the consent of the Land Control Board (LCB) to transfer the suit property to him. When the Defendant failed to sign the transfer forms after consent being granted, the Plaintiff filed the instant suit.

12. The court has noted that the Defendant did not testify at the trial. He did not challenge the Plaintiff's evidence. He did not even file a statement of defence to the action. The contents of his replying affidavit in opposition to the Plaintiff's application for interlocutory injunction remain untested through cross-examination. The court believes the unchallenged evidence of the Plaintiff on the first issue. The court believes that the Defendant was given alternative land by his clan and that he was holding the suit property in trust for the Plaintiff. This conclusion is inevitable from the conduct of the parties over the years. The Defendant has never taken steps to enforce his property rights or to evict the Plaintiff since 1961 despite full knowledge that the Plaintiff had settled upon and developed the suit property. It would also appear that the Defendant has never taken steps to recover the original title deed of the suit property from the Plaintiff.

13. The court has also noted that the consent of the LCB which was obtained on 8th November 1996 indicates that the consideration for the transaction was a *gift*. It was not indicated a sale for monetary consideration. The contents of the consent are totally inconsistent with a normal sale of the suit property.

14. The 2nd issue is whether the interested party is entitled to 2 acres out of the suit property. The court notes that the interested party did not file any pleading on the basis of which such a relief could be sought against the Defendant. The claim was simply based upon the award of the Tribunal and the consequent decree in *Embu CM Award Case No. 38 of 2007*. The court notes that the Plaintiff was not party to those proceedings and there is no indication that he was ever heard.

15. The court has considered the evidence on record on the award of the Tribunal and the consequent decree. The court has also considered the submissions on record on that issue. The existence of the award and decree is not issue. It is not disputed that the Plaintiff was not party to those proceedings. It is also evident from the award of the Tribunal that the Defendant and the interested party basically entered into a consent in terms of which the interested party was to get 2 acres whereas the Defendant was to retain 0.75 acres.

16. The court is not persuaded that the interested party is entitled to 2 acres or any portion of the suit property on the basis of the said award and decree for the following reasons. First, this court is not the proper forum for execution of an award of the Tribunal or the decree of the Magistrate's court.

17. The second reason is that the Tribunal had no jurisdiction to make the award in the first instance. The court concurs with the Plaintiff's submissions that under **section 3 of the Land Disputes Tribunals Act, 1990** (now repealed) the Tribunal's jurisdiction was limited to the three matters specified therein. The nature of the claim before it was definitely beyond its jurisdiction. The resultant award was consequently a nullity in the eyes of the law. It was incapable of being adopted as a decree by the Magistrate's court. Accordingly, there is no legal basis for granting any relief in favour of the interested parties.

18. The 3rd issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. The Plaintiff having succeeded in demonstrating the existence of a trust it would follow that he is entitled to the reliefs sought in the plaint. It would also follow that the interested party is not entitled to any relief for reasons already given in the preceding paragraphs.

19. The 4th and final issue for determination is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful litigant should ordinarily be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co Ltd [1967] EA 287**. The court is aware that all the parties herein are close relatives. The order which commands itself to the court is for each party to bear his own costs.

20. The upshot of the foregoing is that the court finds that the Plaintiff has proved his case to the required standard against the Defendant. The court finds and holds that the interested party is not entitled to any relief in these proceedings. Accordingly, the court makes the following orders;

- a. The Judgement be and is hereby entered for the Plaintiff against the Defendant in terms of prayers (a) (b) and (c) of the plaint dated 6th December 2007.
- b. The interested party is not entitled to any reliefs in this suit.
- c. Each party shall bear his own costs.

21. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 7TH day of MARCH, 2019.

In the presence of Mr. Ithiga for the Plaintiff, Mr Wachira for the Defendant and Mr Joe Kathungu for the interested party.

Court clerk Muinde

Y.M. ANGIMA

JUDGE

07.03.19