



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 168 OF 2014**

**(FORMERLY HCC 49 OF 2000)**

**IRENE WEVETI NJUE (Suing as personal representative of the estate of  
MOSES NJUE NJERU).....PLAINTIFF**

**VERSUS**

**JOSPHAT MBICARI.....1<sup>ST</sup> DEFENDANT**

**JOHN NYAGA MBICARI.....2<sup>ND</sup> DEFENDANT**

**ALBERT NTHIGA KAMAGU.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 25<sup>th</sup> August 2000 the original Plaintiff (now deceased) sought the following reliefs against the Defendants;

- a. *Eviction from parcel of land number Mbeti/Kiamuringa/1815.*
- b. *General damages for loss of user of the land.*
- c. *Costs of this suit.*
- d. *Interest on (c) at court rates.*
- e. *Any further relief this honourable court may deem fit to grant.*

2. It was pleaded that the Defendants had trespassed into the Plaintiff's parcel of land *Title No. Mbeti/Kiamuringa/1815* (hereinafter the *suit property*) without just cause or excuse. It was further pleaded that the Defendants had failed to heed a notice to vacate and notice of intention to sue hence the suit.

3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a joint statement of defence dated 9<sup>th</sup> October 2001 in which they denied the Plaintiff's claim in its entirety. They denied having trespassed into the suit property but averred that they were at all material times in occupation of *Title No. Mbeti/Kiamuringa 305* (hereinafter *parcel 305*) which they had occupied since 1948. They further pleaded that the said parcel 305 was family land which was registered in the name of their eldest brother, Francis Kamagu in trust for the Defendants.

4. The Defendants further pleaded that at all material times the Plaintiff was aware of their occupation of parcel 305 as family land that the Plaintiff merely intended to wrongfully and fraudulently acquire the same.

5. There is no indication on record of the 3<sup>rd</sup> Defendant having entered appearance or participated in the proceedings. At the trial hereof, the Plaintiff's advocate informed the court that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had since vacated the suit property hence the suit was proceeding against the 1<sup>st</sup> Defendant only who was said to be in possession.

6. At the trial hereof the Plaintiff, who was the legal representative of the estate of the original Plaintiff, called three witnesses in support of her claim. The Plaintiff's evidence was to the effect that her late husband had bought the suit property from Francis Kamagu (hereinafter *Francis*) who is the eldest brother of the Defendants. The said Francis was the registered owner of the property at the material time.

7. The Defendants' eldest brother, Francis, testified in favour of the Plaintiff. His evidence was that he was the absolute owner of parcel 305 which he sub-divided into two parcels and sold one portion (the suit property) to the original Plaintiff. He denied any suggestion that parcel 305 was family land. He stated that he solely bought parcel 305 from Ikandi clan. It was his further evidence that his father did not have any land and that he paid for parcel 305 from his own sources. He denied the 1<sup>st</sup> Defendant's suggestion that parcel 305 was bought with the proceeds of the dowry of his sisters.

8. The 1<sup>st</sup> Defendant was the only Defendant against whom the suit was prosecuted. He was the sole defence witness. It was his evidence that parcel 305 was family land which was bought from Ikandi clan using the proceeds of the dowry of his sisters. It was his evidence that the family gave 4 cows, one goat and Ksh.500/-. The said animals were said to have been given to Francis who sold them and paid the proceeds as the purchase price for parcel 305.

9. The 1<sup>st</sup> Defendant contended that Francis was registered as proprietor of parcel 305 in trust for the entire family and that he had secretly sub-divided and sold the family land without involving the family. He contended that the purchasers were not invited into the homestead where the rest of the family members were residing and that Francis did not inform them that he was disposing of the land.

10. When the hearing was concluded on 31<sup>st</sup> January 2019 the Plaintiff was granted 30 days to file and serve written submissions whereas the 1<sup>st</sup> Defendant was granted 30 days upon service to file his. The record shows that the Plaintiff's submissions were filed on 14<sup>th</sup> March 2019 whereas the 1<sup>st</sup> Defendant's submissions were filed on 15<sup>th</sup> May 2019.

11. The court has noted that the parties did not file any statement of issues for determination. The court shall, therefore, frame the issues for determination. Under the provisions of **Order 15 Rule 2 of the Civil Procedure Rules**, the court may frame issues from any of the following;

- a. Allegations made on oath by the parties.
- b. The pleadings.
- c. The contents of documents produced by the parties.

12. Consequently, the court is of the opinion that the following issues arise for determination in this suit;

- a. Whether the original Plaintiff was the proprietor of the suit property.
- b. Whether parcel 305 was ever the 1<sup>st</sup> Defendants' family land and whether Francis was registered only as a trustee.
- c. Whether the original Plaintiff obtained a good title to the suit property.
- d. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
- e. Who shall bear the costs of the suit.

13. The court has carefully considered the oral and documentary evidence on record on the first issue. There is no doubt that despite the 1<sup>st</sup> Defendant's denial in his statement of defence, the suit property was transferred to the original Plaintiff, Moses Njue Njeru, on or about 14<sup>th</sup> February 2000. The suit property was a sub-division of parcel 305. There is abundant evidence on record to demonstrate the series of transactions leading to the original Plaintiff's acquisition of the suit property such as copies of the land register and title deed.

14. The second issue is whether parcel 305 was family land and whether Francis was holding it in trust for the rest of the family members. The court has considered the entire evidence on record on this issue. It was common ground that parcel 305 was not bought for valuable consideration from a Mr. Ngari Muchiro of Ikandi clan. It was not clan land allocated to the Defendants' Mukera clan or the Defendants' father.

15. The only aspect which was in dispute was who as between the Defendants mother and Francis paid the purchase price. Francis claimed to have paid a consideration of Ksh.10,000/- directly to the vendor. The 1<sup>st</sup> Defendant, on the other hand, contended that the purchase price was 4 cows, one goat, and Ksh.500/- which was provided by their late mother.

16. The 1<sup>st</sup> Defendant claimed that the said animals were given as dowry for his two sisters and that Francis was given the cows merely to sell them and pay the purchase price for parcel 305. Although he claimed that the entire family was aware of this arrangement, he did not call any of the surviving family members to testify at the trial. The 1<sup>st</sup> Defendant did not know for how much the animals were sold and how much was ultimately paid to the vendor.

17. The court is of the view that the burden of proof with respect to the issue lies with the 1<sup>st</sup> Defendant. He is the one who pleaded that parcel 305 was family land and that his eldest brother, Francis, was registered as proprietor in trust for the entire family. **Section 107 of the Evidence Act (Cap. 80)** stipulates as follows regarding the burden of proof;

**“(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

18. In order for the court to find and hold that Francis was registered merely a trustee for his family, the 1<sup>st</sup> Defendant was bound to prove that parcel 305 was family land. He was bound to prove how and by whom the purchase price was paid and that it was intended to be family land. A trust over registered land is not to be lightly inferred without sufficient evidence to support such inference. It is also doubtful if such trust could be proved against Francis whereas he was not a party to the suit. The court is thus not satisfied that the 1<sup>st</sup> Defendant has proved the facts on the basis of which a trust may be established.

19. The fourth issue is whether the original Plaintiff obtained a good title to the suit property. Although the 1<sup>st</sup> Defendant pleaded that the Plaintiff had wrongfully or fraudulently acquired the suit property, there were no particulars of fraud which were pleaded in the defence. No evidence of fraud was tendered at the trial either. The allegation of trust was not proved either. In the circumstances, the court finds and holds that the Plaintiff obtained a good and valid title to the suit property. None of the vitiating factors stipulated in **section 26 of the Land Registration Act, 2012** such as illegality, impropriety or corruption were proved against the Plaintiff.

20. The fourth issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. The court has already held that the Plaintiff is the legitimate proprietor of the suit property. The court has also held that the 1<sup>st</sup> Defendant has failed to demonstrate that the suit property was subject to any trust in land law. It would, therefore, follow that the Plaintiff is entitled to the reliefs sought in the plaint in so far as they are compatible with the law.

21. The court has noted from the Plaintiff's written submissions that the claim for general damages was not pursued. At least, there was no submission on general damages and the quantum of damages. The court has also noted that the damages sought in the plaint are damages for *loss of user*. This claim was not pleaded with specificity and no particulars of such loss were pleaded. Consequently, the court shall not award any general damages.

22. The last issue for consideration of is 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 as stipulated in **section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant will normally be awarded costs of the suit unless, for good, reason, the court directs otherwise. The court is aware of the peculiar circumstances of this case. The 1<sup>st</sup> Defendant's action in defending the suit was not unreasonable in the circumstances. The court is of the opinion that each party should bear his own costs.

23. The upshot of the foregoing is that the court finds that the Plaintiff has proved her case to the required standard as required by law. Consequently, there court make the following orders;

- a) Judgement be and is hereby entered for the Plaintiff against the 1<sup>st</sup> Defendant in terms of prayer (a) of the plaint dated 25<sup>th</sup> August 2000.
- b) The 1<sup>st</sup> Defendant shall have a grace period of 90 days within which to vacate the suit property in default of which execution proceedings may follow. Such execution shall be conducted strictly in accordance with the applicable law.
- c) All the other reliefs sought are hereby declined.
- d) Each party shall bear his own costs.

24. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **23<sup>RD</sup>** day of **MAY, 2019**.

In the presence of Mr. Kathungu for the Plaintiff; 1<sup>st</sup> Defendant present in person and in the absence of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**23.05.19**