



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ENVIRONMENT CASE NO. 82 OF 2015

MODE OF TRACK.....FAST TRACK

WILSON KAIGA GIDION GUDAHI

(Suing as the Legal Representative of the

Estate of the late GIDEON GUDAHI KAHIGA).....PLAINTIFF

VERSUS

DANIEL LIVOI GIDEON.....DEFENDANT

J U D G M E N T

WILSON KAIGA GIDION GUDAHI (the plaintiff herein) suing as the legal representative of the Estate of **GIDEON GUDAHI KAHIGA** (the deceased) filed this suit on 29th June 2015 through the firm of **PAUL JUMA & COMPANY ADVOCATES** seeking the following orders as against **DANIEL LIVOI GIDEON** (the defendant):-

- (a) An order of cancellation of the title deed in respect to land parcels NO BUNGOMA KAMAKOIWA/2045, 2046 and 2047 and a declaration that the defendant holds title to land parcel NO BUNGOMA/ KAMAKOIWA/577 in trust for the beneficiaries of the deceased.**
- (b) That upon the Court making a finding in (a) above, an order be made for the sub-division of the land parcel NO BUNGOMA/KAMAKOIWA/577 to be divided with the plaintiff and defendant each getting 7 acres and 20.4 acres to be subjected to succession.**
- (c) Costs of the suit**
- (d) Any other relief the Court may deem just and fit to grant.**

The basis of the plaintiff's claim is that he and the defendant are brothers being sons to the deceased who, prior to his demise owned two parcels of land one in **VIHIGA** and parcel **NO BUNGOMA/KAMAKOIWA/118**. That the deceased sub-divided the land in **VIHIGA** and shared it out among all his children including the defendant. That parcel **NO BUNGOMA/KAMAKOIWA/118** was purchased from the Settlement Fund Trustee by the deceased and the plaintiff further participated in the payment of the loan. That in 1982, land parcel **NO BUNGOMA /KAMAKOIWA/118** was divided into two portions being **BUNGOMA/KAMAKOIWA/577** (the suit land) which was registered in the defendant's names on behalf of the deceased's family and parcel **NO BUNGOMA /KAMAKOIWA/578** which was sold to one **KENNETH OLAKA**. However the defendant has now sub-divided the land parcel **NO BUNGOMA/ KAMAKOIWA /577** into parcels **NO BUNGOMA/KAMAKOIWA/2045, 2046** and **2047** with the intention of disposing them yet the suit land was to be shared among the deceased's beneficiaries. That gave rise to this suit.

Annexed to the plaint are witness statements, copy of grant in respect to the Estate of the deceased, copy of a letter dated 4th December 1967 from the Ministry of Lands and Settlement, copy of a will dated 15th April 1996 copies of Green Cards in respect to parcels **NO BUNGOMA/KAMAKOIWA/577, 578, 706, 707, 708, 709**, copies of Minutes dated 16th June 2012 and copies of official Search in respect of land parcels **NO BUNGOMA/KAMAKOIWA/2045, 2046** and **2047**.

The firm of **PAUL JUMA & COMPANY ADVOCATES** subsequently filed a Notice to cease acting for the plaintiff on 4th August 2015 and indeed when the trial commenced on 18th March 2019, the plaintiff informed me that he would act in person.

The defendant acting in person filed a defence dated 17th July 2015 in which he pleaded, inter alia, that the deceased owned several parcels of land in **VIHIGA** being **SOUTH MARAGOLI/KEGOLE/706,707,708 and 709** and had during his life time transferred the suit land to him. The defendant however denied that he held the suit land in trust adding that Judgment was entered in his favour on 15th June 2015 in **BUNGOMA HIGH COURT CIVIL APPEAL NO 64 OF 2007** and this suit is null and void as it seeks to revive a suit already concluded by a competent Court.

When the case came up for hearing on 18th March 2019 the defendant, though served, did not attend and the plaintiff was the only witness in support of his case. He asked the Court to adopt his statement dated 23rd June 2015 and his list of documents as his evidence. In the said statement, he reiterates that the suit land which is a sub-division of land parcel **NO BUNGOMA/KAMAKOIWA/118** originally belonged to the deceased who died in 1998. That it was registered in the names of the defendant to hold in trust for his siblings who include the plaintiff. But the defendant became untrustworthy and started disposing the same so the plaintiff sought the assistance of the District Officer Tongaren Division. It was there that the deceased expressed his wish to have the suit land returned to him so that he could give the plaintiff and defendant 7 acres each and retain the balance of 20.4 acres in his name. That he was the only one who repaid the loan of Kshs. 6,300/= to the Settle Fund Trustee hence this suit.

I have considered the plaintiff's un-controverted evidence together with the documents filed herein by both parties.

Although the defendant did not attend trial, he pleaded in his defence that this suit has been determined before in **BUNGOMA HIGH COURT CIVIL APPEAL NO 64 OF 2007** and therefore it is null and void. Although the defendant did not testify, that pleading is essentially raising the bar of res judicata and I must therefore determine if indeed this suit is barred by that doctrine because if it is, then I must down my tools in this case.

Res judicata is provided for in Section 7 of the Civil Procedure Act in the following terms:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

Before the plea of res judicata can be successfully invoked, the following conditions must be proved:-

- 1: That the issue in dispute in the former suit between the parties must be directly and substantially in dispute between the parties in the suit where the doctrine is pleaded.**
- 2: The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.**
- 3: The former suit must have been heard and finally decided.**
- 4: The Court or Tribunal which determined the former suit must have been competent.**

See **KARIA .V. ATTORNEY GENERAL 2005 1 E.A 83**. See also **KAMUNGE & OTHERS .V. PIONEER GENERAL ASSURANCE SOCIETY LTD 1971 E.A 263**. Res judicata is a complete bar to proceedings that seek to re-agitate issues that have been determined in previous litigation between the same parties or their privies in a competent Court. It therefore protects parties from being vexed with repetitive litigation.

Is this suit res judicata? Among the documents filed by the defendant in this case is the Judgment of **MUKUNYA J** in **BUNGOMA HIGH COURT CIVIL APPEAL NO 64 OF 2007** involving the defendant (as Appellant) and one **ROY JENDEKA MUDULIA** (as Respondent). The defendant had in that appeal sought to set aside the decision of the Western Provincial Land Appeals Committee which had confirmed the award of the Tongaren Land Disputes Tribunal that had ordered the sub-division of land parcel **NO BUNGOMA/KAMAKOIWA/2045** whereby the defendant was awarded 7 acres and **ROY JENDEKA MUDULIA** was awarded 2 acres. **MUKUNYA J** had no hesitation in setting aside that award since the **TONGAREN LAND DISPUTES TRIBUNAL** had acted out of jurisdiction in determining a dispute over registered land.

That case cannot, however, be invoked to plead res - judicata and therefore bar this case. This is because trust was not and could not be an issue in **BUNGOMA HIGH COURT CIVIL APPEAL NO 64 OF 2007** or in the Tribunal. A Land Disputes Tribunal exercising its jurisdiction under the repealed **LAND DISPUTES TRIBUNAL ACT** could not determine a dispute involving claim to land by way of a trust – **JOSEPH LELEI V RIFT VALLEY LAND DISPUTES TRIBUNAL & OTHERS C.A CIVIL APPEAL NO 82 OF 2006**. This dispute involves a declaration of trust which was not the issue in **BUNGOMA HIGH COURT CIVIL APPEAL NO 64 OF 2007** or the Tribunal.

The plea of res - judicata is not well taken. It is accordingly dismissed.

I shall now consider the plaintiff's claim that the defendant holds the suit land in trust both for them and their siblings. It was therefore the duty of the plaintiff to lead evidence to prove that the suit land was registered in the names of the defendant to hold in trust for both of them and their other siblings who however did not testify although their statements form part of the record. However, the Court will not presume a trust unless there is sufficient evidence to warrant doing so. In **MBOTHU & OTHERS .V. WAITIMU & OTHERS** the **1986 KLR 171**, the Court stated thus:-

“The law never implies, the Court never presumes a trust but in a case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intentions of the parties to create a trust must be clearly determined before a trust will be implied.”

See also **PETER NDUNGU NJENGA .V. SOPHIA WAITIRI NDUNGU 2000 eKLR.**

From the Green Cards and Certificates of Searches filed by the plaintiff, there is no doubt that the suit land was first registered in the names of the deceased on 4th August 1982 and, barely two months later, on 1st October 1982 it was registered in the names of the defendant. The title was subsequently closed on 12th March 1996 upon sub-division to create parcels NO **BUNGOMA/KAMAKOIWA/2045, 2046** and **2047** which are all registered in the names of the defendant although the plaintiff has registered cautions on all of them. That registration was done under the now repealed **Registered Land Act [Chapter 300 Laws of Kenya]** which provided under **Section 27** that:-

“The registration of a person as the proprietor of land shall rest in that person the absolute ownership of that land together with all rights and privileges belonging or appertenant thereto.”

Section 28 of the repealed law also protects the rights of a registered proprietor only subject to the overriding interests specified under **Section 30** thereof. There is however a provisos that a registered proprietor of land is not relieved of any obligations to which he is subject as a trustee. Similar provisions are found in **Sections 24** and **25** of the new **Land Registration Act 2012**. Therefore, although the defendant has since 1982 been the registered proprietor of the suit land and subsequent thereto, the resultant sub - divisions, it is the plaintiff’s case that he holds them in trust. The plaintiff has gone further to allege in paragraph 3 of his statement that though a trustee, the defendant has become untrustworthy and is disposing off the trust property. From the documents availed herein, it would appear that none of the suit properties have so far been disposed off.

But where is the evidence that the suit land is infact trust property? I think that evidence of trust is found in the following uncontroverted facts:-

Firstly, the suit land was originally registered in the names of the deceased who was the father to the parties herein. It is not land that originally belonged to the defendant. There is no evidence that he purchased it for himself as his private property.

Secondly, although the defendant has pleaded in paragraph 4 of his defence that the deceased gave him the suit land during his life time and therefore suggest that it was a gift, the plaintiff has pleaded that the defendant became **“untrustworthy”** once the suit land was registered in his names to hold in trust. I think that description of defendant as **“untrustworthy”** as captured in paragraph 3 of the plaintiff’s statement is correct. This is because, the entry against the defendant’s names on the Green Card to the suit land on 1st October 1982 shows that it was transferred at a consideration of Kshs. 45,000/= yet he did not plead a purchaser’s interest in the suit land. He pleaded in paragraph 4 of his defence that

“ BUNGOMA/KAMAKOIWA/577 was transferred to me by the deceased when he was still alive.”

The suggestion is that it was freely given to him by the deceased because if he paid Kshs. 45,000/= for it, as reflected in the Green Card, nothing would have been easier than to plead as much. That entry depicting the consideration as Kshs. 45,000/= is clearly a fraud perpetuated by the defendant and his accomplices in the Lands Office.

Thirdly, the plaintiff says he is infact the one who paid the Settlement Fund trustee loan for the suit land. In paragraph 6 of his statement dated 23rd June 2015, he states as follows:-

“That I was to benefit from land parcel Number BUNGOMA/KAMAKOIWA/577 as the only person who repaid the loan from Settlement Fund Trustee of land loan of Kshs. 6,300/= and there was also development loan which I paid.”

And in support of that evidence, the plaintiff also produced as part of his documentary evidence the following letter dated 31st October 1967 which I shall reproduce in full as it is brief:-

“The Manager

31st October 1967

National & Grindlay Bank Ltd

Government Road

P O Box

NAIROBI

Dear Sir

RE: BANKER’S ORDER

I enclose herewith a banker’s order executed by Mr Wilson Kaiga for the sum of Kshs. 200 to be paid to the Settlement Fund

Trustees from 30th November 1967 and thereafter on 30th of each preceding month.

Please take the necessary steps.

Yours faithfully

C. N. KAMAU

For DIRECTOR OF SETTLEMENT.”

That letter lends credence to the plaintiff's claim that he is the one who paid the Settlement Fund Trustee loan on behalf of the deceased. How then can the defendant be justified in claiming the suit land as his private property?

The description that he is “*untrustworthy*” fits him very well.

Finally, among the documents filed by the plaintiff is a letter dated 15th April 1996 which bears the thumb print of the deceased and is witnessed by two other persons one of who is the defendant herein. The document is not very legible having been handwritten some 23 years ago but its contents are very relevant to these proceedings and I will try and reproduce it fully:-

“15TH APRIL 1996

GEDION GUDAH KAIGA

He acquired plot No. 118 KAMUKUYWA SCHEME TONGAREN.

It measured 44.4 acres. H decided to sell or transact ten acres to MR KENNETH OLAKA at a price of 28,000 (Thousand only). Among the amount he paid a loan and built a small semi permanent house. The plot was sub – divided to 578 and the remainder has one for GEDION was now 577 KAMUKUYWA. Mzee GEDION had given DANIEL LIVOI Plot NO 577 to take care. Since DANIEL LIVOI has proved unfaithful by starting to sell, he has decided that the land be transferred back to him. Plot NO 577 measures 34.4 acres. Mzee GEDION GUDAH KAIGA wishes to subdivide seven acres to his son WILSON KAIGAH and DANIEL LIVOI also seven acres. The remaining balance to be returned to him.

GEDION KAIGA – sign

E.P

DANIEL LIVOI GEDION

ID 4399488/67

Sign D.O 1 TONGAREN.”

The above document, and whose contents were not rebutted, is clear evidence of how the deceased wished to have the suit land shared among his children. It is clear that the plaintiff and defendant were each to get seven acres and the balance was to remain in the deceased's names. And since the plaintiff has indicated in his statement that the only dependants of the deceased, apart from the parties herein, were **ROY JENDEKA MUDULIA** and **BENNAH GWAMBEZA**, this Court can safely conclude that the remainder of the suit land was to be held in the names of the deceased in trust for his other children. Indeed the defendant has himself filed as part of his documents the proceedings in **BUNGOMA HIGH COURT CIVIL APPEAL NO 64 OF 2007** where **ROY JENDEKA MUDULIA** who I am positive is the same person as **ROIDA JENDEKA MUDULIA** mentioned in the plaintiff's statement had moved to the **TONGAREN LAND DISPUTES TRIBUNAL** seeking a portion of land parcel **NO BUNGOMA/ KAMAKOIWA/2045** from the defendant which she was awarded although that award, as I have already stated above, was set aside by **MUKUNYA J** as the Tribunal had no jurisdiction to make such an award. However, the fact that **ROY (ROIDA) JENDEKA MUDULIA** actually moved to the Tribunal seeking land parcel **NO BUNGOMA/KAMAKOIWA/2045** which is a sub – division of the suit land is a clear demonstration that she was trying to enforce the trust. The document dated 15th April 1996 signed by the deceased in the presence of the defendant herein is cogent evidence upon which this Court can make a finding that the suit land was registered in the names of the defendant to hold in trust for the plaintiff and his other siblings. I am satisfied from the evidence herein that the plaintiff has established the claim of trust. The defendant is a mere trustee holding the suit land in trust and not as his private property. Judgment shall therefore be entered for the plaintiff as prayed in the Plaintiff.

Having said so, I have agonized on whether I should make any direct orders in favour of **ROIDA (JOY) JENDEKA MUDULIA** and **BENNAH GWAMBEZA** who are not parties in this suit yet they are beneficiaries of the suit land. I have decided not to do so because they are strangers to this suit. I will however make orders to ensure that their interests are protected by appointing the plaintiff as their trustee since he has himself stated in his statement that they too are beneficiaries.

The up – shot of the above is that this Court makes the following final Orders:-

1. The Land Registrar to forthwith cancel the titles to land parcels NO BUNGOMA/KAMAKOIWA/2045, 2046 and 2047 and the same to revert to BUNGOMA/KAMAKOIWA/577.

2. The defendant holds land parcel NO BUNGOMA/KAMAKOIWA/577 in trust for himself, the plaintiff and other beneficiaries.

3. The trust is determined in the following terms:-

(a) The plaintiff to be registered as proprietor of 7 acres out of land parcel NO BUNGOMA/KAMAKOIWA/577.

(b) The defendant to be registered as proprietor of 7 acres out of land parcel NO BUNGOMA/KAMAKOIWA/577.

(c) The remaining portion to be registered in the names of the plaintiff TO HOLD IN TRUST for ROIDA (JOY) JENDEKA MUDULIA and BENNAH GWAMBEZA to be shared equally.

(d) As the parties are family, each to meet their own costs.

Boaz N. Olao.

J U D G E

23rd May 2019.

Judgment dated, delivered and signed in Open Court this 23rd day of May 2019 at Bungoma.

Plaintiff – present

Defendant – absent

Joy/Felix – Court Assistants present

Right of Appeal explained.

Boaz N. Olao.

J U D G E

23rd May 2019.