



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 70 OF 2015

(FORMERLY E.L.C. KERUGOYA 96 OF 2013)

(FORMERLY EMBU CIVIL CASE NO. 186 OF 2010)

NYAGA KANYUA.....PLAINTIFF

VERSUS

CHARLES KINYUA MUNENE.....1ST DEFENDANT

CHARLES MUKUTHU KAMUGANE.....2ND DEFENDANT

ASSOCIATION OF JEHOVAH'S WITNESSES

IN EAST AFRICA TRUSTEES – SAMUEL MWANGI,

KIALA MWANGI AND ROBERT KAWALA.....3RD DEFENDANT

JUDGEMENT

1. By a plaint dated 14th December 2010 and amended on 1st August 2018, the Plaintiff sought the following reliefs against the Defendants:

a) *A declaration that Monica Gicuku Simon was holding land parcel Nos. Kyeni/Mufu/4345 and the resultant sub-divisions that is land parcels Nos. Kyeni/Mufu/4791, 4792, 4793, 4795 and 4796 in trust for the children that is the Plaintiff Nyaga Kanyua and his siblings Simon Njiru Njauke, Esther Wachuka and Festus Ileri and that land parcels Nos. Kyeni/Mufu/4791, 4792, 4793, 4795 and 4796 were unlawfully, irregularly, fraudulently and in breach of trust by Monica Gicuku Simon to her children transferred to the Defendants.*

b) *That the District Land Registrar Embu, be ordered to cancel the name of the 1st Defendant Charles Kinyua Munene from the register for land parcel Nos. Kyeni/Mufu/4791 and 4792, the name of 2nd Defendant Charles Mukuthu Kamugane from the register for land parcel number Kyeni/Mufu/4793 and the name of the 3rd Defendant. The Association of Jehovah's Witnesses in East Africa Trustees from the register of land parcel Nos. Kyeni/Mufu/4795 and Kyeni/Mufu/4796 and the name of the Plaintiff Nyaga Kanyua be entered in the registers for land parcel Nos. Kyeni/Mufu/4791, 4792, 4793, 4795 and 4796 to hold the said parcels of land in trust for himself and his siblings Simon Njiru Njauke, Esther Wachuka and Festus Ileri and that the District Land Registrar do issue title deeds to the said parcels of land to the Plaintiff.*

c) *That the 1st, 2nd and 3rd Defendants, their agents, servants, employees, families and their properties do remove themselves from land parcel Nos. Kyeni/Mufu/4791, 4792, 4793, 4795 and 4796 within 60 days from the date of judgement and that in default the Defendants jointly and severally be evicted from land parcel Nos. Kyeni/Mufu/4791, 4792, 4793, 4795 and 4796 upon expiry of 60 days from the date of judgement and thereafter the 1st, 2nd and 3rd Defendants by themselves, their family members, servants, employees or agents be permanently restrained from entering upon, occupying, utilizing and/or in any way interfering with the Plaintiff, Simon Njiru Njauke, Esther Wachuka and Festus Ileri's occupation, use and exercise of their proprietary rights over land parcel Nos. Kyeni/Mufu/4791, 4792, 4793, 4795 and 4796.*

d) *That the Plaintiff be awarded costs of this suit.*

2. The Plaintiff pleaded that he was the son of the late Monica Gicuku Simon (hereinafter *Monica*) who was the beneficiary and proprietor of Title no. *Kyeni/Mufu/4345* (hereinafter *parcel 4345*). The said Monica had acquired parcel 4345 as a beneficiary of the estate of her late father Simon Njiru Njauke (hereinafter *Simon*). The Plaintiff contended that Monica was to hold parcel 4345 on her own behalf and in trust

for the grandchildren of Simon, including the Plaintiff.

3. The Plaintiff further pleaded that in breach of trust and in a fraudulent and illegal manner Monica had secretly sub-divided parcel 4345 into 6 parcels, that is, *Title Nos. Kyeni/Mufu/4791-4796* (hereinafter the *suit properties*) and transferred five of them to the Defendants. The only parcel which was spared was parcel 4794.

4. The Plaintiff's contention was that Monica alienated the suit properties without consulting her children and without obtaining their consent or concurrence. The Plaintiff therefore wanted the said transfers nullified, the Defendants' titles cancelled and the suit properties registered in his name.

5. It is noteworthy that even though the Plaintiff made serious allegations of fraud, breach of trust and illegality against Monica, her legal representative was not joined in the suit to respond to those allegations.

6. By a statement of defence dated 14th February 2011 and amended on 26th September 2018, the 1st Defendant denied the Plaintiff's claim in its entirety. He denied any wrongdoing and denied all particulars of fraud and illegality pleaded by the Plaintiff. He stated that he was a purchaser for value of parcel Nos. 4791 and 4792. He further pleaded that the transaction took place more than 19 years ago hence the suit was statute barred.

7. The 2nd Defendant filed a statement of defence dated 9th February 2011 which was later amended on 28th September 2018. He similarly denied the Plaintiff's claim in its entirety. He pleaded that he was a purchaser for value of parcel 4793 and that there was no subsisting encumbrance against the title at the time of purchase.

8. The 2nd Defendant further denied all the allegations and particulars of fraud and illegality pleaded in the amended plaint and put the Plaintiff to strict proof thereof. He also pleaded that at all material times the Plaintiff was aware of the succession proceedings with respect to the estate of Simon but he did not lodge any objection.

9. The 3rd Defendant filed a statement of defence dated 17th May 2011 which was amended on 1st October 2018. The 3rd Defendant denied the Plaintiff's claim in its entirety. It was pleaded that the 3rd Defendant was a *bona fide* purchaser for value of parcel Nos. 4795 and 4796 from Monica who was the registered proprietor at the material time. The allegations and particulars of fraud and illegality were denied and the Plaintiff put to strict proof thereof.

10. The Plaintiff filed a reply to defence reiterating the contents of the amended defence and joining issue upon the amended defences. The Plaintiff maintained that Monica was merely a trustee and had no authority to transfer the suit properties to the Defendants.

11. At the trial hereof, the Plaintiff testified as the sole witness and closed his case. None of his brothers and sisters testified in support of his claim. He stated that they were not interested in pursuing the suit properties. The Plaintiff conceded that parcel 4345 was a sub-division of *Title No. Kyeni/Mufu/1139* which belonged to Simon. The Plaintiff's main grievance was that his mother, Monica, had secretly sub-divided and sold her share of inheritance from Simon without consulting him and his siblings.

12. The Defendants too testified and called witnesses at the trial. The common thread in their evidence was that they were all purchasers for value of the suit properties. They stated that Monica voluntarily sold the suit properties to them and that upon obtaining the consent of the relevant Land Control Board they were duly registered as proprietors of their respective parcels.

13. Upon conclusion of the trial on 26th February 2019 the Plaintiff was given 30 days to file and serve written submissions whereas the Defendants were given a similar period to file and serve theirs. The record shows that the 1st Defendant filed his submissions on 30th May 2019, the 2nd Defendant filed his on 24th April 2019 whereas the 3rd Defendant filed theirs on 21st May 2019. However, the Plaintiff's submissions were not on record at the time of preparation of the judgement.

14. The court has noted from the record that the parties did not file an agreed statement of issues. The court shall therefore frame the issues for determination as provided for in law. Under **Order 15 Rule 2 of the Civil Procedure Rules** the court may frame issue from the following:

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

15. The court has considered the pleadings, documents and the evidence on record. The court is of the opinion that the following issues arise for determination in this suit:

- a) Whether the late Monica was holding parcel 4345 or the suit properties in trust for the Plaintiff and his siblings.
- b) Whether the Plaintiff has demonstrated breach of trust, fraud or illegality in the transfer of the suit properties to the Defendants.
- c) Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.

d) Who shall bear the costs of the suit.

16. The court has considered the evidence and submissions on record on the 1st issue. There is no doubt that Monica acquired parcel 4345 through succession proceedings of the estate of her late father, Simon. The Plaintiff and his siblings were not entitled to a share of the estate of Simon since they were not beneficiaries of the estate. It was Monica who was a beneficiary of that estate and she is the one who was given a share. See **Yunes Kerubo Oruta & Another V George Kombo Oruta & Another [2015] eKLR**.

17. Although the Plaintiff contended that Monica was given parcel 4343 to hold it on her behalf and in trust for the Plaintiff and his siblings, there was no material on record to demonstrate the existence of such trust whether express, implied or resulting trust. In the case of **Peter Ndungu Njenga Vs Sophia Watiri Ndungu [2000] eKLR** it was held, *inter alia*, that:

“The concept of trust is not new. In cases of absolute necessity, but only in cases of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties must be clearly determined before a trust can be implied. See Ayoub Vs Standard Bank of South Africa [1963] EA. 619 at pages 622, 623.”

18. The court is not satisfied from the material on record and the conduct of all the concerned parties that any form of trust has been established or could be implied in the circumstances. The Plaintiff indicated in his amended plaint that he had three siblings. One may well ask, if they were aware of the alleged trust how come they did not turn up at the trial to tender their evidence. When the Plaintiff was asked at the trial whether his siblings were claiming any portion of the suit properties, he replied that they were not interested and that they did not want to be involved in the case.

19. The court has further noted that there is no material on record to demonstrate that the Plaintiff or his siblings had taken any steps to assert their perceived rights under the alleged trust during the lifetime of Monica. There was no indication that they made any demands upon Monica with respect to the suit property.

20. It would also appear that Monica lived for a considerable period of time after the transfer of the suit properties to the Defendants between 1999 and 2002. There was no indication that the Plaintiff took any legal action against her for the purpose of enforcing the alleged trust. There was also no indication that the Plaintiff ever lodged any encumbrance against the suit properties in order to protect his perceived interest in either parcel 4345 or the suit properties.

21. As indicated earlier in the judgement, the Plaintiff has made serious allegations of breach of trust, fraud and illegality against Monica. He did not join her personal representative, if any, to respond to those allegations. Monica was the main actor in all the transactions on the basis of which the Plaintiff filed the suit. It would be a violation of the cardinal rules of natural justice for a court of law to make an adjudication without the affected person being heard. In the premises, the court finds and holds that the Plaintiff has failed to demonstrate the existence of a trust to the required standard as the alleged wrongdoer was not made a party to the suit.

22. The court has also considered the material evidence on record and the submissions on the 2nd issue. The court is not satisfied that the Plaintiff has demonstrated a breach of trust, fraud and illegality against any of the defendants. As indicated before, the Plaintiff's mother (Monica) was the main actor in the impugned transactions. She is the one who sub-divided, sold and transferred the suit properties to the Defendants. The role of the Defendants was merely that of willing purchasers. There is evidence on record that it was Monica who informed the 1st and 2nd Defendants that she was selling the suit properties. The purchase price was negotiated and paid at Monica's house. The purchasers were taken to the Land Control Board by Monica for consent to transfer.

23. In those circumstances, the court is unable to appreciate how the Defendants could be faulted for purchasing the suit properties. There was, clearly, no evidence of fraud or illegality on their part in the acquisition of the suit properties. If there was any irregularity in Monica's acquisition of the suit properties from the estate of Simon during the succession proceedings, the Defendants have nothing to do with it. If, Monica's co-administrator did not sign or counter sign any relevant statutory forms, that can only be an issue between the concerned administrators and the beneficiaries of the estate of Simon. As indicated before, the Plaintiff is neither an administrator or beneficiary of the estate of Simon. He has no legal standing to complain on how his estate was administered or distributed.

24. The third issue is whether or not the Plaintiff is entitled to the reliefs sought in the amended plaint. The court has already found and held that the Plaintiff has failed to demonstrate the existence of a trust and breach of trust. The court has also found and held that the Plaintiff has failed to demonstrate the allegations of fraud and illegality pleaded against the Defendants. It would therefore follow that the Plaintiff is not entitled to the reliefs sought in the amended plaint or any one of them.

25. The fourth issue 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. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigants should not be awarded costs of the suit.

26. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his claim to the required standard against the Defendants. Consequently, the Plaintiff's suit is hereby dismissed with costs to the 1st, 2nd and 3rd Defendants.

27. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **20TH** day of **JUNE 2019**.

In the presence of Mr. Okwaro for the Plaintiff; 2nd Defendant present in person, Mr. Manyange holding brief for Ms. Ndirangu for the 3rd

Defendant and in the absence of the 1st Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

20.06.19