



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND CASE NO. 67 OF 2015

DANSON CHESUM SUTER.....PLAINTIFF

VERSUS

PETER SUTER.....1ST DEFENDANT

GILBERT SUTER.....2ND DEFENDANT

JUDGMENT

By a plaint dated 9th March 2015 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) A temporary injunction against the defendants their servants and/or agents restraining them from entering, ploughing, occupying, constructing and or in any way dealing with plot No. MOIBEN/KAPSOWAR/1854
- b) A declaration that the plaintiff is the rightful owner of parcel of land known as plot No. MOIBEN/KAPSOWAR/1854
- c) An order directing the defendants to give vacant possession of the excised portion of land and eviction to issue.
- d) Costs and interest of the suit.

The 1st defendant filed a defence and counterclaim on 17th March 2015 and sought for the following orders:

- a) A declaration that the plaintiff holds the suit land in trust for himself, and the 2nd defendant in the ration 2.5 acres, 2.5 acres and 1 acre for the Plaintiff.
- b) A declaration that the 1st defendant is the rightful owner of 2.5 acres out of the suit land.
- c) An order directing the County Surveyor to subdivide the suit land and give the parcel to its rightful owners.
- d) Pursuant to (b) above, an order do issue directing the county land registrar, Elgeyo Marakwet County to register an amended Registry Index Map and issue titles upon sub-division.
- e) A permanent injunction restraining the plaintiff from trespassing or interfering with the plaintiff's portion of land out of the suit land.
- f) An order restraining the plaintiff from charging, leasing or interfering in anyway with the suit land.

Before the matter proceeded the plaintiff withdrew his suit against the defendants in its entirety on 9th May 2017. On 28th February 2018 a consent was recorded whereby the 2nd defendant was given 1 acre out of parcel No. Elgeyo Marakwet/ Kapsowar (Moiben)1854, the plaintiff was to execute the necessary documents to effect the transfer and the 2nd defendant was discharged from the suit.

On 25th September 2017 Counsel for the parties recorded a consent to the effect that status quo agreed on as at 19th March 2015 be maintained and any compensation due from the National land Commission in respect of land parcel No. MOIBEN /KAPSOWAR/1854 or part thereof be deposited in a joint accounts of MAGARE MUSUNDI & Co Advocates and LUSINDE KHAYO & Co. Advocates. Pending the hearing and determination of this suit. The plaintiff was allowed to file a defence to counterclaim and witness statements within 7 days.

The suit now remained between the 1st defendant and the plaintiff in respect of the counterclaim.

1ST DEFENDANT'S CASE IN THE COUNTERCLAIM

It was the 1st defendant's case that he was given the suit land which belonged to his father in 1976. That the suit land was registered in the name of his older brother as he was the only adult out of all the children and therefore he held it in trust.

PW1 testified that he was given the green card and produced the same as P-Exh 1. He also testified that the land belonged to his father and mother. He stated that he in occupation of the land and his claim was only for 2 ½ acres as there were two families. He testified that his brothers were not using their shares of the suit land.

The parties agreed by consent that the 2nd defendant get one acre out of the suit land and he was discharged from the proceedings. He testified that they never agreed how to share the land and he did not attend any meeting where he signed transfer forms.

PW2 testified that the suit land belonged to their father but was registered in Danson's name because during demarcation he was at Lelan and gave authority to Danson to register on behalf of their father and hold in trust. He further testified that in a meeting held on 12th March 2014 it was agreed by elders that Danson and Peter were to get 2 ½ acres of land each and Gilbert 1 acre. Danson refused and insisted that he was entitled to 3 ½ acres. He testified that he was the chairperson in the meeting where it was agreed that Danson get 3 ½ acres, Peter 1 ½ acres and Gilbert 1 acre. He further stated that in the as per exhibit 4 the chief wrote a letter indicating that the land should be divided as per the elders' decision.

The Plaintiff, Danson Suter, the defendant in the counterclaim testified that he was entitled to 3 ½ acres as he was the one present during the time of demarcation. He stated that he did not know of the meeting of 20th March 2014. He produced the title deed dated 23rd February 1981, consent dated 21st August 2013, Application for consent, mutation form, minutes for the meeting on 12/9/2013 and Musa Yator's letter dated 29th July 2013 as plaintiff exhibits 1 through 6. Further, it was his testimony that there was no documentation that he was to get 2 acres from the suit land.

He also testified that he did not buy the suit land and that the land was family land.

DW2, a sister to the 2nd defendant and a step sister to the other parties testified that she had attended 2 meetings on the suit land and in one of them it was agreed that Danson and Peter get 2 ½ acres each and Gilbert 1 acre. She was a year old at the time of adjudication.

PLAINTIFF IN THE COUNTERCLAIM'S SUBMISSION

Counsel stated that from the evidence it is not disputed that all the siblings were minors at the time of registration hence the land could not have been registered in their names. That their father was away and the defendant/plaintiff was the only adult and that the plaintiff has not disputed that his siblings are entitled to the land or that he is holding it in trust.

Counsel further submitted that there was a meeting held on 20th March 2013 where it was agreed that the land be shared equally between Peter and Danson and the evidence of the 1st defendant makes it probable that the land was to be shared equally. The defendant has denied the meeting's existence despite the minutes indicating his presence. Further that he has also not led evidence explaining why he is prepared to give out 1 acre and 1 ½ acres despite being the absolute owner of the property.

Counsel relied on the case of **Peter Gitonga v Francis Maingi M'Ikiara Meru HCCC No. 146 of 2000** on creation of trusts. Counsel therefore urged the court to find that the plaintiff in the counterclaim is entitled to 2.5 acres of the suit land.

DEFENDANT IN THE COUNTERCLAIM'S CASE

It was the defendant in the counterclaim's case that he participated in the degazettment of the forest to create the suit land. That he obtained 2 acres and the other share of 4 acres was comprised of the portion of his father and mother who also participated in the process. The entire piece of land, 6 acres was registered in the Plaintiff's name.

He stated that their mother was not present during the forest clearance and therefore was not entitled to a share of the land. Their father offered one share to the 2nd defendant on behalf of their mother and he was given one acre. He therefore testified that he is entitled to a bigger share as he participated in the forest clearance.

DEFENDANT'S SUBMISSION

Counsel for the defendant relied on the provisions of Sections 24, 25 and 26 of the Land Registration Act on absolute ownership from registration and indefeasibility of title.

Counsel submitted that the question of trust is a matter of evidence and there was no evidence placed before the court to prove it was being held in trust. Further, that the minutes of the meeting are a fabrication and therefore cannot be evidence of a trust. Counsel submitted that the only issue for determination is whether a trust was created and that the counterclaim has not been proved by the 1st defendant. She urged the court to dismiss the counterclaim and that the 1st defendant is only entitled to 1.5 acres which he was willing to transfer.

Analysis and determination

This is a case which was filed by the plaintiff who later withdrew the same in its entirety against the defendants. There was a consent giving the 2nd defendant 1 acre out of the suit land and the 2nd defendant was discharged from the proceedings. The suit was withdrawn when the 1st defendant had filed a counterclaim which is the case before the court for determination. From the record and the evidence there is only one issue for determination which is whether the plaintiff held the land in trust for the defendants.

Whether the plaintiff held the suit land in trust for the defendants and what acreage?

In **Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggah Ahmed Al-Heidy & Others [2015] eKLR** the court pronounced itself on trusts as follows;

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175).

Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (supra).

In **Peter Gitonga v Francis Maingi M'Ikiara [2007] eKLR** the court held;

A "trust" can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this;

"Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged." See HCCC 1400 of 1973 as quoted in Mwangi vs Mwangi [1986] KL R 328 at 332, by Shah J.A.

It is not disputed that the suit land is family land which belonged to the father of the parties herein. It is also not disputed that the defendants were minors by the time this land was registered in the name of the plaintiff. His only issue is that he helped with the clearance of the forest and therefore he should get a bigger portion. The father of the parties evidently had no other option rather than to have their older brother registered as the proprietor of the suit land. Looking at the circumstances and the evidence adduced it is clear that the plaintiff held the suit land in trust for the defendants.

Why did the plaintiff willingly agree to give the 2nd defendant 1 acre and discharge him from the case? It can be deduced from the evidence that this was what had been agreed in a meeting which resolved that the brothers get 2.5 acres each with the 2nd defendant getting 1 acre. The defendant in the counterclaim has not proven why he should have the larger share. His initial claim is based on greed and an attempt to deny the brothers their shares.

In **Joseph M'itonywa M'kirigia v M'nkumbuku M'kirigia [2018] eKLR** the court held;

As a Trustee the Defendant shall ensure that the suit land is shared in 2 equal parts between himself and the Plaintiff.

In the case cited above the circumstances were similar to the present case and the court held that the land be shared in equal parts. I have considered the evidence and find that the plaintiff held the land in trust for the defendants. I therefore find that the counterclaim has merit and is therefore allowed as prayed and give the following orders:

- a) A declaration is hereby issued that the 1st defendant is the rightful owner of 2.5 acres out of the suit land.
- b) An order is hereby issued directing the County Surveyor Elgeyo Marakwet to subdivide the suit land and give the parcel to its rightful owners.
- c) An order is hereby issued directing the County Land Registrar, Elgeyo Marakwet County to register an amended Registry Index Map and issue titles upon sub-division and payment of the requisite fees.
- d) A permanent injunction restraining the plaintiff from trespassing or interfering with the 1st defendant's portion out of the suit land.
- e) Each party to bear their own costs of the suit.

Dated and delivered at Eldoret on this 3rd day of June, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of Mr.Karuiki Mwaniki holding brief for Mrs.Khayo for defendant and Mr.Too holding brief for Mr.Magare for Plaintiff.

Mr.Emmanuel – Court Assistant