



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 52 OF 2008

NANCY MWARI MARETE.....1ST PLAINTIFF

ERIC MWENDA.....2ND PLAINTIFF

VERSUS

DANIEL RIUNGU MARETE.....1ST DEFENDANT

PETER MUINDI M'ITIRI.....2ND DEFENDANT

JUDGMENT

1. The 1st plaintiff is a sister of 1st defendant, while 2nd plaintiff is a son of 1st defendant. Both plaintiffs are claiming entitlement to the land parcel **No. 2654/ Abothuguchi/Kithirune** (Suit land) measuring 0.41 Ha. This land is currently registered in the name of 2nd defendant who bought the land from 1st defendant.

2. Vide the Plaint dated 13th May 2008, it is averred that 1st plaintiff's share of $\frac{3}{4}$ acre in **Parcel No. 2654 Abothuguchi/Kithirune Adjudication** was separate but was included in the suit land herein when the 1st Defendant applied for the title. The plaintiff's further state that the suit land was registered in the name of Daniel Riungu Marete to hold the same in an implied trust for the plaintiffs and that they (plaintiffs) are the ones in occupation of the suit land. The plaintiffs further contend that 1st defendant had fraudulently sold the suit land to 2nd defendant.

3. The plaintiffs therefore sought orders for the transfer of the suit land Parcel No. **2654/Abothuguchi/Kithirune** to themselves (plaintiffs) as the transaction where the land was sold to 2nd defendant by 1st defendant was null and void.

4. The 1st and 2nd Defendants filed their respective statement of defences on 16th July 2008 denying the plaintiff's claim *in toto*. The 1st defendant averred that he was the registered proprietor of the suit premises and he sold the same for value to the 2nd Defendant. The 2nd Defendant equally claimed that he bought the land for value from the 1st Defendant.

5. **Pw1 Nancy Mwari** testified that they have lived on the suit premises for the last 20 years together with the 2nd Plaintiff and other family members, that the suit parcel came out of **Abothuguchi/Kithirune/187** which belonged to **M' Marete Kiogo** (father of 1st plaintiff and 1st defendant) who passed on in September 1998. She claimed that her father had 3 parcels of land which he had subdivided during his lifetime, two of which were granted to the sons, while she was granted a parcel next to that of the 1st Defendant in **Abothuguchi/Kithirune/187**. She identifies her Parcel as **No. 2654/Abothuguchi/Kithirune** Adjudication Section measuring 1.03 acres.

6. PW1 further told the court that the 1st Defendant sold the suit land secretly and never granted them a portion of the aforesaid land, and that they sought to resolve the issue with the area chief where they recorded a settlement that the suit parcel of land belonged to both plaintiffs.

7. During cross-examination, PW1 conceded that no other girls were given land by their father and that the other daughters live on the land of their stepmother. Taken to task as to why she chose Parcel No. 2654 out of Parcels 2651,52,53,54, and 55, PW 1 claimed that parcel 2654 was her portion.

8. **Pw2 Eunice Nyoroka** testified and adopted her witness statement dated 8.3.2013 as her evidence. She is the mother of the 2nd plaintiff and she is a wife of 1st defendant. Her evidence is that the suit premises belonged to the 1st Defendant's father. She stated that she resides on the aforesaid land and lays a claim to the same by virtue of being a wife to the 1st Defendant. It was her testimony that she was not aware

that the land was sold by the 1st Defendant but only came to learn about the sale when eviction orders were sought in respect of the suit premises.

9. Pw3 Eric Mwenda also testified and adopted his statement recorded on 8.3.2013 as his evidence. He avers that he is a son of the 1st Defendant and stays on the land with **Pw1** and **Pw2**. He conceded that Land Parcel No. 187 was inherited by his uncles and his father after a succession cause to which his father got land parcel No. 2654 and was thereby issued with title. He denied that he was given land in Laikipia by his father. He stated that his father left the suit premises in the year 2006.

10. On 7.11.2018, Parties adopted a consent to the effect that item no. 4 in plaintiff's list of documents dated 12th March 2013 be produced as **PeXH 1**, which is a Copy of Green card for **L.R No. Abothuguchi/ Kithirune/2654**.

11. DW1 Peter Muindi is the 2nd defendant. He testified and also adopted his statement recorded on 20.12.2012 as his evidence. He contends that 1st Defendant is the one who sold to him the suit land and was informed that 1st defendant had given his son (**Pw3**) land in Laikipia. **DW1** told the court that he did a search before he purchased the land and he established that the suit land was registered in the name of the 1st Defendant. He bought the land after Confirmation of grant with the understanding that the parcel measuring 1.03 acres shall be excised out of Parcel No. 187. He denied that the land was fraudulently transferred to him by the 1st Defendant but failed to avail the consent for transfer of land.

12. DW1 further stated that they had consented with the 1st Defendant in **Meru Hcc No. 101 Of 2007 Daniel Riungu Marete Vrs Peter Muindi M' Itiri** that the 1st defendant would move out of the suit land and give him occupation of the said property but the same was halted by the orders of this Court. He denied that the plaintiff's had put structures in the aforesaid premises and maintained that at the time of sale the suit land was vacant.

13. DW1 produced the following documents in Support of defence case; **Dexh 1** Documents in respect to **succession cause No. 80 of 2004**, **Dexh 2** Documents in Respect to the Land Control Board, **DEXH 3** Agreement for Sale, **Dexh 4** Copy of Title deed in respect of Laikipia/Kalalu/877, **Dexh 5** Title in respect of P/No. Abothuguchi/Kithirune/2654 and **Pexh 6** Document in respect to **Meru HCC No. 101 of 2007**.

14. Dw2, Gerald Gituma testified and adopted as his evidence, his witness statement recorded on 20.12.2012. He is a brother of the 1st Defendant. He avers that they filed a succession cause and distributed the estate of their father granting parcel No. 187 to **Julius Meme, Daniel Riungu, John Mwiti and Samson Kiriungi**. He told the court that their father had showed each person their shares. He further stated that at the time of filing the succession cause, none of their seven (7) sisters had opposed the same. He confirmed that the 1st Defendant had sold his share.

15. DW2 also claimed that **PW1** and **PW2** do not reside on the suit land but confirmed that the 1st Defendant has two houses on the land. During cross examination, **DW2** initially stated that **Eric**, 2nd plaintiff stays on the suit land but he later said that he doesn't know where Eric stays. As for his sister **Nancy**, **DW2** stated that she doesn't stay on the suit land, but previously, she resided in Nkabune with one **Mwirigi Mathew** with whom they sired one child.

Analysis and Determination

16. I have considered all the evidence, the record and the rival submissions proffered by the parties. I frame the issues for determination as follows;

1. Whether 1st defendant held the suit land **parcel 2654/Abothuguchi/Kithirune** in trust for the plaintiffs.
2. Whether 2nd defendant is an innocent purchaser.

Whether 1st defendant held the suit land parcel 2654/Abothuguchi/Kithirune in trust for the plaintiffs.

17. The claim by the plaintiffs herein has been anchored on trust. That the 1st defendant held **land Parcel Abothuguchi/Kithirune/2654** in trust for the plaintiffs. However, it was submitted by the defence that the issue of trust was not specifically pleaded by the plaintiffs. On this point, defence relied on the provisions of **order 2 rule 4 of the Civil Procedure rules; Nairobi civil appeal no. 171/2011 Kenya tea development agency limited vs. Victory tea brokers limited, and Nairobi civil case no. 714 of 2003 National social security fund board of trustees vs. Dr. Sally Kosgei & Another**.

18. I find that paragraph 5 of the plaint captures the following content;

“at all material times, parcel no. 2654/Abothuguchi /Kithirune/ Adjudication Section was registered in the name of Daniel Riungu Marete to hold it in an implied trust for the plaintiffs”.

19. In response thereof, 1st defendant in his statement of defence at paragraph 3 has stated as follows;

“by way of defence the 1st defendant denies the contents of paragraph 5 and particularly that the defendant held the parcel of land known as Abothuguchi/Kithirune/2654 in trust for the 1st plaintiff or at all and puts the plaintiff into strict proof thereof”.

20. It is therefore clear that plaintiffs had raised the issue of trust in their pleadings and that is why 1st defendant framed his defence in the manner stated herein above.

21. The main issue that spurns out is whether an element of trust arose in the relationship of the 1st Defendant with the Plaintiffs and whether the same curtailed the sale of the suit premises. The law never implies, the court never presumes a trust but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties- see **Mbuthu and 8 Others versus Waitimu & 11 Others (1986)KLR 171**. In **Thika ELC No. 275 of 2017 (formerly Nairobi H.C.C.C.No. 162 of 2005) Peter Nyaga Kairu vs. Esther Wanjiku Njau & Others**, I stated as follows on matters trust;

“TRUST, any TRUST be it customary, resulting or constructive trust is a question of fact and must be proved. It cannot be imputed.”.

22. This court therefore has to determine whether the suit land is ancestral land or not. If the answer is in the affirmative, then whether the plaintiffs are entitled to such ancestral land.

23. The original owner of the suit land was one M^rMarete Kioga, the father of 1st plaintiff and 1st defendant. The 1st defendant had filed a succession cause and as per the confirmed grant dated 23.5.2005, he distributed the estate of the deceased in the manner set out therein. One of the properties that 1st defendant acquired was parcel no. **LR.ABOTHUGUCHI/KITHURINE/187**, -see defence exhibit 1 (e). This property was subsequently subdivided into 5 parcels of which the suit land no.2654 is one of them. This parcel is the one which was sold by 1st defendant to the second defendant.

24. It is therefore crucial to determine first and foremost as to whether parcel no.187 was ancestral land. Both plaintiffs claim that they live on the suit land. The 1st defendant did not testify, but his brother, one Gerald Gituma (**DW2**) did. He was rather evasive on the issue of who is occupying the suit land. He initially stated that the 2nd plaintiff stays on the suit land, then further during cross examination, he stated that;

“I don’t know where Eric is staying but I know he is at Kithirune. I don’t know if he is on the suit land Abothuguchi/Kithirune/2654. I can’t state that Eric is on the portion that was sold to Muindi because I don’t know who stays there”.

25. Thus DW2, who happens to be a brother of 1st plaintiff and an uncle of 2nd plaintiff did not challenge the averments made by plaintiffs that the latter occupy the suit land.

26. The 2nd defendant who testified as DW1 was more forthright on the issue of whether the suit land is ancestral land. He stated as follows during cross examination;

“For the land No. 187, it was originally owned by Marete Kioga. It is hence ancestral land. That is where Riungu was born. I don’t know if Nancy was born there. I understand she got married. They however must have been raised together on that land (Riungu and Nancy). Nancy and Eric are using Marete’s structures which are two houses”.

27. This evidence clearly confirms that **parcel no.187** was ordinarily used as the family or ancestral land. This is where even 1st defendant grew up and he only relocated to another parcel after he sold the suit land in year 2006 or thereabout. I have no doubts that the suit parcel was ancestral land.

28. Are the plaintiffs entitled to such ancestral land?. **Section 28 of the Registered Land Act** (repealed) provided that:

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject..... Unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register. Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

29. **Section 30 of the Registered Land Act (repealed)** provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register(g)The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”

30. **Section 28 of the Land Registration Act** bears a heading **“OVERRIDING INTERESTS”** and provides that;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register....(b) trusts including customary trusts (emphasis added)”.

31. It is clear that both the current legal regime and the immediate former legal regime recognized customary rights which are an encumbrance to the title holder.

32. In **Justus Maina Muruku v Jane Waithira Mwangi [2018] eKLR** the Court relied on the decision of **Justice Khamoni in Gathiba vs Gathiba Nairobi HCCC No. 1647/84** where the court stated that;

“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126(1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them, where a person holding a piece of land in a fiduciary capacity under any of the customary law has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as trustee. (Emphasis added)””

33. In **Isack M’Inanga Kiebia v Isaya Theuri M’Lintari & another [2015] eKLR**, the Supreme Court made reference to the High court’s decision in the matter where the learned Judge held that the claim of interest by the respondents was one of trust, emanating not as a result of possession or occupation of the suit property, but from the fact that the property was ancestral land, passed on from generation to generation, thus qualifying **as an intergenerational trust**. The SCOK affirmed the High Court’s position that a trust, indeed, existed over the suit properties and also held that one need not be in actual physical possession and occupation of land to prove the existence of a trust.

34. In the present matter, plaintiffs are the ones in control of the suit land.- see **Mbui Mukangu vs. Gerald Mutwiri (2004) eKLR**.

35. An argument has been advanced by the defence that plaintiffs have not given any plausible reason as to why they want that **specific parcel no 2654**. To this end it is submitted that parcel no. **Abothuguchi/Kithirune/187** was subdivided after the succession cause into parcels **2651, 2652, 2653, and 2654** and were shared among the brothers of 1st defendant whereby the share of 1st defendant was parcel 2654. That argument does not hold any weight. I have seen the confirmed grant and it shows that **DANIEL RIUNGU MARETE** was to get land no. **Abothuguchi/Kithirune/187** in whole and not just **2654**. The subsequent sub division of that **parcel 187** into the parcels no’s **2651-4** series was not sanctioned by a court order in the succession cause. If 1st defendant found it expedient to share this land with his siblings, then he ought to have taken into consideration the people who were also occupying part of the **parcel 187**, his own sister and his son (plaintiffs).

36. I find that the occupation of the land by the Plaintiffs and the nature of the relationship of the 1st defendant and the plaintiffs created a fiduciary relationship. Further, the court has already made a finding that the suit land was ancestral land which leads to the conclusion that plaintiffs are entitled to the land on the basis of customary trust.

Bonafide Purchaser

37. The 2nd defendant is claiming that he is a bonafide purchaser of the suit land. In **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR** the Court relied on the case of **Katende V Haridar & Company Limited [2008] 2 E.A.173** where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove that:

- (a) he holds a certificate of title;**
- (b) he purchased the property in good faith;**
- (c) he had no knowledge of the fraud;**
- (d) he purchased for valuable consideration;**
- (e) the vendors had apparent valid title;**
- (f) he purchased without notice of any fraud;**
- (g) he was not party to any fraud.”**

38. The 1st defendant had acquired the suit land via succession cause which is a lawful process. It cannot therefore be said that there was fraud in the transfer of the land from 1st defendant to 2nd defendant. But the question is, did 2nd defendant purchase the property in good faith?.

39. The copy of the green card availed by plaintiff's shows that the suit premises was registered on **26.9. 2006** in the name of the 1st Defendant and within a record period of two months on **24.11.2006**, the land was registered in name of 2nd defendant. A caution was placed by the 1st Plaintiff on **20.9. 2007**. The consent to the land control board was made on **14.2. 2006** (see D-Exh2 (a)) while the land sale agreement was made on **2.8.2006** (see D-Exh 3). The timelines of events clearly indicate that the 2nd defendant had set out to buy the suit land long before **parcel 2654** was registered in the name of 1st defendant. That is not all, it is also evident that the two defendants were in haste to dispose off the land from 1st defendant to 2nd defendant. There was certainly no good faith on the part of these two parties (defendants).

40. The 2nd Defendant admitted that he entered into a sale agreement with the 1st Defendant on 2nd August 2006. I have looked at the sale agreement and the same states as follows;

“,...the land is sold with improvement standing thereon, which is a house and piped water. But the developments shall be paid as agreed, that is; the house shall cost Kshs. 40,000/= piped water shall cost Kshs 35,000/=...

41. The testimony of the 1st Defendant that the land was sold vacant and without any structures was therefore false. If anything, 2nd defendant did admit that **Nancy** and **Eric** are the ones using Marete's structures which are the two houses. Thus even as 2nd defendant was in a hurry to get the title in his name, he was aware that plaintiffs were in occupation of the suit land. He therefore did not purchase the property in good faith.

42. In the case of **Samuel Kamere Vs Land Registrar [2015] eKLR** the Court of Appeal held that;

“In order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (Emphasis added).

43. The 2nd defendant certainly does not meet the aforementioned criteria of a bonafide purchaser.

Conclusion

44. I find that the title held by the 2nd defendant in respect of the suit land is encumbered by the overriding interests of the plaintiffs. I therefore proceed to grant orders as follows;

1. It is hereby declared that the plaintiffs are entitled to the parcel of land No. 2654/Abothuguchi/Kithirune measuring 0.41 ha by way of customary trust.

2. An order is hereby issued for the transfer of land Parcel No. 2654/Abothuguchi/Kithirune from the 2nd defendant to the plaintiffs.

3. The Deputy Registrar of this court is hereby authorised to sign the requisite documents to give effect to the implementation of this Judgment.

4. The consent of the land control board is hereby dispensed with in respect of the aforementioned transfer.

5. The second defendant is hereby directed to surrender the original title of parcel no Abothuguchi/Kithirune/2654 to the Land registrar within 30 days from the date of delivery of this ruling failure to which the production of the said title is to be dispensed with in the process of the aforementioned transfer.

6. Any orders of inhibition, injunction and caution subsisting in respect of the land Abothuguchi/Kithirune/2654 are hereby discharged in order to give effect to the implementation of this judgment.

7. The 2nd defendant is at liberty to follow his claim against the 1st defendant in a separate suit.

8. The Costs of the suit shall be borne by the 1st Defendant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF SEPTEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Mwiti for plaintiffs

Kirimi holding brief for Muriuki for defendants

1st plaintiff

2nd plaintiff

2nd defendant

HON. LUCY. N. MBUGUA

ELC JUDGE