REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 9B OF 2019

DANIEL NTOITHA MWERERIA.....APPELLANT

VERSUS

ISAAC MUKARIA MWERERIA.....RESPONDENT

(Being an appeal from the Judgement of Hon. A. G Munene SRM in Civil Case No. 204 of 2012 at Maua)

JUDGMENT

1. The parties herein are brothers, born of the same father and mother. On 26/11/2012, the respondent (former plaintiff) herein filed the suit in Maua Chief Magistrates Court , Civil Case No. 204 of 2012 against the appellant (former defendant) seeking orders declaring that the defendant held land Parcel No. 3376/THIMA/ANTUAMBUI (the suit land) in trust for the plaintiff and an order declaring that the plaintiff is entitled to one acre out of parcel no. 3376/THIMA/ANTUAMBUI. The respondent averred that before the demise of his late father, Mwereria M'naituli in the year 2000, he left him a parcel of land to be held in trust by the defendant who would transfer it to the plaintiff upon coming of age.

2. A statement of defence was filed on 21/12/2012 opposing the suit, where defendant stated that Parcel No. ITHIMA/ANTUAMBUI/3376 was demarcated to him in the year 1983 well before the Adjudication Record was completed and that during the 60 days period provided for filing of objections, no person ever filed any objections against his ownership of the suit land and therefore the said land is the exclusive property of the appellant.

3. During the hearing of the case before the lower court, the plaintiff testified that he is a brother to the defendant who is their 1st born while he is the last born in the family. Plaintiff's case was that their father had entrusted the suit land to defendant to hold it in trust for the plaintiff who was 5 years old at the time. When plaintiff attained the age of majority, his brother, the defendant refused to transfer the one acre out of the suit land prompting the plaintiff to file the suit before the lower court. The plaintiff further stated that all his other brothers, 8 of them got their respective shares of their fathers land. The Njuri Ncheke heard the said dispute and decided in favour of the plaintiff but defendant still refused to transfer the suit land.

4. The testimony of the plaintiff before the lower court was corroborated by his own mother who testified as PW2. Other witnesses were his brother PW3 and a clansman PW4.

5. The defendant on the other hand testified that his father's land was parcel No. 859 and that he was allocated 2 acres on 15/4/1976, of which one acre was his inheritance while the other was for the expenses that he incurred during demarcation exercise. The two acres were combined to form parcel No. 3376. He further added that he is not the eldest son in their family, the eldest son being one Makathimo Mwireria, and that in Meru culture, the oldest son is the one usually given the land to hold in trust for others. In respect to the letter dated 29/03/1984 his father said that the remainder of parcel No. 859 was to be registered in the names of their father and the plaintiff. The defendant had further stated that parcel no ANTUAMBUI/ITHIMA/764 was bought for the plaintiff by his brothers. The testimony of the defendant was supported by DW2 and DW3 who were his brothers (from same father but different mothers).

6. On the 27/12/2018 the Learned Senior Resident Magistrate Hon. A.G. Munene delivered his Judgement, where he determined that Parcel No. 3376/THIMA/ANTUAMBUI was given to the defendant to hold in trust for himself and the respondent and he ordered that 1 acre out of the suit land was to be registered in the name of the plaintiff.

7. Aggrieved by the decision of the Senior Resident Magistrate, defendant has appealed to this court on the following grounds;

a. The learned magistrate erred in law and misdirected himself when he failed to consider the appellants submissions on both points of law and fact.

b. That learned magistrate's decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

c. The learned magistrate erred in law and fact in holding that, the fact that the title deed has been issued to the defendant does not discharge the trust bestowed upon him

d. The learned magistrate erred in law and in fact in holding that one acre out of Parcel No. 3376/THIMA/ANTUAMBUI to be registered in the names of the respondent.

8. On 16.7.2019, the parties through their advocates made a consent whereby they agreed that status quo as appertaining on that day of 16.7.2019 be maintained and that the parties were to file submissions by 16.8.2019. The appellant duly filed his submissions on 1.8.2019. However, I did not see any submissions by the respondent at the time I was handling this file to write the Judgment. Nevertheless, I have proceeded to write the Judgment after considering the record, the issues arising therein as well as the submissions of the appellant.

9. In summary, the question for determination is; ***whether the trial court arrived at a correct decision in determining that the defendant/appellant held the suit land in trust for the plaintiff/ respondent.***

10. It is the duty of this court to re-evaluate the evidence, asses it and make its own conclusions, keeping in mind that it neither saw nor heard the evidence of the witnesses and making due allowance for that- see **Selle v. Associated Motor Boat Company Ltd (1968) EA.**

11. In the Judgment of the Honorable Magistrate, he stated that **"The fact that the title has been issued to the defendant does not discharge the trust bestowed upon him …".** Is this a correct interpretation of the law? In the case of **Jason Gatimu Wangara v. Martin Munene Wangara Kerugoya ELC No. 278 of 2013, Judge B.Olao** was dealing with an almost similar case to the present one where the dispute in respect of the suit premises was pitying one brother against the other where it was observed that:

> ***"There is nothing in the Registered Land Act (now repealed) and under which the suit land was registered, which precludes the declaration of a trust in respect of registered land even if it is a first registration. Secondly, Section 28 of the same Act contemplates the holding of land in trust – see MUMO VS MAKAU 2004 1 K.L.R 13(CA). The parties herein are Kikuyu and, in KANYI VS MUTHIORA 1984 K.L.R 712 (C.A), the Court held that the registration of land in the name of one party under the Registered Land Act does not extinguish the right of other parties who may be entitled to it under Kikuyu Customary Law".***

12. In the current legal regime, trust including customary trusts is an overriding interest of which all registered land is subject to pursuant to provisions of section 28 (b) of Land Registration Act

13. I conclude that in principle, the trial magistrate gave a correct interpretation of the law, that trust is not extinguished when one acquires title to land.

14. I must point out at this juncture that the respondent's claim before the lower court appears to have been anchored on inheritance of his father's land. The law of inheritance of a person's property is clearly spelt out under the law of succession Act, but this applies only in respect of the estate of a deceased person. When one is alive they are free to deal with their properties as they deem fit subject to the overriding interests including trust as set out in section 28 of the Land Registration Act.

15. In the case of **Jemutai Tanui vs. Juliana Jeptepkeny & 5 others ELC No. 44 of 2013, Eldoret,** , the court was dealing with a case where the plaintiff had inherited land of her father through transmission in succession proceedings and her children were claiming the land on the basis of trust. It was held that the plaintiff held the land only subject to leases, charges, and overriding interest, and there was no automatic trust arising from the transmission.

16. In the case of **Muriuki Marigi vs. Richard Marigi Muriuki and Others COA at Nyeri Civil Appeal No. 189 of 1996**, the court held that;

> ***"The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub division and distribution among his wives and children except if he personally on his own free will decides to sub divide and distribute it among them……..".***

17. It is quite evident that the father of the litigants herein one MWERERIA M'NAITULI took deliberate steps to distribute his property when he was alive. One of those properties is the suit land registered in the name of the appellant.

18. The respondent did not have an automatic right to his father's land. It was incumbent upon him to demonstrate that their father intended the suit land to be registered in the name of the appellant in trust for the respondent to the tune of one acre.

19. In **Meru ELC NO. 104 OF 2009 Margaret Nkirote and 2 Others vs. Mutwiri Mutungi (Judgment delivered on 27th march 2019),** I made reference to the case of **Mbothu & 8 Others vs. Waitimu & 11 Others (1986) KLR** where the court had stated that;

> ***"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. The intention of the parties to create a trust must be clearly determined before a trust will be implied.'***

20. Likewise in **Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR** the Court held that;

"The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily…."

21. In **Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] Eklr** the Court also held that:

"It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence".

22. The authorities cited by the appellant **Cherles K. Kandie Vs. Mary Kimoi Sang (2017) eKLR, Alice Wairimu Macharia Vs. Kirigo Philip Macharia (2019) eKLR, Njenga Chogera Vs. Maria Wanjira Kimani & 2 Others (2005) eKLR, and Peter Ndungu Njenga Vs. Sophia Watiri Ndungu (2000) eKLR,** resonate well with the holding in the above mentioned cases.

23. Turning back to this appeal, the appellant and respondent are brothers. The respondents claim before the lower court was that the suit land belonged to their father but it was registered in the name of the appellant because by the time the appellant was given the suit land, the respondent was only 5 years old. The appellant has not disputed the averment that the suit land belonged to their father. However, he claims that part of it was his inheritance to the tune of one acre while he got the other acre as he is the one who assisted the father in getting the land during the demarcation process.

24. In the trial court the appellant had indicated that his father's land was 859 from which he was given 2 acres that formed parcel 3376/THIMA/ANTUAMBUI. He did not deny the fact that their father divided and gave the rest of parcel no. 859 to his other brothers.

25. No evidence has been adduced by any of the parties to the effect that the land which Mwereria M'Naituli was giving his sons was ancestral land or that the same had been gathered by the clan.

26. I have scrutinized the entire record to discern the intention of plaintiff's father. The first list of documents availed by the respondent before the lower court consisted of 7 documents. The certificate of search produced as PEXH 1 shows that the appellant herein became the registered owner of parcel no 3376/THIMA/ANTUAMBUI on 1.2.1992 and a title deed was issued on 2.12.1998. The green card for the suit land also confirms that the appellant was registered as the owner of the suit land in 1992. The other documents are in the list dated 28.8.2013. It is not clear how the documents were tendered in court as evidence. However, a perusal of the same do not show that the father of the plaintiffs had intended the plaintiff to have any portion out of the suit land.

27. The respondent in his evidence made reference to the mode of distribution of their father's estate in the succession cause. However, no grant confirming the mode of distribution was availed. What the respondent availed was an application for confirmation of the grant in respect of their father's estate. In any event, the suit land could not have been part of that estate of Mwereria M'Naituli as the suit land was already registered in the name of the appellant. Thus, none of the plaintiff's documents can be construed as having a manifestation of a trust.

28. On the other hand, the appellant produced his documents in the list dated 10.7.2013 as his exhibits before the lower court consisting of 4 documents. The first exhibit is a letter dated 22.10.1983 written by the plaintiff's father to the land adjudication officer where he states as follows;

"The Land Adjudication Officer

P.O. Maua

Dear Sir

Application for Land transfer:

I Mwereria Naituri of Antuambui sub-unit, I want to transfer my piece of land to my son M'Imana Mwereria ID no. 2390772/65. The piece of land is at Ngiriana with the serial no. 859, and I want to give him 1.00 acre and the remaining is for me and my young son. My ID no. 7212694/70. To my request and your kindness I agree that you hear my grievances".

29. This letter clearly demonstrates that the father of the plaintiff could and did put his intentions in writing. He was aware of his minor children. The plaintiff had told the lower court that he was born in 1978, hence he was a child aged 5 when the father wrote the letter. The person who was actually told to take some of the land out of parcel no. 859 and leave some for plaintiff's father and his young son is M'Imana Mwereria,(who happens to be a brother of the litigants herein and who testified as PW2 before the lower court).

30. Then there is the adjudication register abstract for no. 2484 dated 29.3.1984. It provides further information on how plaintiff's father wanted to subdivide his parcel no 859. The serial NO. 2484 in the adjudication register shows that the land 859 belonged to Mwereria Naituri and he had the same demarcated on 15.4.1976 into 2 acres, one acre and another one acre. The serial no. 3376 shows that this parcel was demarcated from S/NO. 2484 on 17.7.1983 in the name of Daniel Ntoitha Mwereria, the appellant herein. It does not mention that the appellant was to be registered as the owner of any portion thereof in trust for the minor children, yet this is the era when Mwereria M'Naituli was putting down his intentions in writing.

31. A perusal of the green card availed as Dexh 2B for parcel no. 859 shows that this land 859 was registered in the name of MERERIA NAITURI on 2.1.1992 and a title deed was issued on 4.12.1995, and the land was then transferred to Kobia Mwereria on 23.6.1998. It follows that plaintiff's father was transferring the land (859) to another of his son known as Kobia when plaintiff was 20 years old! This is another clear demonstration that plaintiff's father was able to actualize his intentions of distributing his land even when the plaintiff was an

adult.

32. The father of the plaintiff died on 11.8.2000 (as per respondent's evidence). There is not the slightest evidence to show that during his lifetime, he ever tried to wrestle the suit land from the hands of the appellant yet he was aware that the said land was demarcated to the appellant for the last 17 years (since 1983). During his life time, the father of the plaintiff never took his son, the appellant to any litigation forum over the suit land. Further, it is apparent that plaintiff attained the age of majority in 1996, having been born 1n1978. There is no evidence again that he nudged his father to actualize the father's alleged intentions during the lifetime of the father. The plaintiff only went to the clan, Njuri Ncheke and the court after his father's death.

33. I have not deciphered any intention on the part of respondent's father to give an acre of the land out of the suit land to the said respondent. I therefore disagree with the trial court's holding that the appellant was registered as the owner of the land in trust for the respondent because the latter was five years old. This is because even if respondent was five years old, in 1983, he did grown up and was an adult by the time his father died in year 2000.

34. **The upshot of this Judgment is that the appeal succeeds. The lower court Judgment and the decree there of are hereby set aside. Any orders of inhibition or injunction that may have subsisted in respect of the suit land are hereby discharged. Considering that the parties herein are family, then I direct that each party bears their own cost of the suit.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12TH NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Karanja holding brief for Kirimi for appellant

Respondent

HON. LUCY. N. MBUGUA

ELC JUDGE