



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 489 OF 2015**

EUNICE KEMUNTO NYAUNDI ..... 1<sup>ST</sup> PLAINTIFF  
YAQUB IBRAHIM NYANGAI .....2<sup>ND</sup> PLAINTIFF  
BILIAH MOKEIRA NYANGAI .....3<sup>RD</sup> PLAINTIFF  
ANNE NYANGANYI NYANGAI .....4<sup>TH</sup> PLAINTIFF  
DORCAS KWAMBOKA MOBISA .....5<sup>TH</sup> PLAINTIFF  
ROSELINE KERUBO NYANGAI .....6<sup>TH</sup> PLAINTIFF  
BOAZ BRIAN BICHAGE NYANGAI .....7<sup>TH</sup> PLAINTIFF

**VERSUS**

**CHARLES NYANGAI .....DEFENDANT**

**RULING**

1. The plaintiffs in the instant suit are all children of the defendant. The defendant is the registered owner of land parcel number **Gesima Settlement Scheme/71** measuring 7.2hectares or thereabouts. The plaintiffs vide the plaint dated 30<sup>th</sup> October 2015 claim that the defendant was registered as such proprietor in trust for them and their late mother Hellen Mandere Nyangai (deceased). The plaintiffs claim the defendant in 2015 attempted to subdivide the said land with the intention of transferring the same to third parties which would have prejudiced the plaintiffs' interest in the said land. The plaintiffs seek a declaration that the defendant holds the land in trust and for their benefit and a permanent injunction restraining the defendant from in any manner dealing with the suit property.

2. The defendant in a statement of defence dated 19<sup>th</sup> November 2015 and filed in court on the same date denies that he holds the suit property in trust and for the benefit of the plaintiffs. The defendant avers in the statement of defence that he was allocated the suit land following application by the Settlement Fund Trustees (SFT) who after he repaid the loan advanced to him by SFT transferred the land to him as the sole owner and not as trustee for the plaintiffs as alleged. The defendant denies breaching any trust and/or that he has transferred the suit land or intends to transfer the same to 3<sup>rd</sup> parties as alleged.

3. The defendant/applicant by a Notice of Motion application expressed to be brought under Orders 2 Rule 15, 37 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act seeks the following orders:-

- (i) That the Honourable court be pleased to strike out the instant suit.**
- (ii) That the costs and/or incidental to the application and the suit be provided for.**

The application is supported on the following grounds set out on the face of the application:

**1. THAT the defendant/applicant has been and still is the registered proprietor of all parcel of land known as LR No. Gesima Settlement Scheme/71 (herein after referred to as the suit land). Consequently, has absolute and exclusive rights over the same to the exclusion of all and sundry, the plaintiffs/respondents not excepted.**

**2. That the plaintiffs/respondents are the sons and daughters of the defendant/applicant's 1<sup>st</sup> wife (deceased) through whom they are claiming their interest in the suit land purporting the ownership of the same to be held by the defendant/applicant**

on behalf.

3. That the plaintiffs/respondents lack locus standi to file the instant suit without obtaining the grant of legal representative of their deceased mother.
4. That the instant suit ought to have been commenced by way of the originating summons and not by plaint as herein.
5. That the plaintiffs/respondents suit herein is fatally defective, misconceived, incompetent and otherwise an abuse of this honourable court's process.
6. That the intended hearing of this suit is an exercise in futility as it is clear that the plaintiffs/respondents plaint has no chances of success.
7. That any further delayed dispensation of the matter herein summarily is a slap on the proprietary rights of the defendant/applicant over the suit land.
8. That the defendant/applicant stands to suffer irreparable loss and damage and the plaintiffs/respondents are preying on the defendant/applicant's disadvantage of being old and of poor health.
9. That it is proper fit, just, reasonable and in the interest of justice to grant the orders sought herein considering the circumstances of this matter.

4. The application is further supported on the supporting affidavit sworn by the defendant on 28<sup>th</sup> July 2017 where he basically reiterates the grounds in support of the application. The defendant however under paragraph 6 of the supporting affidavit has indicated that as he is elderly and sickly it was his desire to subdivide and transfer the suit land to the children of his three wives who included the plaintiffs/respondents herein.

5. The plaintiffs filed grounds of opposition to the application dated 27<sup>th</sup> September 2017 contending that the plaintiffs' suit disclosed a cause of action and was not an abuse of the court process. The plaintiffs further contended they had the locus to institute the suit and that there was a triable issue touching on trust which needed to be determined by having the suit heard on its merits.

6. On directions of the court the parties argued the application by way of written submissions. The defendant/applicant's submissions were filed on 21<sup>st</sup> November 2017 while the plaintiffs' submissions were filed on 30<sup>th</sup> January 2018. It is the defendant/applicants submissions that, he, being the registered absolute proprietor of the suit property and the plaintiffs being his children he cannot be said to hold the suit land in trust for the plaintiffs as the registration confers him exclusive and absolute rights of ownership. The defendant admits the deceased mother of the plaintiffs was his wife but does not admit he becomes a trustee of the plaintiffs through his deceased wife. The defendant submits that he is entitled to deal with his land as the owner thereof and in accordance with his obligation as the father of the plaintiffs and his other children from his other two wives, he was willing and ready to subdivide the suit appropriately amongst the children of his three wives.

7. The plaintiffs submit that their father, the defendant herein holds the suit land in trust for them and predicate their claim on what they state to be the matrimonial right of their deceased mother to the land as she exclusively occupied the land before she died in 2001. The defendant states the plaintiffs mother together with her children (the plaintiffs) as well as his 3<sup>rd</sup> wife together with her children have been in occupation of portions of the suit property and it was his wish to subdivide the land amongst all the children. Indeed in his witness statement he states that he had sought the land board's approval to subdivide the land into 2 portions; one for his first wife (plaintiffs mother), and the other for the third wife which approval was given but the plaintiffs objected. The defendant thus submits he has always acknowledged the plaintiffs beneficial interest and it is his intention to give effect to the same. The defendant submits that the plaintiffs' suit is devoid of any merit and prays for its dismissal.

8. Order 2 Rule 15 under which the defendant's instant application is anchored provides under subrule (1) thus:-

**O.2.(15)(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the grounds that-**

**(a) It discloses no reasonable cause of action or defence in law; or**

**(b) It is scandalous, frivolous or vexatious; or**

**(c) It may prejudice, embarrass or delay the fair trial of the action; or**

**(d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or, judgment to be entered accordingly, as the case may be.**

9. In the present suit the defendant who is the plaintiffs' father has not denied the plaintiffs right of occupation of the suit land and neither does he deny that the plaintiffs have an entitlement to the land as beneficiaries. As per the pleadings it is apparent the plaintiffs want to be the ones to determine how the suit property and/or indeed the defendant's properties ought to be shared out and/or distributed. The issue for the court to ponder is whether the defendant's children would legally be entitled to restrain him from dealing with his property as he deems fit during his lifetime provided he does not deal with the properties in such a manner as would result in disinherit them. The Law of

Succession Act, Cap 160 Laws of Kenya which comes into operation once a person is deceased, under Part III Sections 26 to 30 makes provisions for dependants of a deceased person. Under Section 29(a) the plaintiffs qualify as dependants of the defendant in the event of his death. In my view it is only in the event of the defendant's death would the plaintiffs be entitled to participate in the distribution of the defendant's estate as his dependants and beneficiaries and that would have to be in succession proceedings as envisaged under the Law of Succession Act, Cap 160 of the Laws of Kenya.

10. The evidence available establishes the defendant was allocated the suit property by the Settlement Fund Trustees (SFT) in 1964 and after repayment of the SFT loan he was registered as the absolute owner of land parcel **Nyamira/Gesima Settlement Scheme/71** on 4<sup>th</sup> December 2007. The rights of a registered owner of property are clearly set out under Sections 24, 25 and 26 of the Land Registration Act, 2012. Section 24(a) provides:-

**24. Subject to this Act-**

**(a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.**

Section 25(1) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by Section 28 of the Act as not requiring noting in the register. In the event a registered owner holds the property as a trustee, the rights conferred by registration would be subject to the duty or obligation placed upon him as such trustee.

11. In the instant matter it is necessary therefore to determine whether the defendant held the title subject to any overriding interests and/or as a trustee as asserted by the plaintiffs. The evidence is in abundance that the defendant is the registered owner of the suit property and that the plaintiffs are indeed his children. There is also ample evidence that the defendant has all along acknowledged the plaintiffs have a beneficiary interest over the suit property. The plaintiffs claim the defendant is holding the suit property in trust for them. There can be no basis for the defendant to be said to hold the suit land in trust for the plaintiffs when in fact he may even have acquired the land before some of the plaintiffs were born (back in 1964). While the defendant cannot deal with the suit property in total disregard of the plaintiffs interest as beneficiaries my view is that the plaintiffs cannot equally prevent the defendant being the registered owner of the property from dealing with the suit property in any manner he chooses including determining how to distribute the same amongst the beneficiaries. If a father who is registered as owner of property was to be held to hold such property as a trustee of his children, such position would create confusion and uncertainty which would make it virtually impossible to carry out any transactions affecting land as practically the bulk of land would be subject to trust. There is no basis upon which the court can hold that the defendant holds the suit property in trust for the plaintiffs.

12. Counsel for the plaintiff has submitted that the defendant held the suit land subject to the overriding interests under Section 28 of the Land Registration Act No. 3 of 2012 notably:-

**(a) Spousal rights over matrimonial property;**

**(b) Trusts including customary trusts.**

Counsel placed reliance on the case of **Henry Mukora Mwangi -vs- Charles Gichina Mwangi C.A No. 245 of 2004 (unreported)** where the Court of Appeal held that the registration of land under statutory law does not extinguish right to land under Customary Law. The case however is distinguishable from the facts in the present case. In the case, the respondent who was a brother of the appellant inherited 195 acres of land following his father's death in trust of other beneficiaries. The father had 3 wives and it was agreed by all the parties that, the respondent's mother's house which was the first house gets 75acres and the other two houses 60 acres each. The respondent allocated himself 45 acres out of 75acres of the first house, and the 45 acres was registered in his name. He transferred 30acres to his brother, the appellant, meaning he ended up with 15 acres more than his brother, the appellant. The court held that the respondent had not demonstrated his entitlement to the extra 15acres and held that the same were held by him under a customary trust in favour of the first wife and the appellant and the 15 acres were ordered to be shared equally between the respondent and the appellant.

13. In the instant case, the defendant was the original allottee of the suit land. The plaintiffs are his children and he has a right to determine how he wishes to deal with and/or distribute his estate during his lifetime. The plaintiffs have not sought to have the trust they claim discharged which begs the question what happens if the court were to declare the defendant holds the suit property in trust for the plaintiffs. **Does it mean they would still have to wait until the defendant dies before they distribute his estate?** The defendant is alive and wishes to settle the affairs of his estate to obviate the obvious wrangles that would be there once he exits the scene. The plaintiffs should not place unnecessary hurdles on his path. The best option would be for the plaintiffs and their father to agree on the distribution of his estate now that he has shown a willingness to actually distribute the land he owns when he is still alive, otherwise after he dies there is bound to be protracted litigation as the plaintiffs' action shows, which can be avoided.

14. From my foregoing discussions, it must have become apparent that I am not persuaded the plaintiffs have any reasonable cause of action against the defendant. The suit amounts to an abuse of the court process and accordingly I order the suit commenced by the plaintiff dated 30<sup>th</sup> October 2015 struck out for being incompetent and an abuse of the court process.

15. Each party shall bear their own costs of the application and the suit.

**RULING DATED, SIGNED and DELIVERED at KISII this 16<sup>TH</sup> DAY of MARCH, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> plaintiffs

..... for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

..... court assistant

**J. M. MUTUNGI**

**JUDGE**