



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 135 OF 2015**

JECINTA WAMBURA M. CIERO.....1<sup>ST</sup> PLAINTIFF

NJOKI LUCY RUKENYA.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

**BENSON WARUI NJANJA.....DEFENDANT**

**JUDGMENT**

This is yet another of those family disputes best suited for settlement outside the Courts. However, where parties are not prepared to pursue that route, the Courts must step in and perform their solemn responsibility of determining them. The Courts can only “*promote*” alternative forms of dispute resolution and cannot force the parties to do so.

The parties are siblings and children of **NJANJA KABIRU** (the deceased) who at all material times, was the registered proprietor of the land parcel No. **KABARE/NYANGATI/270**, measuring 4.9 Ha. He had three wives namely **JANE KANINI**, **FAITH WANJA** and **CHARITY WANJIKU**. When the parties’ mother **JANE KANINI** died, a dispute arose over her burial place and the defendant instituted before the **CENTRAL DIVISION LAND DISPUTES TRIBUNAL CASE No. 5 of 2001** which ordered that the defendant be given eight (8) acres out of the land parcel No. **KABARE/NYANGATI/270** which was sub-divided into two portions being **KABARE/NYANGATI/3937** and **KABARE/NYANGATI/3938**. It is the plaintiffs’ case that land parcel No. **KABARE/NYANGATI/3937** measuring 3.24 Ha (the suit land) was registered in the names of the defendant to hold in trust for the plaintiffs and their two other sisters and it was also agreed that the defendant would retain four (4) acres and the plaintiffs and two other sisters one (1) acre each. Despite the defendant’s knowledge that he is only a trustee, he has become violent and refused to allow the plaintiffs access to the suit land. The plaintiffs therefore moved to this Court on 29<sup>th</sup> October 2015 seeking judgment against the defendant in the following terms:

- 1. A declaration that the defendant holds land parcel No. KABARE/NYANGATI/3937 in trust for himself and the plaintiffs.***
- 2. An order for the determination of the trust by directing that each of the two plaintiffs gets one (1) acre from land parcel No. KABARE/NYANGATI/3937.***
- 3. Costs of the suit with interests.***

In his defence, the defendant denied that he holds land parcel No. **KABARE/NYANGATI/3937** in trust for himself and the plaintiff or that there was any agreement about sharing it with the plaintiffs as pleaded in the plaint. He added instead that he solely pursued the suit land for himself and nothing would have prevented the plaintiffs from doing so when the dispute was at the **CENTRAL DIVISION LAND DISPUTES TRIBUNAL**. He pleaded further that he is in exclusive possession and occupation of the suit land to the exclusion of the plaintiffs and urged this Court to dismiss the suit as being incompetent, bad in law and an abuse of the Court process.

**JECINTA WAMBURA MWANIKI** who is the 1<sup>st</sup> plaintiff was the only witness for the plaintiffs while the defendant did not call any other witness apart from himself.

Their respective cases are as per their statements filed herein and which they asked the Court to adopt as their evidence together with the documents filed. That evidence is what I have summarized above.

Submissions have been filed both by **Mr. MAINA KAGIO** advocate for the plaintiffs and **Ms WANJIRU WAMBUGU** advocate for the defendant.

I have considered the evidence herein and the submissions by counsel.

It is common ground that:

(a) *The parties are siblings.*

(b) *That the suit land is a resultant sub-division of land parcel No. KABARE/NYANGATI/270 which was registered in the names of their deceased father on 6<sup>th</sup> May 1958.*

(c) *Title to land parcel No. KABARE/NYANGATI/270 was closed on 25<sup>th</sup> April 2001 upon its sub-division into two parcels one of which is the suit land.*

(d) *The suit land is registered in the names of the defendant.*

The only issue for my determination is whether the defendant holds the suit land in trust for himself and the plaintiffs.

Before I interrogate that issue, however, the defendant's counsel has in her submissions raised the objection that in fact this suit is both an abuse of the Court process, statute barred and res-judicata. Counsel has raised the following two questions in that objection:

(b) *“Given that the Award was adopted way back in February 2001 and the plaint in the instant case was filed on 29<sup>th</sup> October 2015, (a span of fourteen (14) years and nine (9) months time, would ELC 135 of 2015 be deemed to be barred by the express provisions of the Limitation of Actions Act”*

(c) *“Does the fact that there was an earlier suit PM LDT No. 5 of 2001 (to which the instant plaintiffs never made an application to be enjoined) render the instant case an abuse of the Court process in view of the express provisions of Sections 6, 7 and 8 of the Civil Procedure Act Cap 217?”*

(e) *“Does the fact that the plaintiffs did not challenge the adoption of the Tribunal's award in KERUGOYA PM LDT 5 of 2001 render the matter res-judicata thus rendering ELC 135 of 2001 (the instant suit an abuse of the Court process?”.*

On the issue of limitation, this suit is founded on a claim of trust and it is clear from **Section 20 (1) of the Limitation of Actions Act** that no limitation period applies in such a case. In **STEPHENS VS STEPHENS 1987 K.L.R 125**, the Court of Appeal held that the limitation period does not apply in cases of trust where confidence which has been reposed in a trustee is abused and the trust property converted to personal use. This suit is therefore not statute barred.

On the issue of res-judicata, it is correct that there was previously **CENTRAL DIVISION LAND DISPUTES TRIBUNAL CASE No. 5 of 2001** involving the defendant (as claimant) and the deceased and two of his wives (as defendants) where an award was made and adopted by the **PRINCIPAL MAGISTRATE'S COURT at KERUGOYA** as a judgment and thereafter a decree followed. However, the said Tribunal could not determine a dispute concerning trust as it had no jurisdiction to do so. In **JOSEPH MALAKWEN LELEI & ANOTHER VS RIFT VALLEY LAND DISPUTES APPEALS COMMITTEE & OTHERS C.A CIVIL APPEAL No. 82 of 2006 (2014 e K.L.R)**, the Court of Appeal made it clear that the jurisdiction of a Tribunal established under the **repealed Land Disputes Tribunals Act** did not extend to determining issues of trust. Res-judicata cannot therefore be sustained as a bar to this suit because the issue of trust was never **“heard and finally decided”** by the Tribunal which was also not **“a Court competent”** to determine such a dispute and which is a pre-requisite for res-judicata to apply as provided under **Section 7 of the Civil Procedure Act**. The plea of res-judicata is therefore not well founded and must be rejected.

Finally, counsel for the defendant has submitted that this suit is an abuse of the Court process. In **BLACK'S LAW DICTIONARY 9<sup>TH</sup> EDITION**, the term **“abuse of process”** is defined as:

*“The improper and tortious use of legitimately issued Court process to obtain a result that is either unlawful or beyond the process's scope – Also termed abuse of legal process; malicious abuse of process, malicious abuse of legal process.....”.*

Courts in this country have adopted the following definition of abuse of Court process as given in **BEINOSI VS WYLEY 1973 (SA 721 SCA)**:

*“What does constitute an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all encompassing definition of the concept “abuse of process”. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of Court to facilitate the pursuit of the truth are used for purposes extraneous to that objective”.*

Apart from a mere allegation that the plaintiffs are abusing the process of this Court, no evidence has been placed before me to suggest in what manner the plaintiffs are guilty of doing so. In my view, the plaintiffs are pursuing what they genuinely believe to be their share of their late father's land. I do not see how such pursuit can be an abuse of the process of this Court and I must therefore reject that submission.

I shall now consider the merits or otherwise of the plaintiffs suit.

The plaintiffs claim is based on trust. The onus was on them to lead evidence to prove that the defendant holds the suit land in trust. As was held in **MBOTHU & OTHERS VS WAITIMU & OTHERS 1986 K.L.R 171:**

*“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined*

***before a trust will be implied”.***

Among the trusts known in law is a constructive trust which is imposed by the law whenever justice and good conscience so require – ***HUSSEY VS PALMER (1972) E ALL E.R 744.***

The defendant’s case appears to be hinged on the fact that the suit land is registered in his names and is therefore not held in trust for the plaintiffs and also that only he pursued the suit land at the Tribunal and the plaintiffs were not parties. It is now well settled that the registration of land in the names of a party does not relieve him of his obligation as a trustee. See ***MUMO VS MAKAU 2004 1 K.L.R 13, KANYI VS MUTHIORA 1984 K.L.R 712*** and ***MUKANGU VS MBUI 2004 2 K.L.R 256*** among others.

It is not in dispute that the suit land was part of land parcel No. KABARE/NYANGATI/270 belonging to the deceased. The defendant did not acquire it through his own proceeds. It is not therefore the defendant’s private property acquired solely by himself for his own use. The evidence shows that as the only son in his mother’s house, it was given to him to hold for that house. In cross-examination by counsel for the plaintiffs, he said:

***“It was clan land. My father had three (3) wives. It is true that the land was sub-divided in 1976 among his three wives. It is true that my mother was ploughing the eight (8) acres which was her share. It is true that when our mother died, there was a problem. I was the only son of my mother. It is true that the Tribunal ordered that I be awarded eight (8) acres as the share of my late mother JANE KANINI”.***

The defendant however denied having agreed to share the suit land with the plaintiffs with him getting four (4) acres and the plaintiffs one acre each. However, the plaintiff having admitted that the suit land measuring eight (8) acres is what his late mother used to plough, it is clear to this Court, taken together with the other evidence herein, that the defendant could only have been registered as the proprietor of the suit land to hold in trust for himself and his siblings. And although the proceedings in the Tribunal were not availed for my perusal, it seems to me that when the defendant filed the suit at the Tribunal, he must have sought orders that he be awarded the suit land to hold for his mother’s house. This is because, the decree that followed the Tribunal’s award reads as follows:

***1. “That the judgment is hereby entered in terms of the award.***

***2. That BENSON WARUI NJANJA is hereby ordered to be given 8 acres out of land parcel No. KABARE/NYANGATI/270 as the share of his late mother JANE KANINI”*** Emphasis added

He cannot now claim, as he did in his defence, that:

***“The two plaintiffs are my sisters. They did not ask either my father or mother to give them land during their life time. They are married. When I filed Tribunal Case No. 5 of 2001, the plaintiffs were not parties. I do not hold land parcel No. KABARE/NYANGATI/3937 in trust for the plaintiffs. This case should be dismissed because when I was pursuing the land, they did not assist me”.***

Clearly, the Tribunal recognized that the defendant was entitled to the suit land because that was his mother’s share. That must have been what he pleaded before it and which was up-held in his favour. He cannot now claim that he is entitled to the suit land as the sole proprietor. He went to the Tribunal claiming it ***as his mother’s*** share. The Tribunal agreed with him. His mother’s share cannot be his property. It belongs to his mother’s house which consists of him and his siblings. He cannot appropriate and reprobate.

The defendant has also made heavy weather of the fact that the plaintiffs did not participate in the Tribunal proceedings. That may be so. But as the trustee, his duty was to preserve and protect the suit land on behalf of his mother’s house and it matters not that the plaintiffs and the other siblings were not parties to the suit in the Tribunal. The parties herein are Kikuyus so this Court is alive to the fact that under Kikuyu Customary Law, land is registered in the names of the first son to hold in trust for the family. It is not clear whether the defendant is the eldest in the house of his mother but being the only son, there can be no doubt in my mind that he was the recognized trustee. Ordinarily, the eldest son in the family is regarded as the trustee (MURAMATI) under Kikuyu Customary Law – ***NJUGUNA VS NJUGUNA 2008 1 K.L.R 889*** and also ***MWANGI VS MWANGI C.A CIVIL APPEAL No. 245 of 2004 NBI 2013 e K.L.R.***

The defendant has also placed a lot of premium on the fact that the plaintiffs do not live on the suit land and are also married. It is however clear from the evidence that he had made it impossible for the plaintiffs to utilize the suit land, which their mother used to cultivate, by being hostile and violent towards them. Indeed he has, by his own admission, been convicted for assaulting the plaintiffs. This is what he said when he was cross-examined on that issue:

***“It is true that I had been charged with a criminal case of assaulting the plaintiffs. I was convicted and sentenced to eight (8) months probation for assaulting them over land”***

The defendant cannot therefore be heard to claim, as he has done in his written statement, that none of the plaintiffs live on the suit land. He has made it impossible for the plaintiffs to access the suit land by being violent towards them. Similarly, the fact that the plaintiffs are married does not entitle the defendant to deny them their right to land which originally belonged to their father and was never at any time the defendant’s private property. The defendant cannot therefore discriminate against the plaintiffs because of their sex or marital status. ***Article 27 of the Constitution*** is clear on that. Besides, Kenya subscribes to and has ratified various International conventions and treaties which clearly state that women shall not be discriminated upon. One such convention is the ***CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)***. It is highly un-likely that the defendant would have treated the plaintiffs in the manner that he has if they were his brothers. In my view, the plaintiffs have been very magnanimous. They only seek one (1) acre each from the eight (8) acres. If they had sought a bigger portion, this Court would gladly have granted them because whereas a trustee

**(MURAMATI)** may be entitled to a bigger share if he has been good **MURAMATI** – see **MWANGI VS MWANGI 2013 e K.L.R** citing **NJUGUNA VS NJUGUNA** (supra) – the defendant has demonstrated by his conduct that he has not been a good **MURAMATI**.

Considering all the above evidence and particularly the fact that the suit land is part of ancestral land that was passed to the parties' father and subsequently to the defendant, I am satisfied that the plaintiffs have proved their case against the defendant.

There shall be judgment for the plaintiffs against the defendant in the following terms:

- 1. A declaration that the defendant holds land parcel No. KABARE/NYANGATI/3937 in trust for himself and the plaintiffs.**
- 2. An order for the determination of the trust by directing that each of the two plaintiffs gets (1) eacre from the land parcel No. KABARE/NYANGATI/3937.**
- 3. As the parties are family, each shall meet their own costs.**

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> MARCH, 2018**

**Judgment delivered, dated and signed in open Court at Kerugoya this 14<sup>th</sup> day of March 2018**

Plaintiffs present in person

Defendant - absent

Mr. Kagio for Plaintiffs – absent

Ms Wanjiru for Defendant – absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> MARCH, 2018**