



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 306 OF 2017

(Formely Kisii ELcc No. 200 of 2016)

FRANCIS OLOO OMBOGO.....1ST PLAINTIFF

SILAS ABONDO OMBOGO.....2ND PLAINTIFF

VERSUS

ZILPA ATIENO ODAK.....DEFENDANT

JUDGMENT

1. The plaintiffs through Ngala Awino & Co. Advocates sued the defendant by way of a plaint dated 13th July 2016. They have sought the following reliefs;-

- a. A declaration that the current registration of title be revoked and half portion to revert to the family of Rose Agneta Ombogo.**
- b. A declaration that the defendant is holding ½ of land parcel number Central Kasipul/Kamuma/1047 in trust of the plaintiffs and the plaintiffs children and that there be an order that the defendant do surrender ½ of the land parcel number Central Kasipul/Kamuma/1047 to the plaintiff and his children (ie family of Rose Ombogo).**
- c. An injunction restraining the defendant from evicting the plaintiffs and the plaintiffs siblings from land parcel number Central Kasipul/Kamuma 1047.**
- d. The registrar of Land Homa-Bay be directed to correct the land records to include the plaintiffs' names in land parcel number Central Kasipul/Kamuma/1047.**
- e. Costs of this suit.**
- f. Any other relief this court may deem fit to grant for ends of justice to be met.**

2. The plaintiffs claim that they are children of the late Rose Agneta Ombogo and step children of the defendant. That they have all along lived on their ancestral land **LR NO. CENTRAL KASIPUL/KAMUMA/1407** (the suit land). In the year 1980, the defendant transferred the whole of the suit land into her name yet she was to hold in it trust for family and lineage of her co-wife, Rose Agneta Ombogo (deceased). The defendant claimed that her co-wife, who was the mother of the plaintiff had given her (defendant) a portion of the suit land. The defendant then threatened to evict the plaintiffs and the rest of the plaintiffs' siblings from the suit land hence provoking the instant suit.

3. By her statement of defence dated 19th August, 2016, through Gumbo & Associates who was initially on record but ceased acting for her on 11th December, 2017, the defendant denied the plaintiffs' claim. She termed the suit bad in law, fatally defective and that it should be struck out with costs. She stated that the plaintiffs' living on the suit land does not in itself confer ownership of the land on them. That not the whole parcel of the suit land was ancestral as she acquired half acre from Achacha Otunga Ondiek and three acres was exchanged with Silfano Ondiek. She further stated that part of the land which was ancestral land was subdivided and allocated to the father of the plaintiff and her husband. That after the sub-division, the father of the plaintiff sold half acre of the land to the defendant.

4. On 13th January, 2018, the defendant was duly served for hearing of the suit fixed for 18th April 2018. The service is proved by an affidavit of service sworn on 16th January 2018 by a duly authorised process server, Julius Otieno Ramoya.

5. On the hearing date, the defendant failed to attend court without reason. Hearing proceeded ex-parte whereby the plaintiff (PW1) testified

and produced in evidence certificate of official search dated 5th January 2016 (PEXhibit 1) and green card (PEXhibit 2) as well as family lineage chart (PEXhibit 3) in respect of the suit land.

6. Learned counsel for the plaintiff filed submissions dated 2nd May 2018, in which he gave history of the suit land and particulars of trust on the part of the defendant. He referred to PEXhibit 2 which indicates that the defendant was given the portion of her co-wife as a gift by unknown person. Counsel termed the suit as unchallenged and urged the court to grant orders sought in the plaint.

7. I have considered the pleadings, evidence of PW1 and submissions by the plaintiff's counsel. I bear in mind the decision in **Great Lakes Transport Co. (U) Ltd- v- Kenya Revenue Authority (2009) KLR 720** with regard to issues for the court's determination. The parties did not frame any issue for determination. Therefore flowing from the pleadings are the following issues for determination.

a. Who is the registered proprietor of the suit land?

b. Any trust in the suit land?

c. Reliefs available to the parties in this suit.

8. On the 1st issue, PW1 and his co-plaintiff stated in the plaint that they realised that the defendant transferred the whole of the suit land which was ancestral land into her name in the year 1980. They sought an order directed at the land registrar to correct the land records to include their names in the suit land. PW1 relied on their joint statement herein whereby they stated that the defendant transferred the land parcel into her name as they were still young. PEXhibits 1 & 2 show the name of the defendant as the proprietor of the suit land as a land certificate thereof was issued to her on 18th June 1980.

9. Certificate of title to land is to be held as conclusive evidence of proprietorship save for exceptions under Section 26 (1) of the Land Registration Act 2012 which states:

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be challenged, except-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party ; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” (Emphasis provided)

10. In regard to the issue of trust, the plaintiffs stated that the defendant was to hold the suit land in trust for them. They pleaded particulars of trust at paragraph 11 of the plaint as hereunder:-

a) At the time of the land was being registered in the defendant's name, it was registered on the ground that she was to hold it in trust for Rose Agneta Ombogo and the children of Rose Agneta Ombogo and that she was to transfer the said half portion to Rose Ombogo and her children when the children of rose Ombogo were of age (that is the plaintiffs and their siblings).

11. PW 1 relied on their statement which reads, inter alia:-

“She was to hold the land parcel in trust for us and transfer it to us when we grow up.....”

12. It was the plaintiff's claim that the suit land was ancestral land while the defendant stated that not the whole of it was ancestral land as claimed by the plaintiffs. To that extend, there is no dispute that part of the suit land was ancestral land which include customary trust an overriding interest under **Section 28 (b) of the Land Registration Act 2012.**

13. The suit land was an agricultural land situated within a land control area as envisaged under **Section 6 (1) of the Land Control Act (Cap 302).** However, in the case of **Macharia Mwangi Maina –v- Davidson Mwangi Maina (2014) eKLR** the court of Appeal held, inter alia:-

“The creation of a trust over agricultural land in a land control area does not constitute an “other disposal of or dealing for the purpose of Section 6(1) of the Land Control Act and, therefore, does not require the consent of the local land control board.”

14. Moreover, it would be unjust and inequitable to allow the defendant to remain registered as the proprietor of the whole suit land. The Court of Appeal differently constituted in **Willy Kitilit –v- Michael Kibet (2018)** held that

“ In essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles”

15. Clearly from PExhibit 1, as at 20th July, 1976, the defendant was holding ½ half share of the suit land while Christopher Ombogo Oloo, father of the plaintiffs held another half share thereof. Surprisingly that position changed on 18th June 1980 when the whole land was transferred to the defendant as a gift, yet she was to hold it in trust for the children of the late Christopher Ombogo Oloo who was husband to Rose Agneta Ombogo (deceased) and the defendant herein. Indeed the defendant breached the trust as pleaded in this suit.

16. The upshot is that the plaintiff's claim has considerable merit. It is not challenged and it has been proved by the plaintiffs against the defendant on a balance of probability.

17. A fortiori, I enter Judgment for the plaintiffs against the defendant in terms of orders (a), (b) and (d) sought in the plaint dated 11th July 2016 and filed in court on 13th July, 2016.

DELIVERED, SIGNED and DATED in open court at MIGORI this **31st** day of **MAY, 2018**.

G. M. A. ONGONDO

JUDGE

In the presence of:

Mr. Kiseru learned counsel holding brief for learned counsel Ngala Awino for the plaintiff.

Tom Maurice Court Assistant

G. M. A. ONGONDO

JUDGE