



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 140 OF 2011

ANTONY KIMATHI GITARI.....1ST PLAINTIFF

JANICE MUKAMI GITARI.....2ND PLAINTIFF

VS

JAMES GITARI M'IKIARA.....1ST DEFENDANT

SILAS MWERERU M'MUGAMBI.....2ND DEFENDANT

FREDRICK IKUNDA MUGAMBI.....3RD DEFENDANT

JUDGMENT

1. The Plaintiffs sued the Defendants claiming that the suit land L.R NTIRIMITI SETTLEMENT SCHEME/190 registered in the name of the 1st Defendant who is their father. They claim that the 1st Defendant held the suit land under trust for them. That the 1st Defendant transferred the suit land to the 2nd and 3rd Defendants in breach of trust. That the said 1st and 2nd Defendants have threatened to evict them from the suit land where they were born and bred. They seek the following orders;

- a. A declaration that the 1st Defendant held LR NO. NTIRIMITI SETTELEMENT SCHEME/190 in trust for himself and the Plaintiffs and that transfer thereof to the 2nd and 3rd Defendants was fraudulent and malicious.
- b. An order directing the District Land Registrar to rectify the register in respect of LR NO. NTIRIMITI SETTLEMENT SCHEME/190 by cancelling registration of the 2nd and 3rd Defendants as owners and thereafter cause re-registration of the same in the name of the 1st Defendant to hold in trust for himself, the Plaintiffs and their mother Caroline Wanja Mathiu.
- c. Costs and interest of this suit.
- d. Any other or such better orders which this Court may deem fit to grant in the circumstances.

2. The Defendants filed their defence and counterclaim and denied the Plaintiff's claim. The 1st Defendant denied that the Plaintiffs are his biological children nor they reside on the suit land as both are employed and live in towns where they work. The Defendants have denied any trust on the suit land as the land was never ancestral. The 2nd and 3rd Defendants have asserted that the transfer of the suit land to them was lawful. In their counterclaim they sought the following orders;

- a. An order of permanent injunction to be granted against the Plaintiffs to restrain them, their agents or servants from entering, interfering or otherwise dealing with the 2nd and 3rd Defendant's parcel of land No. L.R. NTIRIMITI SETTLEMENT SCHEME/190.
- b. Costs and interests.

3. The Plaintiffs adduced evidence that they were born in the suit land and have lived there with their family comprising of the 1st Defendant and their mother. That the 2nd & 3rd Defendants are their uncles. That they learnt from the 1st Defendant that he had transferred the suit land to the 2nd and 3rd Defendants without their knowledge and in breach of the trust. They claim to have acquired interests and rights in the land under customary trust. They stated that the 1st Defendant had allocated them ½ acre to grow crops on the suit land but have stopped when they were threatened with eviction by the 2nd and 3rd Defendants.

4. The Plaintiffs produced their birth certificates and the marriage certificate for their parents to prove that they are indeed children of the 1st Defendant. They assert that their father has no other land and as beneficial owners of the suit land they have been rendered destitute.

5. The 1st Defendant adduced evidence that he was the registered owner of the suit land having bought the same from Settlement Fund Trustee. That the land is not family land as he did not inherit it. He denied that the Plaintiffs are his children and that his wife came with them. He however confirmed that he brought up the Plaintiffs and educated them and are working in gainful employment and that they should buy their own parcels of land just like he did. That he transferred the suit land to the 2nd and 3rd Defendants on his own accord as he had no obligation to consult the Plaintiffs. When challenged about the birth certificate of the Plaintiffs he insisted that he objected to the birth certificates being issued in his name. He stated that even if they were to be found to be his children (which they are not) they cannot force him to transfer land to them during his lifetime.

6. DW2 and DW3 testified that they are blood brothers of the 1st Defendant. They stated that the suit land is not ancestral land and therefore is not subject to customary trust. That they became registered as owners of the land through lawful processes and they took it free from any encumbrance, trust included.

7. The parties elected to file written submissions which I have carefully considered.

8. The key issue for determination is whether the suit land is subject to a customary trust. The suit land was registered under the Land Registration Act Cap 300. Section 27 a) of the said Act states as follows;

“the registration of a person as the 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 28 of the said Act provides 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 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) 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.

9. The above provisions are similar to Section 24, 25, 26 and 28 of the current Land Registration Act, 2012. In both sets of provisions customary trust is recognized as an overriding interest which binds the land of a registered proprietor. Trust however need not be noted on the land register. It is overriding. The registered proprietor is not relieved from a duty or responsibility of a trustee.

10. In this case the Plaintiffs have pleaded trust over the suit land. Trust is a matter for evidence. It has to be proved by the person asserting on a balance of probability. I have examined the title of the suit land and it would appear that it was first registered in the name of Settlement Fund Trustees (SFT) and the 1st Defendant became registered on the 2.4.1996. It is admitted in evidence by both sides of the suit that the land is not ancestral land. That it was acquired by the 1st Defendant from SFT and therefore was the absolute owner enjoying such rights privileges appurtenant to a registered owner as envisaged by section 27 & 28 of the Land Registration Act. It is also on record that the Plaintiffs do not occupy the suit land. I find and hold that the Plaintiffs have not proved any trust on the land.

11. In the case of **Muriuki Marigi Vs Richard Marigi Muriuki & 2 Others Civil case No. 189 of 1996 (2008) I KLR 1073**, the Court of Appeal held as follows;

“It was stated that the law recognizes the rights of Children over their father’s estate. These rights are inchoate and accrue upon the death of the father. The inchoate rights of the Respondent to the land owned by the 1st Appellant had not accrued at the time of filing suit before the High Court and at the time when this appeal was lodged. If the Respondent has any claim of land against his father, his inchoate rights accrued when his father (the 1st Appellant) died.....”.

12. The 1st Defendant denied paternity of the Plaintiffs. The Court was shown birth certificates which prima facie shows that they are children of the 1st Defendant. The 1st Defendant did not adduce any evidence to counter the documentary evidence. Be that as it may, even if the Court was to make an assumption that they are indeed children then their rights would remain inchoate until the death of their father. In the instant case it is on record that the suit land has already been transferred to the 2nd and 3rd Defendants and there is nothing for the Court to fault the 1st Defendant for gifting the suit land to the recipients of the suit land.

13. Guided by section 27 and 28 of the Registered Lands Act (repealed) and section 24, 25, & 26 of the Registration of Lands Act and having held that the 2nd and 3rd Defendants are lawfully registered owners of the suit land the Plaintiffs have no legal basis to interfere with the suit land. The Defendants counterclaim succeeds.

14. In the end the Plaintiffs case is dismissed and the Defendants counterclaim is granted with costs to the Defendants.

Orders accordingly

DATED, DELIVERED AND SIGNED AT MERU THIS 28TH DAY OF JUNE 2018.

J G KEMEI

JUDGE

In the presence of:

C/A Mutua

Basilio Gitonga for 1st and 2nd Plaintiff

Muthamia for 1st to 3rd Defendants