REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 54 OF 2004

JOSEPH M'ITONYWA M'KIRIGIA ..... PLAINTIFF

VS

M'NKUMBUKU M'KIRIGIA ..... DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on 16/6/2004 against the Defendant seeking the following orders: -

    a. A declaration that the plaintiff is the rightful owner of half share out of the land parcel No Nyakii/Thuura/1144 (suit land).

    b. An order that the Defendant do transfer the said half share to the plaintiff as per the trust.

    c. In the alternative the Executive Officer, be empowered to execute all the requisite documents and transfer the said portion to the plaintiff.

    d. A permanent injunction estopping the Defendant from harassing damaging alienating wasting or in any interfering with the plaintiff's peaceful occupation and use of the half share of the said land.

    e. Cost of the suit.

2. The Plaintiff and the Defendant are brothers. He avers that the Defendant was entrusted with the suit land measuring 4.4. ha by the Plaintiff and their Uncle M'Aritho M'Iterekwa in 1973 to hold in trust for himself and the Plaintiff. That both are in possession and occupation of ½ of the suit land having made extensive developments over the years. That the Defendant became registered owner of the suit land in trust for both brothers. That the Defendant has breached the trust by refusing to dissolve the said trust and transfer the ½ share of the land to him.

3. The Defendant denied holding the suit land in trust. He stated that the plaintiff occupies 2 acres and not ½ share of the suit land as alleged. That despite the plaintiff forceful entry into the said 2 acres in 2004, he has willingly given him 2 acres to occupy which he should take peacefully and with gratitude. In addition, he has filed a counterclaim seeking an order for permanent injunction against the plaintiff from interfering with his 9.80 acres of the suit land.

4. In reply to defence and counterclaim the plaintiff prayed for dismissal of the plaintiff's counterclaim on the grounds that both parties occupy ½ of the suit land. He reiterated that the suit land is trust property and both parties are entitled to ½ share.

The Plaintiffs case

5. PWI -The Plaintiff led evidence that the suit land is ancestral having been given to them by their maternal Uncle M'Aritho. That their own father had no land of his own. That the suit land was registered in the name of the Defendant in 1973 to hold in trust for both of them because he was of majority age at the time of demarcation and registration. That then he was a young boy (not circumcised). The Defendant is his elder brother and they are only two sons in their family. That he lives on 3 acres of the suit land while the Defendant is on aprox. 8 acres. That in 1990 their uncle declared in the presence of the Manyura clansmen Jason Mulira, Joseph M'Anampiu, Charles M'Manyaa that the land will be shared equally between the parties. On refusal by the Defendant to share the land, he reported the matter to the Assistant Chief – Kiamwitari sub-location who held a meeting on the 16.6.1998 in the presence of the 15 Manyura Clan elders, 10 Thuura Kiamwitari sublocation village elders, 8 clan elders and sons of the parties. The meeting resolved that the land be shared equally amongst the parties.

6. The Defendant proving adamant, the Plaintiff reported the matter to the area District Officer who advised him to file a case at the Land Dispute Tribunal (LDT) which tribunal award was adopted by the Court in CMCC NO. 19 of 1990 as a judgment of the Court. The decision of the LDT was to the effect that the suit land be shared equally. That on appeal the said decision was set aside by the High Court in 2002 on

grounds that the LDT did not have jurisdiction to determine trust in land and hence filed this current suit. That based on the decision of the LDT he took steps to have the land surveyed in 2004 and in the process cut down trees to pave way for the survey. That he was arrested as result of this though the trees cut were on his portion of the suit land. That the subdivision was not concluded as the determination of the LDT was quashed. That his mother died in 1997 and the uncle in 1995.

7. PW2 – Joseph M'Anampiu stated that he is a locational leader and a neighbour to the parties. That he knows both parties. That he knew the parents of the parties as well. That he was part of the clan members who heard the case on the 16.10.1990 when the clan resolved to share the land into ½ between the parties. He stated that both parties live on the suit land; one on the right and the other on the left side. That they have both planted coffee, bananas, trees and built dwelling houses on their respective portions. That the suit land was registered in the Defendants' name as the plaintiff was young then.

8. PW3 – M'Manyara M'Rwito testified that he knows the parties. That he knew their parents as well. That he was a village elder. That he attended a clan meeting in 1990 where the mother and the uncle of the parties were present. That the meeting resolved that the suit land be divided into two ½ between the parties. That the parties agreed with the decision of the elders.

The Defendant's case

9. DWI – Jonah Nkumbuku Kirigia- stated that he is the elder brother of the plaintiff. That the suit land is 11.80 acres and he is holding 9.80 while he has allowed the plaintiff to reside on 2 acres. He denies holding the suit land in trust for the plaintiff and states that the land was allocated to him during adjudication upon application to the adjudication committee. That he did not buy the land but gathered it by himself during demarcation. Further that it did not belong to his uncle M'Aritho. That his father did not have any land. That they were born at M'Aruri where their parents lived before he brought them to the suit land. Further that there was no clan meeting that took place in 1990 and neither was there a letter written to the chief in 1998 intimating that land would be shared into two portions. He denied being given land by his maternal uncle M'Aritho. He reported that the plaintiff caused him and his wife to be arrested for allegedly destroying trees and bananas which apparently were on his side of the land. He denied that his mother and uncle directed him to share the land equally. He contended that he cannot share the land equally and the plaintiff must accept 2 acres already given to him and no more. He testified that he will share the land amongst his 9 sons whom he has already shown them where to settle on the ground.

10. DW2 – Jeremiah Mathiu testified that he knows both parties and knew their parents too having hailed from Thuura – Manyura Ruriene sublocation. That the parents of the parties did not have land of their own and were accommodated by one Maruri M'Mwirichia. That originally, they were not from Thuura but had come from somewhere else. That Thuura area was declared an adjudication area in 1954 under Land Consolidation Act Cap 283 and the land committee was constituted at Nyaki location. The land was being adjudicated per clans who would then share the land with their members. That the party's clan did not have land and the Defendant persistently approached the land committee to allocate him which they did in 1960. People like the Defendant whose clans did not hail from the area were given remnants of the land by the committee. That he paid all the fees and contributions required of allottees and met all the conditions thereto. That thereafter the Defendant fenced the land, built a house and brought the plaintiff and his parents to live with him. That the Defendant got the land through his personal initiative and not from his uncle or the clan. That the Defendant lives on aprox 9 acres while the plaintiff occupies 2 acres given to him by the Defendant. That the plaintiff was reluctant to seek his own land while he was already of age at the time of adjudication of the land in the area. That their parents are buried on their suit land.

11. DW3- Joseph A'Anampiu testified and gave evidence similar to the DW2. That the clan of the parties hailed from Tharaka and not Thuura and therefore were not allocated land by the committee. However, the Defendant got the remnants after persistently pleading with the committee individually and not on behalf of his clan or family. Their Uncle M'Aritho hailed from Thuura and in particular the Manyura clan.

12. DW4 – Salome Gachera M'Marete- stated that she is the sister of the parties to this suit. That their parents hailed from Mituunguu and not Thuura and since their clan was not from the area they did not get land during adjudication. That they had no land of their own and were accommodated at M'Ruri's home where his father worked and upon his death moved to his son's home M'Anampiu. That her father came from Tharaka and not Thuura. Their clan was not from Thuura. That her father could not get land at Thuura because his clan was not from there and yet the land was being allocated to clan only. That her father did not apply for the land. That the Defendant applied for allocation of land to the committee at the chief's office and after persisting his name was entered in the register. That he paid the adjudication and survey fees. Upon survey, the land was handed over to him whereupon he commenced clearing the bushes, fencing and constructed a house and went to fetch his family from M'Anampiu to live with him. That the plaintiff did not bother to seek land from the committee albeit having been of age at the time. She denied that their maternal Uncle M'Aritho gave the Defendant any land. That her mother asked the Defendant before her death to give the plaintiff a portion of the land as he had no land of his own and in honour of their mother's request, the Defendant gave him 2 acres. That the land dispute arose after the death of their parents. She clarified that the land is not ancestral land. On cross examination she stated that she was young (about 12 years) during the adjudication and demarcation of land in 1960.

13. DW5 – Joshua Muriungi – stated that he is a cousin of the parties and the son of M'Aritho their maternal Uncle. That the dispute in respect to the suit land started after the parents of the parties died. That his father M'Aritho never gave the Defendant any land. His father had his own land which he got from his clan at Thuura location. That his father who died in 1995 informed him that the suit land belongs to the Defendant. On cross examination he stated that he was not present when the land was being gathered nor during the adjudication as he was born in 1964.

14. DW6 – Benson M'IKiungu gave a similar testimony to that of DW3 & 4. He stated that allocation of land then followed the clan of the father and since the Defendant's father did not come from Thuura, he did not get land forcing the Defendant to apply for the land on his own. Further that he went with the Defendant to apply for land from the committee and it took over 10 years to get it. That he also was allocated land as well.

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

Analysis and determination

16. The admitted facts of this case are; the suit land is registered in the name of the Defendant; the parties are blood brothers; both reside on the suit land since the1960s; the land has been subject to dispute since the 1990s first at the clan level, the chief, the District Officer and later the LDT before the appeal at the High Court. It then started again with the filing of this case before the Court.

17. Having considered the evidence on record, the written submissions of the parties, the legal authorities were cited and the applicable law, the issues for determination are;

A. Whether the suit land is held under trust?

B. Costs of the suit

18. The law is now settled as to the existence of a customary trust as an overriding interest in land. Even before the new Land Registration Act was promulgated, Courts in this Country had moved to the position where customary trust in land was recognized having given some interpretation to section 30(g) of the then Land Registration Act, Cap 300 which provided as follows;

"Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

(g)the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed"

19. In the case of **Kanyi – v- Muthiora, (1984) KLR 712**, it was held that the registration of the land in the name of the appellant under the Registered Land Act did not extinguish the Respondent's rights under Kikuyu customary law and neither did it relieve the appellant of his duties or obligations under Section 30 as trustee. In **Mwangi & Another –v – Mwangi, (1986) KLR 328,** it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights and the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the provisions of Section 126 (1) of the Registered Land Act as to the reference to a trustee are merely permissive and not mandatory."

20. In the current Registration of Land Act, 2012 Section 28 (b) customary trusts are specifically provided for as follows;

"Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a) …….;

(b) trusts including customary trusts;

It is clear from the above that customary trust being an overriding interest need not be noted on the register and that all registered land is subject to the overriding interests.

21. It is trite that customary trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded. In the case of P**eter Gitonga Vs Francis Maingi M'Ikiara Meru HCCC NO. 146 of 2000**- it was stated that:-

A "trust" can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; "Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged".

22. The Plaintiff led evidence that the suit land was given to the Defendant by their maternal uncle to hold in trust for himself and the Plaintiff since their parents were landless and that it was the wish of their mother and uncle that the suit land be shared equally between them. PW2 testified that he attended a clan meeting in the 1990s where it was decided that the land be shared equally. He also testified for the Defendant with the result that he gave conflicting testimony as to the events and facts of the case. I shall disregard his testimony entirely on that account.

23. The Defendant in his defence and counterclaim averred that the suit land belongs to him absolutely and denied any trust on the land. He also averred that he did not buy the land. He led evidence on his own and through his witnesses that he got allocated the land by the adjudication committee absolutely and not to hold for his family. He claimed to have paid for the survey fees and other outgoings. These receipts were not presented in Court. From the Court record the Court expunged some receipts that he had attempted on grounds that they were not addressed to him nor was he the maker. That notwithstanding the land was registered in his name.

24. The evidence of DW3 -6 can best be summarized as hearsay as the witnesses were too young at the gathering and adjudication to understand what was going on. One of the them had not even been born. The testimony is of little value to the Court.

25. Guided by the decision of **PETER GITONGA VERSUS FRANCIS MAINGI M'IKIARA MERU HC.CC NO. 146 OF 2000** above, I will look at the circumstances of registration of the suit land. It is on record that the Plaintiff was born in about 1949 and therefore in 1954 was only 4years old, thus was still a minor and could not have been registered as owner of land let alone go and gather the land. In 1960 he was 11 years old. The evidence that the land was registered in the name of the Defendant as he was of age is more probable.

26. Uncontroverted evidence has also been led that the Plaintiff, the Defendant, siblings and parents settled on the suit land since the 1960s.

The Plaintiff has been on the land since they were settled by the Defendant then. In the case of **Mukangu Vs Mbui (KLR)** the Court of Appeal at page 163 stated;

"But more significantly we think a trust arose from possession and occupation of the land by Gerald which has the protection of section 28 & 30g of the Act unless there is an enquiry made which discloses no such rights which would be superfluous in this case".

27. Taking the evidence of the Plaintiff and the PW3 and the meeting of the clan elders headed by the Sub-Chief, Kimwatari sublocation in 1998 and weighing it against the testimony as presented by the parties at the Land Dispute Tribunal No 34 of 1998, it is probable that the land was given/obtained through his clan membership by the maternal Uncle M'Aritho. In the said meeting held on 16-6-98 the parties agreed to share the land equally. The Defendant has not rebutted in evidence (other than a mere denial) the existence of this meeting. That taken with the Plaintiff's evidence that when the Defendant reneged on this understanding, it led to his filing a claim at the Land Dispute Tribunal (LDT) No 34 of 1998 is more probable.

28. I am aware that the decision of the LDT was quashed by the High Court on account of Jurisdiction, however in my considered view that did not dissipate the value of the evidence of the parties as freely given at the tribunal regarding the subject matter which was and still is a claim of ownership of land by trust by the Plaintiff. This is evidence taken in Proceedings in a manner prescribed under the then Land Dispute Tribunal Act and would be considered admissible in evidence as shown on the record of the Court. I find the evidence credible and will consider it in this case.

29. At the LDT proceedings in 1998, the plaintiff led evidence similar to the one in this case and the Defendant on cross examination by the elders stated as follows;

" Q. Where did the land (suit land) come from?

A. From our Uncle.

Q. did you give your uncle anything for giving you the land?

A. Yes I paid for the committees subsistence.

Q. why can't you share the land equally with your brother?

A. because am the eldest

Q. How big is the land you occupy?

A. six acres.

Q. who uses the balance of this land?

A. It is the claimant.

From the above evidence it is clear that the Defendant admitted that the land came from his maternal Uncle M'Aritho. The reason for denying the plaintiff equal shares is on account that he is the eldest in the family. He did not say that he owns the land as of right. He also recognised and admitted that the land is being used equally by the two brothers. The testimony given by most witnesses was that the father of the Plaintiff came from another clan and therefore could not have been allocated land in this area. This evidence is consistent with testimony that for the Defendant to have gotten land, it had to be through the clan of M'Aritho as land was being allocated clanwise. The Plaintiff was too young at the time of demarcation and therefore fell on the Defendant to be registered as owner of the land. The Defendant admitted that he did not purchase the land. The events that follow allocation of the land such as settling the family (including the plaintiff), burying their parents on the land was just part of the natural events on family land use. In the Tribunal the Defendant stated that he had offered the Plaintiff three (3) acres at the District Officers Office but he refused. In his evidence he stated that he wished to give the land to his 9 sons thus deny the Plaintiff his due share. He has not explained why whilst he claims to be the absolute owner of the suit land on one hand, on the other he is prepared to give the Plaintiff 2 acres. This evidence in totality leads the Court to conclude that the land was held under trust for the family, the plaintiff and the Defendant included.

30. The upshot is that the Court finds the Plaintiff has proven his case on a balance of probability grants orders as follows;

a. The Defendant's counterclaim against the Plaintiff is dismissed.

b. Judgement is entered for the plaintiff against the Defendant as prayed.

c. As a Trustee the Defendant shall ensure that the suit land is shared in 2 equal parts between himself and the Plaintiff. The subdivision shall as much as possible be in accordance with whatever side each is occupying. He shall facilitate the execution of the subdivision and transfers and in default the Registrar of this Court to execute all the necessary documents for and on behalf of the Plaintiff.

d. Parties being brothers, each to meet their costs of the suit.

Orders accordingly.

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

J.G. KEMEI

JUDGE

In the presence of:

C/A Mutua

Ms. Aketch holding brief for Ms. Mutinda for plaintiff

Ms. Kaume for Defendant

Both parties were present