REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 143 OF 2015

NELIA NJERI KANG'ANG'I ..... PLAINTIFF

VERSUS

STEPHEN GICHANGI KANG'ANG'I ..... DEFENDANT

JUDGMENT

NELIA NJERI KANGANGI (the plaintiff herein) filed this suit originally at the High Court in Nyeri on 5th December 2011 seeking judgment against the defendant in the following terms:

> ***1. An order for the defendant, his agents or servants to vacate and remove their properties from L.R No. MUTIRA/KIRIMUNGE/196 and in default, they be forcefully evicted at their own costs.***
>
> ***2. General damages for trespass.***
>
> ***3. Costs and interests.***

The plaintiff's claim was predicated on pleadings that she is the absolute registered proprietor of the land parcel No. MUTIRA/KIRIMUNGE/196 measuring 1.98 Ha or thereabout (the suit land) and that without any colour or right or authority from the plaintiff, the defendant has failed, refused and/or ignored the notice to vacate.

By his amended statement of defence and counter-claim filed on 15th February 2016, the defendant pleaded that not only does the plaint disclose no reasonable cause of action and does not comply with the mandatory provisions of ***Order 3 Rule 1 (2) to (4) of the Civil Procedure Rules*** but it is also frivolous, vexatious and an abuse of the Court process. The defendant pleaded further that the issues relating to the right of ownership, possession and/or control of the suit land are res-judicata and/or otherwise sub-judice due to the District Tribunal Case No. 55 of 2006 and the Provincial Appeal Committee Case No. 25 of 2006. The defendant therefore pleaded that the Court has no jurisdiction to determine this dispute.

By his counter-claim, however, the defendant went on to plead that the suit land originally belonged to his father **WILLIAM KANGANGI WAMWII** and comprised of 4.9 Ha. That his father had two wives one being the plaintiff and the other the defendant's mother who was therefore entitled to 2 Ha and the plaintiff 2.9 Ha. However, the defendant's father transferred the whole 4.9 Ha to the plaintiff rendering the house of his other wife landless. That the defendant's father had another parcel of land being MUTIRA/KIANGAI/195 measuring 6.9 Ha but that land belongs to the defendant's grandfather. It is the defendant's case that the plaintiff was given the suit land by the defendant's father to hold in trust for herself and the defendant's family. The defendant therefore sought judgment against the plaintiff in the following terms:

> ***1. A declaration that the defendant holds the land parcel No. MUTIRA/KIRIMUNGE/196 in trust for herself and for the defendant's benefit.***
>
> ***2. The determination and/or dissolution of the trust over the land parcel No. MUTIRA/KIRIMUNGE/196 and the defendant to get two (2) acres (sic) out of 4.9 acres (sic) of land parcel No. MUTIRA/KIRIMUNGE/196.***
>
> ***3. Dismissal of this suit.***
>
> ***4. Costs of defence and counter-claim.***

When the parties appeared before this Court on 24th October 2017, it was agreed by consent that this dispute be determined on the basis of the witness statements and other documents filed herein and that counsels do put in their respective written submissions. That was

subsequently done.

This dispute will therefore be determined on the basis of the witness statements and other documents filed by both parties.

I must first however set the record straight as to whether the suit land measures 4.9 Ha (as pleaded by the defendant in his defence and counter-claim) or 1.98 Ha (as pleaded by the plaintiff (in his plaint). Among the documents filed in this case is the certificate of search in respect to the suit land dated 25th January 2008 and which shows the approximate area of the suit land as 1.98 Ha which translate to 4.9 acres. The correct acreage of the suit land is therefore 1.98 Ha (4.9 acres) and not 4.9 Ha as stated by the defendant in his defence and counter-claim. It is clear that that was an error on the part of the defendant.

I also need to determine whether this suit is res-judicata and also whether I have no jurisdiction to determine this suit as pleaded by the defendant in his defence.

JURISDICTION:

The issue of jurisdiction has to be determined at the earliest opportunity because without it, a Court must down its tools – ***OWNERS OF THE MOTOR VEHICLE 'LILLIAN S' VS CALTEX OIL (K) LTD 1989 K.L.R 1***. Although the defendant has pleaded in paragraph five (5) of his defence that the jurisdiction of this Court is "***not admitted"***, he has himself placed before this same Court his counter-claim for adjudication over the same subject matter. Nothing has been pleaded to show in what respect this Court lacks jurisdiction to handle this dispute which is in relation to the ownership of the suit land. The provisions of ***Section 13 of the Environment and Land Court*** are wide enough to clothe this Court with the requisite jurisdiction to determine this dispute. See also ***Section 150 of the Land Act***. It is clear to me that the plea on jurisdiction was not made with any serious conviction or is another typographical error. I dismiss it.

RES-JUDICATA

This is provided for in ***Section 7 of the Civil Procedure Act*** in the following terms:

> ***"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court"***. Emphasis added.

It is clear therefore that before res-judicata can be successfully pleaded as a bar, the following must be established:

> ***1. The issue in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar;***
>
> ***2. The former suit should be between the same parties or parties under whom they or any of them claim litigating under the same title;***
>
> ***3. The suit must have been heard and finally determined;***
>
> ***4. The Court that heard the former suit must have been a competent Court.***

Therefore, if the previous suit was heard and determined by a Court that was not competent in that it had no jurisdiction over the dispute, the plea of res-judicata cannot be up-held. In ***MULLA, THE CODE OF CIVIL PROCEDURE 18TH EDITION at Page 285***, the authors have stated the following:

> ***"A judgment delivered by a Court not competent to deliver it cannot operate as res-judicata since such judgment is not of any effect. It is a well settled position in law that if a decision has been rendered between the same parties by a Court which had no jurisdiction to entertain and decide the suit, it does not operate as res-judicata between the same parties in subsequent proceedings".***

While pleading res-judicata, the defendant stated that the dispute herein was the subject of the Central Division Land Disputes Tribunal Case No. 55 of 2006 and Provincial Appeals Committee Case No. 25 of 2006. The proceedings in those two cases are part of the record. The proceedings of the Central Division Land Disputes Tribunal shows that the said Tribunal made the following orders after hearing the parties herein and their witnesses:

"AWARD

The panel gives the following award ------

MUTIRA/KIANGAI/195 1: Naomi Wangunda

2: Kangangi Wamwii - 1.9 acres

3: Nelia Njeri Kangangi - 1 acre

MUTIRA/KIRIMUNGE/196 1: Stephen Gichangi - 1 acre

2: Nelia Njeri

Kangangi - 3.9 acres".

When the matter went to the Provincial Appeals Committee, it made the following order:

> ***"AWARD***
>
> ***After listening to both parties, we directed the parties to go to the High Court for sub-division of both titles – MUTIRA/KIANGAI/195 and MUTIRA/KIRIMUNGE/195".***

The reference to the parcels of land in the Provincial Appeals Committee's award as MUTIRA/KIANGAI/195 and MUTIRA/KIRIMUNGE/195 must have been an error as the parcels are MUTIRA/KIANGAI/195 and MUTIRA/KIRIMUNGE/196. That notwithstanding, as the above two parcels of land are registered, the Central Division Land Disputes Tribunal had no jurisdiction to make the orders that it did sub-dividing it. That is settled law – see ***JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA DIVISION LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL No. 256 of 2002 (KISUMU).*** That award cannot therefore be raised as a plea in res-judicata. Only the High Court and, after 30th August 2011, this Court, had the requisite jurisdiction to determine this dispute. Further, the defendant's counter-claim in this suit is based on trust. The Central Division Land Disputes Tribunal could not determine a dispute based on trust – ***JOSEPH LELEI & ANOTHER VS RIFT VALLEY LAND DISPUTES APPEAL COMMITTEE & OTHERS C.A CIVIL APPEAL No. 82 of 2006 (ELDORET***). It is clear therefore that this suit is not res-judicata.

Having settled the issues of jurisdiction and res-judicata, I shall now examine the merits of the parties respective claims over the suit land.

It is common ground that the suit land is registered in the names of the plaintiff as per the certificate of search dated 25th January 2008. The document of title was not availed but by her own statement, the plaintiff has said that she has been the registered proprietor of the suit land since 2004. The plaintiff has not however stated the circumstances under which she became the registered proprietor of the suit land except that it belonged to her late husband who had allowed the plaintiff to work on the coffee crop growing on it before he later asked the defendant to vacate. A copy of the notice to vacate dated 1st January 2011 has been availed. The plaintiff is the only witness in support of her case and by a further statement dated 22nd September 2017, she has confirmed that her late husband also owned another parcel of land being MUTIRA/KIANGAI/195 measuring 6.9 acres which was ancestral land and which is however registered in the names of his brother **MAIMBA KIURA** also deceased. She added that her late husband had two wives one of who is the mother to the defendant. It is her statement that in 1987 when her late husband retired, he returned home from Mombasa and allocated the suit land to her while the plaintiff's mother was allocated the ancestral land although the defendant was allowed to cultivate a portion of the suit land where he still resides and has refused to vacate hence this suit. She denied that she holds the suit land in trust for the defendant.

The defendant's statement however is that the suit land belonged to his late father **WILLIAM KANGANGI** and he has lived thereon since 1969 with his family after his late father allowed him to live there. He states further that after his late father returned from Mombasa with the plaintiff, he noticed persons visiting the land with papers claiming that his late father had transferred the suit land to plaintiff. He therefore enquired from his late father who told him that he did not know what had happened and advised him to move to Court. It was then that he moved to the Land Disputes Tribunal and was awarded one (1) acre but was aggrieved by that decision and so he appealed.

The defendant filed statements by three (3) witnesses namely **ERNEST NDEGE, JOSEPH CHOMBA** and **STANLEY CHEGE.**

In his statement, **ERNEST NDEGE** confirmed that the late **WILLIAM KANGANGI** who was the husband to the plaintiff and the father to the defendant had only one parcel of land being the suit land and when he returned from Mombasa with the plaintiff following his retirement, he settled on the suit land with the plaintiff. He states that the late **WILLIAM KANGANGI** who had two wives ought to have shared the suit land equally between them.

JOSEPH CHOMBA is a brother to the defendant and confirmed that their late father had two wives being the plaintiff and **NAOMI WANGUNDA KANGANGI** the mother to the defendant. He states that the suit land was allocated to their deceased father by their **UKIURU CLAN** and in 1969, the defendant was allocated to live on it as it was about to be grabbed since their father was in Mombasa. However, when their father returned from Mombasa upon retirement, he transferred the suit land to the plaintiff yet it should have been shared between the two houses of the plaintiff and the defendant's mother. Similar evidence is contained in the statement of **STANLEY CHEGE** who is also a member of the **UKIURU CLAN.**

Submissions have been filed both by **Mr. C.M. KINGORI** counsel for the plaintiff and **Mr. A.N. CHOMBA** counsel for the defendant.

The plaintiff's claim is anchored on the un-disputed fact that she is the registered proprietor of the suit land which is registered under the

now ***repealed Registered Land Act***. ***Sections 27 and 28 of the repealed Act*** makes it clear that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto. Obviously, such rights include the right to evict trespassers. That is one of the remedies sought by the plaintiff together with a claim for damages. There is however a provisal to ***Section 28 of the repealed Act*** in the following terms:

> ***"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".***

Similar provisions are found in ***Sections 24 and 25 of the new Land Registration Act.*** It is now trite law that the mere registration of land in the name of a party does not extinguish the rights of other persons who may be entitled to it by virtue of a trust. There is sufficient jurisprudence in that respect including:

> ***1. MUMO VS MAKAU 2004 1 K.L.R 13***
>
> ***2. KANYI VS MUTHIORA 1984 K.L.R 712***
>
> ***3. MUKANGU VS MBUI 2004 2 K.L.R 256.***

As the defendant's counter-claim is based on trust, the duty was on him to prove the existence of a trust in his favour. The law, as set out in the case of ***SALESIO M' ITONGA VS M' ITHARA & OTHERS 2015 e K.L.R*** is that trust is a question of fact to be proved by evidence. In ***MBOTHU & OTHERS VS WAITIMU & OTHERS 1986 K.L.R 171,*** the Court held that:

> ***"The law never implies, the Court never presumes a trust but in case of absolute necessity.***
>
> ***The Courts 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".***

The question that I need to answer is whether or not the defendant has placed before this Court sufficient evidence on which his counter-claim based on trust can be founded.

The plaintiff's evidence, as supported by his witnesses that he has lived with his family on the suit land since 1969 is not in doubt and has not been rebutted. Indeed it is this occupation that the plaintiff wants to bring to an end. The defendant's statement is that his late father allowed him to live on the suit land and it was not until his return from Mombasa on retirement that problems arose when the suit land was registered in the names of the plaintiff and eviction notices were issued. Therefore the defendant's interest on the suit land are among the overriding interests recognized by ***Section 30 of the repealed Act***. ***Section 28 of the new Land Registration Act*** similarly recognizes trusts including customary trusts as some of the overriding interests over land. The fact that the defendant's late father allowed him to occupy and work on the suit land could only have been in recognition of the fact that it was family land to be held in trust for the benefit of his family and future generations. This is fortified by the defendant's evidence that the suit land was originally ancestral land. Although the plaintiff has stated in her further statement dated 22nd September 2017 that her deceased husband owned the suit land and another parcel No. MUTIRA/KIANGAI/195 which was ancestral land, she does not provide evidence of when and how her late husband obtained the suit land. If he obtained it through a purchase or gift, nothing would have been easier than to avail the supporting evidence. The un-controverted evidence that the defendant and his family have lived and continue to live on the suit land is evidence upon which this Court can conclude, which I hereby do, that the subsequent registration of the plaintiff as the owner thereof was always subject to the defendant's interest thereon based on trust.

The plaintiff has also suggested in her statement that her co-wife who is the mother of the defendant was allocated the land parcel No. MUTIRA/KIANGAI/195 which is the ancestral land. In the same statement, however, she concedes that the land parcel No. MUTIRA/KIANGAI/195 is infact registered in the names of **MAIMBA KIURA** her late husband's brother also deceased. Surely there was no way in which her deceased husband could have allocated to his other wife land belonging to another person when he had his own land. The truth can only be that the plaintiff's late husband had only one parcel of land which is the suit land and which he intended to be used by his family which include both the plaintiff and the defendant. It could never have been the intention of the plaintiff's late husband that only her house benefits from the use of the suit land while the other house represented by the defendant remains destitute. That is why he allowed the defendant to occupy and use the suit land. That is also why this Court is inclined to believe the defendant's statement that his late father ***"didn't know***" how the suit land had been transferred to the plaintiff and whoever facilitated that transfer took advantage of his late father's ***"old***" age. It is also instructive to note that the eviction of the defendant and his family from the suit land only commenced in 2011 long after the plaintiff's husband had retired and the suit land had been transferred to the plaintiff. If the defendant and his family were trespassers on the suit land, nothing would have prevented him from evicting them way back in 1969 when they moved to the suit land. Clearly, the defendant cannot be a stranger on the suit land and the plaintiff's claim that he and his family be evicted therefrom and that she be paid damages is not supported by the available evidence. I must therefore dismiss the plaintiff's claim.

On the other hand, there is sufficient and credible evidence that the plaintiff was only registered as the proprietor of the suit land to hold it in trust for herself and her co-wife and therefore the defendant. The defendant and his family have always lived on the suit land and continue to do so since 1969. There is no evidence that the defendant's mother **NAOMI WANGUNDA KANGANGI** was allocated any other land and the land parcel No. MUTIRA/KIANGAI/195 which the plaintiff suggests was the defendant's share is infact registered in the names of another person. That is sufficient evidence upon which this Court can make a finding, which I hereby do, that the plaintiff holds the suit land in trust for herself and the defendant and that the said trust should be determined in the manner proposed by the defendant in his counter-claim.

Ultimately therefore and having considered the evidence by both the parties in this suit, this Court makes the following orders:

1. ***The plaintiff's suit is dismissed.***

2. ***The defendant's counter-claim is allowed in the following terms:***

    (a) A declaration is issued that the plaintiff holds land parcel No. MUTIRA/KIRIMUNGE/196 in trust for herself and the defendant.

    (b) The trust is hereby determined and an order is issued that land parcel No. MUTIRA/KIRIMUNGE/196 be sub-divided with the plaintiff retaining 2.9 acres and the defendant getting 2.0 acres.

3. As the parties are a family, each shall meet their own costs.

B.N. OLAO

JUDGE

7TH MAY, 2018

Judgment dated and signed at Bungoma this 7th day of May 2018.

Read and Delivered on 26th Day of June 2018

S.N MUKUNYA

JUDGE

26TH JUNE, 2018