



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 24 OF 2017

GEORGE MUSAI MACKENZIE.....1ST PLAINTIFF

ROSE NDANU MACKENZIE.....2ND PLAINTIFF

FRANCISCA NDUNGE MACKENZIE.....3RD PLAINTIFF

VIRGINIA NTHENYA MACKENZIE.....4TH PLAINTIFF

KEVIN MUSEMBI MACKENZIE.....5TH PLAINTIFF

LAUREEN NDUKU MACKENZIE.....6TH PLAINTIFF

VERSUS

BARRY MANZA MACKENZIE.....1ST DEFENDANT

LANDS REGISTRAR MAKUENI COUNTY.....2ND DEFENDANT

JUDGMENT

1. The plaintiffs brought action against the first defendant by way of a plaint dated 24th February, 2017 and filed in court on even date. On the 15th May, 2017 the plaintiffs amended their plaint upon being granted leave by the court to include the Land Registrar, Makueni County, the second defendant herein.

2. The prayers sought in the amended plaint dated 12th May, 2017 are;

c. A declaration that the registration of land parcel Makueni/Kako/67 and Makueni/Kako/392 in the names of the 1st defendant is null, void and of no legal effect,

d. An order to the Land's Registrar Makueni County to cancel the title deeds Makueni/Kako/67 and Makueni/Kako/392 issued to the defendant Barry Mackenzie.

e. An order to the Lands Registrar Makueni County to issue new title deeds in the names of the plaintiffs and the defendant to hold jointly and in equal shares,

f. In the alternative, an order that the 1st defendant herein retains land parcel Makueni/Kako/67 while the plaintiffs' take land parcel Makueni/Kako/392 and have transferred by the 1st defendant to their name to have it registered jointly in their names,

g. Any other relief this honourable court may deem fit,

h. Costs of the suit and interest thereon.

3. The claim is denied by the first defendant vide his statement of defence dated 7th February, 2018 and filed in court on even date. There was no evidence of the second defendant having ever been served with the amended plaint since no affidavit of service upon the said defendant was ever filed by the plaintiffs.

4. Hearing commenced on the 19th February, 2018. The first plaintiff testified on behalf of his co-plaintiffs. He adopted his undated witness statement filed in court on the 1st December, 2017 as his evidence.

5. His evidence was that he, his co-plaintiffs and first defendant are his brothers and sisters.

6. He said that land parcels number Makueni/Kako/67 and Makueni/Kako/392 belonged to their late father. He added that the two parcels of land were registered in the first defendant's name on behalf of the entire family since their father was aged. He said that the two parcels remained in the first defendant's name since he was the most financially able child of their father. That when they requested the first defendant to subdivide the two parcels of land amongst themselves, he declined to do so despite his initial agreement to subdivide them in a family meeting that the parties herein held in their home.

7. The first plaintiff went on to say that they later approached Munyasia and Company Advocates who prepared an affidavit which the first defendant declined to sign on the allegation that he had offset a loan that was due to their deceased father and therefore he ought to retain the two parcels of land for himself.

8. The first plaintiff produced a copy of the unsigned affidavit dated 15/12/2016 and a demand dated 19/1/2017 as PEX No.s 1 and 2 respectively.

9. His evidence in cross-examination by Mr. Ngugi for the defendant was that he and his co-plaintiffs were not present when their late father and the defendant decided that the latter should hold the suit properties in trust for them. He said that even though he had heard about the letter dated 28/10/82 from the National Bank, their father did not have a loan facility with the said bank. According to him their father had a loan facility with the Standard Bank. Regarding the original title deed that the first defendant holds, the first plaintiff asserted that it shows that the former holds the land in trust for the family. He said that he had no documents to show how the land was allocated to the first defendant, an issue he reiterated in his evidence in re-examination.

10. The plaintiffs thereafter rested their case.

11. The evidence of the first defendant was that he bought land parcel number Makueni/Kako/67 and Makueni/Kako/392 in an auction upon which the title deeds were issued to him. He said that his father who retired from service in 1975 acquired a loan facility of Kshs. 40,000 from National Bank in 1976. That his father failed to meet the monthly installments for the loan repayments whereupon his land was advertised for auction. The first defendant approached the management of National Bank which agreed to his proposal to take over the loan facility which had by then shot up to Kshs. 100,000. He revealed that it took him 5 years to repay the loan and that the plaintiffs who are his siblings never contributed towards the loan repayment.

12. The first defendant went on to say that his father never requested him to hold the two parcels of land in trust. Regarding the affidavit (PEX No1), the first defendant told the court that his siblings appeared before Mr. Munyasia where they demanded to know how he repaid the loan. He produced two documents in his list of documents dated 7/7/2018 as DEX nos. 1 and 2 respectively.

13. The first defendant's evidence in cross-examination by Mr. Mutune for the plaintiffs was that the two parcels of land were purchased by his father and had them registered in his (father's) name.

14. He said that the title deeds were issued on 26/2/83 and that the auction was done in 1967. He reiterated that his father obtained the loan facility in 1976. On being shown a certificate of official search dated 27/2/2017, the first defendant told the court that it shows that on 29/7/83 there was notification of charge by Agricultural Finance Corporation (AFC) and that he was the one who acquired the loan facility. He reiterated that his father never directed him to hold the land in trust for the plaintiffs.

15. The plaintiffs' counsel and the first defendant's counsel on record filed their written submissions on 10/4/2018 and 19/4/2018 respectively.

16. The plaintiffs' counsel cited section 25(1) of the Land Registration Act which provides as follows;

“ The rights of a proprietor, whether acquired on first registration or 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) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

17. The counsel further cited section 25(2) of the same Act which provides that;

“(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

18. The counsel was of the view that from the evidence of the first plaintiff and that of the first defendant, there was evidence to show that the father of the plaintiffs and the first defendant transferred the two land parcels to the latter to hold in trust for the former and urged the

court to issue the orders sought in the amended plaint.

19. On the other hand the counsel for the first defendant was of the view that the plaintiffs did not adduce any evidence to warrant the grant of the orders sought.

20. The counsel further submitted that the plaintiffs did not adduce any evidence whatsoever to show that the titles held by the first defendant were acquired unprocedurally, irregularly or unlawfully and cited the case of *Nyeri Chemists Ltd Vs Jane Wanjiku Muriithi & 3 others [2016]e KLR* where L.N Waithaka, J held as follows;

“whereas the applicant vide paragraph 8 of the plaint has cast aspersions on the title held by the 1st and 2nd respondents, no evidence whatsoever was led capable of showing that the title held by the 2nd respondent was acquired unprocedurally, irregularly or unlawfully. That being the case by dint of the provisions of Section 26 of the Land Registration Act, 2012 this court is obligated to treat the 2nd respondent as the prima facie owner of the suit property”

21. I have read the evidence on record and the submissions that were filed by the parties. In my view the issue for determination is:-

a) Whether or not the first defendant holds land parcels number Makueni/Kako/67 and Makueni/Kako/392 in trust for the plaintiffs.

Firstly I agree with the counsel for the first defendant that the plaintiffs did not adduce any evidence whatsoever to show that the first defendant acquired unprocedurally, irregularly or unlawfully the two aforementioned parcels of land. In any case parties are bound by their pleadings and I see no averment in that regard in the amended plaint. Regarding the issue of trust the first plaintiff in his evidence told the court that they were not present when their father and the first defendant allegedly made an agreement that the latter was to hold parcels number Makueni/Kako/67 and Makueni/Kako/392 in trust for them. Even though the plaintiffs deny that their late father never obtained a loan facility with the National Bank of Kenya Ltd, DEX no.2 which is a letter dated 22/10/82 and produced by the first defendant shows that one Mackenzie Musau's loan facility was taken over by his son, Barry Mackenzie who is the first defendant herein. There is nothing to show that the plaintiffs ever participated in the repayment of the said loan facility. From the evidence on record and the exhibits produced, there is nothing that can make this court infer trust from the alleged arrangement between the plaintiffs' late father and the first defendant.

22. In the case of *Jutetabi Africa Adventure Ltd & Another Vs Christopher Michael Lockily [2017] eKLR*, the Court of Appeal cited the cases of *Gichuki Vs Gichuki [1982]KLR 285 and Mbothu & 8 others Vs Waitutu and 11 others [1986] KLR 171* and stated thus;

“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 effort to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied”

23. As I have indicated, there is nothing in the evidence before me that can enable this court to infer that there was the intention by the first defendant and his father who is also a father to the plaintiffs to create a trust. In the circumstances, my finding is that the plaintiffs have on a balance of probabilities not satisfied this court that they have a cause of action against the first defendant. I, therefore, proceed to dismiss their suit with costs to the first defendant. It is so ordered.

Signed, dated and delivered at Makueni on this 20th day of July, 2018

MBOGO C.G

JUDGE

In the Presence of:

1st Plaintiff

4th Plaintiff

Mr. Ngugi for the 1st defendant

N/A by the 2nd, 3rd and 4th defendants as well as their counsel

Mr. Kwemboi Court Assistant

Mbogo C.G, Judge

20/7/2018