



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

LAND CASE NO. 68 OF 2010

JANE MWARANIA.....1ST PLAINTIFF

JOSEPH GATOBU M'IKIUGU.....2ND PLAINTIFF

MONICA KAJUJU M'IKIUGU.....3RD PLAINTIFF

JANE KANANU M'IKIUGU.....4TH PLAINTIFF

VERSUS

FRANCIS MURITHI M'IKIUGU.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiffs commenced these proceedings by a plaint dated **17th May, 2010** which was filed on **20th May, 2010**. They sought the following orders:-

a) A declaration that the defendant holds Land Parcel No. ABOTHUGUCHI/KITHIRUNE/91 in trust for himself and the plaintiffs and should subdivide the said land and give to the plaintiffs.

b) Costs, interest and any other relief this Honourable Court deems just and fit to grant.

2. The defendant is expressed to have filed his defence dated **2nd August, 2009** (this appears to be an error for the plaint was filed in the year 2010) on the **3rd August, 2010** and the plaintiffs reply to this defence was filed on **9th September, 2010**. The plaintiffs then successfully lodged an application seeking leave to amend their plaint on **6/1/2012**.

3. The plaintiff first testified on **15/12/2016**. However the suit proceeded to hearing *de novo* on the **21/2/2018** following orders of this court made on **15/2/2017**.

THE PLEADINGS

The Plaint.

4. According to the amended plaint dated **8th February 2012**, the first plaintiff is the mother to the other plaintiffs and the defendants. In the 1940s or thereabouts, her husband was allocated land by his clan on which to settle his family and he settled the family thereon immediately. However in the 1960s, during consolidation, adjudication and registration on land, her husband caused the said land to be registered in the name of the defendant with the intent that he should hold the same in trust for the other family members. By then the defendant was very young. The defendant has allowed the plaintiffs to occupy and continue utilizing the suit land and they have continually developed the said land. The land was registered as **ABOTHOGUCI/KITHIRUNE/91** and the family has lived on it since 1940s until after their patriarch's demise when the defendant became hostile to the other family members, claiming to be an absolute proprietor thereof which, according to the plaintiffs, amounted to a breach of trust. It is also alleged that the defendant has attempted to evict the plaintiffs and to demolish their houses. He has also attempted to dispose off the suit land to one Martin Mwirigi in order to deny the Plaintiffs land. It is pleaded that the plaintiffs have lived on the suit land all their lives together with their families and have undertaken extensive developments which include, construction of permanent buildings which was done without any opposition from the defendant. It is on the basis of those facts that the prayers of declaration of trust and subdivision of the land are sought.

The Amended Defence.

5. In his amended defense dated **12th March 2012** and filed on **13th March 2012**, the Defendant denied the claim. In particular he denied the particulars of trust set out in the claim and pleaded that this suit is time barred and an abuse of the court process. He also pleaded that the plaintiffs' Have no locus standi to bring the suit on behalf of the estate of the deceased. The defence states that the defendant was given the said land absolutely and that this is not the only land the deceased had; the deceased had other portions of land where his family was supposed to settle. The plaintiff filed a reply to the amended defense and reiterated all the matters in the amended plaint.

THE EVIDENCE OF THE PARTIES

The Plaintiffs' evidence.

6. In her evidence the 1st plaintiff testifying as **PW1** stated that the defendant was **aged 8** when the land was registered in his name; that she wants the land now held by the defendant to be divided amongst all her sons including the defendant. She testified that her husband had another land parcel and that since everyone could only be registered once, and women were not entitled to registration, and she did not want the land parcel to be lost, she caused the defendant to be registered in his name to hold the same in trust for the family. She testified that her family lives on the land which is registered in the name of the defendant, and which she wants subdivided. According to her the defendant turned against the family when he married a wife. Her husband had intimated that the land was to be subdivided equally among the family members but unfortunately he died before this was done.

7. **PW2, Jane Kananu M'Ikiugu**, the 4th defendant, adopted her statements filed in the record and testified that the defendant is her elder brother while she is the 5th born in the family. However the land in question was registered before she was born. According to her the defendant was registered as a trustee for the family. She averred that she lives on the suit land.

8. **PW3, Susan Gatuiri Ikiugu**, adopted her witness statements and further testified that the defendant is the eldest brother in the family and that he and her mother had been having a dispute. According to her the family elders took up the matter and later advised that the same be taken before the Land Disputes Tribunal, Meru Central. While before the Tribunal her mother was the complainant and the Tribunal said that the suit land should be divided. In her recollection the defendant appealed the Tribunal decision before the Embu based Provincial Appeals Committee which also ruled against him. He was not satisfied and he therefore filed **Meru HCCC NO 41 of 2003** and the High Court overturned the Appeals Committee decision. According to her, her other brothers and sisters were sick from stress that arose out of the dispute and she expressed her desire that the trust should be terminated and the land be shared out among family members. She sought a declaration that the defendant holds the land in trust for the family. The witness recalled that Meru traditions of earlier times never recognized women's entitlement to land and that the land was registered in the defendant's name simply for convenience. She testified that the defendant had breached the trust when after his father's death he proclaimed that he did not recognize the rest of the family members saying that they should go and occupy parcel number **482**. According to her the defendant has built a church on that parcel number **482** and he and her other brothers farm on small portions of that land while the entire family lives on plot number 91. It was her testimony that she will also like the defendant to get a piece of plot number **91** if it is subdivided.

The Defendant's Evidence.

9. The Defendant testified also testified on the **21st February 2018** as **DW1**. He recognized the Plaintiffs as members of his family, stating that **PW1** is his mother while the rest of the defendants are his siblings. He admitted that he was registered as owner of the land in question in 1963 at the age of nine. Despite having been allocated the land while he was of tender age, he disputed the allegation that one could not get more than one parcel of land at that time but failed to support his contention with any evidence. He averred that he was not told that the land will be held by him in trust for anyone. He averred that he was told by his father that the land was his. He stated that his father also owned plots number **482** and **1314**. However he denied the allegations by the plaintiffs that he was using plot number **482**. He adopted his witness statement filed on **26th June 2013**. He testified that he does not want any other land from those two other parcels that is plot number **482** and **1314**. He admitted to having applied for correction of name on the green card in the year **2001** after his father died in the year **2000**. According to him, the correction was only meant to perfect the parcel to read his full name. When shown entry number five (**5**) on the register, he admitted that his mother lodged a caution, against the title and further admitted that his mother, his brothers and sisters live on the suit land. He stated that the land originally belonged to the clan and that while his father was alive, there was no dispute. He admitted that title to plot number **482** was issued on the same day as title to plot number **91**. He accused his mother of wanting to take over his land while she has her own property. However he also admitted that the tree crop on then said land was planted by his father. He denied knowing anything about his father's financial affairs and averred that his mother receives the proceeds from the sale of the tea. On cross examination, he stated that he was never asked whether he should be registered as owner of the land that he has never discussed the land with his father, that his mother has never told him why he was registered and that he only heard of the trust in the court proceedings.

Submissions of the parties.

10. The plaintiff filed his submissions on the **26th March, 2018**. I have looked through the court record and found no submissions filed on behalf of the defendant.

DETERMINATION

Issues for Determination

11. The issues that arise in this suit are as follows:

- a. Whether the defendant holds the title to the suit land in trust for himself and for the other family members.**
- b. What orders should issue?**

(a) Whether the defendant holds the title to the suit land in trust for himself and for the other family members.

12. It is common ground that the suit land is registered in the name of the defendant. The dispute arises from lack of any express particulars of trust on the title. It is possible to hold that land is held in trust provided the right evidence is before court. Whether the trust is registered or not, it is therefore in all cases a matter of evidence. The question in the instant suit is whether the plaintiffs' have established their claim of trust on a balance of probabilities.

13. The evidence of both parties agrees that the plaintiff was very young when the land was registered in his name. The land is said to have been clan land allocated to the defendant's father in the 1940s to settle his family, including the defendant, on.

14. The plaintiff's version is that at the time of demarcation and issuance of title the land was registered in the name of the defendant so that it may not be lost to third parties. It is also acknowledged that the other land that the deceased had was acquired from a Cooperative Society and it was not therefore clan land. It is not the land acquired from the Cooperative Society that the defendant is claiming. It is the land that emanated from the clan.

15. In the instant suit, there is incontrovertible evidence that all the parties have lived on the suit land for decades. There was no will from the deceased upon his death. The defendant avers that the deceased informed him that the land was his absolutely. He does not have any witness to corroborate this evidence.

16. The defendant desires that the rest of the family leaves him and his wife and children to move to two other plots which also belonged to the deceased. Only the particulars of one of these plots, that is plot number 482 have been given. From documentary evidence in the form of a certificate of official search dated 23/1/2012 in the defendant's bundle filed on 26/6/2013 in this case, it measures 0.368 hectares. There is also credible oral evidence from the plaintiffs that the defendant is also in part-occupation of this plot on which he has erected a church house. There is no evidence of ownership or size of plot number 1314.

17. The 1st plaintiff testified that the deceased may have wanted to subdivide the land equally among the family members but he died before he did so. Coming to her support are at least three other of her children who are enjoined as her co-plaintiffs in this suit.

18. There is also incontrovertible evidence that the other members of the family besides the defendant have conducted extensive developments on the suit land without any opposition from the defendant who is said to have become hostile only after his father's death. The defendant also admitted under cross examination that he only applied for a correction of the name in the land register after his father's demise.

19. The defendant did not purchase the land for he was young and had no resources, or at least has not shown that he had resources to enable him do so. His evidence is inconsistent in that whereas he at first stated that his father told him that the land belonged to him he later stated that the two never discussed the issue of the ownership of the land.

20. I take note of the evidence, which is acknowledged by the defendant himself that his father planted the tea crop that is growing on the land. It is clear from PExh 2 that the 1st plaintiff had been picking the tea on the land until the defendant and his brothers obtained a court order stopping the picking. Can one plant a perennial crop on land that he did not intend to benefit the entire family he was managing? In my view, the answer is "no."

21. In am also of the view that the fact that the deceased never informed the others to vacate the land on the basis that the land belonged to the defendant is a pointer to the fact of existence of trust. When asked who heard his father telling him to take care of the home during the proceedings before the Chief contained in PExh 2, the defendant answered that his other brothers and his mother did. However he failed to call anyone as a witness.

22. In PExh 3, the deceased's brother, an uncle to the defendant, also denied that there was any will left by the deceased. The defendant also admitted in PExh 2 that the alleged statement by his father was not in writing. It is also clear that the land was already divided into four portions including one for their parents by the time the deceased died and the defendant was confined to his own portion, though it is evident from PExh 3 that no individual title deeds have been processed or issued in respect of those portions. Mathiu Kiui, a witness in the land Tribunal proceedings P.Exh 3 is recorded as stating that both the suit land and the land at Nduruma were divided into four portions by the deceased.

23. The defendant himself seems to acknowledge this subdivision when he states in PExh 3 as follows:

"We have lived with my father for a long time without any problem. We have never had a problem with my brothers and my mother as well. Kiugu gave his will and whatever he said and did I have not changed. What he had witnessed with his tongue will not pass it.(sic) Kiugu left me with the home and told me to administer the family the way he used to do. That's what I am doing. I have never chased anybody at home and not even from the shamba. We are going to sit down as family members and divide Kiugu's property the way he did. At Kioru, Kiugu showed everyone his portion. He said that Murithi has a portion, Kiugu has, Martin has, likewise to Gatobu. Kiugu has three shambas and we will divide all parcels as he said."

24. From the beginning of the proceedings in PExh 3 to the end, the defendant's line of cross examination of the witnesses showed that his defence at the time was that he was wrongfully accused by the complainants and that he did not have the intention of evicting the complainant and other persons entitled to the land. The tribunal's verdict in those proceedings was also for the greater part based on the admission of the defendant as set out above.

25. The plaintiffs rely on the case of **Jason Gitimu Wangara Vs Martin Munene Wangara and Others (2013) eKLR**. In that case the

court observed that it came out clearly in the course of the trial that the parties' late father's only surviving wife and the defendants all lived on the suit land. The court observed as follows:

“It is highly unlikely that his father would give him alone the suit land leaving nothing for his siblings. From the evidence on record, the Court finds that the defendant's assertion that the plaintiff was registered as owner of the suit land in trust for the family is the more credible conclusion that this Court can arrive at.”

26. The court in the **Jason Gitimu Wangara** case (supra) also stated as follows:

“The defendants did confirm that the plaintiff as the eldest son was given the land by the clan to hold in trust for the family. In my view, there is sufficient evidence on record to make a finding that the plaintiff holds the land in trust for the family. This is supported by the fact that the parties who are all family live on the suit land and so too did their father who was buried on the same land together with his six wives as well as other family members. There is also evidence that there are some twenty homesteads on the suit land. Under those circumstances, the only conclusion that this Court can arrive at is that the plaintiff, though registered as proprietor of the suit land, holds the same in trust for the family and that registration does not relieve him of his duty as a trustee. As such, he cannot evict the defendants from the suit land as he now seeks and his claim is therefore dismissed.”

27. I find that decision to be quite persuasive in this matter.

28. There is sufficient evidence in the instant suit to enable this court hold that the defendant held the suit land in trust for his other family members, and I do so hold.

CONCLUSION

(b) What orders should issue?

29. I therefore find that the plaintiffs have established their case on a balance of probabilities. I hereby enter judgment for the plaintiffs against the defendant and issue the following final orders:

a. A declaration that the defendant holds Land Parcel No. ABOTHUGUCHI/KITHIRUNE/91 in trust for himself and the plaintiffs.

b. A declaration that the trust is hereby terminated and that the defendant should with immediate effect execute all the necessary documents to effect equitable subdivision of Land Parcel No. ABOTHUGUCHI/KITHIRUNE/91 amongst all the parties in the suit including himself, and in default the Deputy Registrar of this court do execute all the necessary documents to effect such subdivision and transfer of the resultant subdivisions to each of the parties to this suit.

c. The defendant shall bear the costs of this suit to be mutually agreed on by the parties and in default to be taxed.

It is so ordered.

Dated, and signed at Kitale on this 1st day of **August, 2018**.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 29th day of August, 2018 in open court in the presence of:

Mr. Kaume for Ondieki for respondent

Ms. Rimita holding brief for Mwanzia for plaintiffs

C/A Mutua

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE.