



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 104 OF 2017

(FORMERLY EMBU H.C.C.C NO. 81 OF 2012)

JAMES KARANO CHRISTOPHER.....1ST PLAINTIFF

JULIUS MURIUKI MUCHINA.....2ND PLAINTIFF

VERSUS

CHRISTOPHER NJAGI KARANO.....1ST DEFENDANT

NICASIUS WANJOHI NJAGI.....2ND DEFENDANT

ROBERT MBUI NJAGI.....3RD DEFENDANT

JOSEPH MUTUGI NJAGI.....4TH DEFENDANT

MARTN MUTHII NJAGI.....5TH DEFENDANT

JUDGEMENT

1. By a plaint dated 17th December 2002 and filed on 18th December 2002, the 1st Plaintiff sought the following reliefs against the Defendants;

a. That the Defendants do vacate the Plaintiff's L.R. No Mutira/Kathare/221 forthwith and in default they be forcefully evicted.

b. That any caution or restrictions placed by the Defendants or any one of them against the Plaintiff's said parcel of land be ordered withdrawn or removed forthwith.

c. The Defendants do pay the Plaintiff the costs of the suit.

2. It was pleaded that the 1st Plaintiff was the registered proprietor of *Title No. Mutira/Kathare/221* (hereinafter described as the *suit property*). It was further pleaded that the Defendants were residing on the suit property as licencees by virtue of being the 1st Plaintiff's relatives.

3. The Plaintiff also pleaded that by reason of the Defendants' misconduct and other acts of hostility towards him and his family, he had terminated the Defendants' licence to continue residing on the suit property and requested them to vacate the same.

4. The Plaintiff further case was that the Defendants had all refused to vacate the suit property. The 1st Plaintiff was also aggrieved because the 1st Defendant had lodged a caution against the suit property and refused to withdraw it despite demand.

5. All the Defendants entered appearance and filed a joint written statement and counterclaim dated 10th January 2003. The Defendants denied being licencees of the Plaintiff on the suit property and put him to strict proof thereof. The Defendants denied all the material averments in the plaint and stated in their counterclaim that the suit property was registered in the Plaintiff's name under the direction of the 1st Defendant in trust for all the Defendants in equal shares.

6. The Defendants further pleaded that it was on the basis of the said trust that each of the Defendants had taken possession of and developed their respective shares of the suit property by building homes, cultivating coffee, bananas, and other crops. It was the Defendants' case that

in breach of trust the Plaintiff had sought to evict them and dispossess of the suit property. They stated that a caution was registered to protect their interest in the suit property pending resolution of the dispute.

7. The Defendants therefore sought the following reliefs in their counterclaim against the 1st Plaintiff.

a. Dismissal of the Plaintiff's case with costs.

b. A declaration that the Plaintiff holds piece of land Mutira/Kathare in trust for himself, 2nd Defendant, 3rd Defendant, 4th Defendant and 5th Defendant in equal shares of 1.52 acres each.

c. Costs of the counterclaim.

d. Such further or other relief.

8. It would appear from the record that during the pendency of the suit the 2nd Plaintiff herein, Julius Muriuki Muchina, filed Embu HCCC No. 63 of 2003 vide a plaint dated 17th November 2003 against the Plaintiff and the 1st Defendant seeking the following orders;

a. That the 2nd Defendant do remove the caution/restriction lodged against parcel No. Mutira/Kathare/221.

b. That the 2nd Defendant be ordered to pay the costs of this suit.

c. Any other or further relief of this honourable court.

9. The basis of the latter suit was that the 2nd Plaintiff had bought one acre out of the suit property from the 1st Plaintiff but which could not be transferred to him due to the caution lodged by the 1st Defendant. It was the 2nd Plaintiff's case that 1st Plaintiff was at all times ready and willing to transfer the said one acre to him but could not obtain the consent of the Land Control Board in that regard due to the subsisting caution.

10. It would appear from the record that the said suits were consolidated for hearing and disposal as one suit and that is how Julius Muriuki Muchina became the 2nd Plaintiff in these proceedings. Some of the documents in court file, however, describe him as a third party.

11. At the trial hereof, the 1st Plaintiff testified on his behalf as the sole witness and closed his case. The 1st Plaintiff's case was that he inherited the suit property from his late grandfather through succession proceedings and that the land was his absolutely. He denied any suggestion that he was holding it in trust for his entire family members. He confirmed that the 1st Defendant was his father whereas the 2nd – 5th Defendants were his siblings.

12. The 2nd Plaintiff testified on his own behalf as well and closed his case. His evidence was straightforward and uncontroverted. He simply reiterated the contents of the suit he had filed. He was a purchaser for value of one acre out of the suit property. He bought that portion from the 1st Plaintiff in 2002 and paid the full purchase price but it could not be transferred to him because of the caution lodged by the 1st Defendant.

13. The 1st Defendant, who is the 1st Plaintiff's father, testified on his own behalf in this matter. He stated that the 1st Plaintiff was his eldest son. It was his evidence that the suit property initially belonged to his father, Karano Njagi, who died in 1963. He stated that he had agreed to have the 1st Plaintiff registered as owner of the suit property to hold it in trust for the family upon the death of Karano Njagi. The 1st Plaintiff was about 9 years old when he was registered as proprietor. He asserted that the 1st Plaintiff and his siblings who are the 2nd – 5th Defendants also reside on the suit property with their wives and children. He, therefore, wanted the suit property to be shared equally amongst all his children.

14. Upon conclusion of the 1st Defendant's case the counsels for the parties agreed to have the 2nd to 5th Defendants rely upon their witness statements and documents on record without putting them in the witness stand. The court proceeded to record the consent and gave the parties at least 90 days to file and exchange written submissions. However, by the time of preparation of the judgement, only the 2nd Plaintiff had filed his submissions.

15. The court has noted from the court file that the parties did not file an agreed statement of issues for determination. In that case, the court shall proceed to frame the issues for determination on the basis of the pleadings, documents and evidence on record.

16. In my opinion, the following issues arise for determination in this suit;

a. Whether the 1st Plaintiff holds the suit property as the absolute proprietor thereof or in trust for his entire family.

b. Whether the Defendants were residing on the suit property as licencees of the 1st Plaintiff.

c. Whether the 1st Defendant had a lawful excuse for lodging a caution against the suit property.

d. Whether the 2nd Plaintiff was a *bona fide* purchaser for value of one acre of the suit property without notice of any other claim in respect thereof.

e. Whether the 1st Plaintiff is entitled to the reliefs sought in the suit.

f. Whether the Defendants are entitled to the reliefs sought in the counterclaim.

g. Whether the 2nd Plaintiff is entitled to the reliefs sought in his suit.

h. Who shall bear the costs of the suit.

17. The 1st issue is whether the 1st Plaintiff was registered as proprietor of the suit property as absolute owner or on his own behalf and in trust for the Defendants as well. The court has considered the evidence on record on this issue. There is no doubt that the 1st Plaintiff was a minor aged about 9 years at the time he acquired the suit property in 1967 or thereabouts. There is also no doubt that the previous proprietor of the suit property was Karano Njage, who was the 1st Defendant's father and the 1st Plaintiff's grandfather.

18. It would also appear that the 1st Plaintiff acquired the suit property through succession proceedings after the death of his grandfather. The proceedings of the succession case were not produced in evidence to demonstrate who filed the proceedings and on what basis and capacity the 1st Plaintiff was ultimately given ownership of the suit property. It is apparent, however, that he did not file the proceedings himself since he was a minor at the material time.

19. The evidence on record also revealed that 1st Plaintiff's grandmother who was also the 1st Defendant's mother continued to reside on the suit property for many years until her death in 2000 or thereabouts. The 1st Defendant has resided on the suit property since 1963 to date whereas the 2nd – 5th Defendants have resided thereon since they were respectively born. The 1st Plaintiff's siblings have since established their homes, cultivated cash crops and food crops on the suit property for several decades without any objection or complaint by the 1st Plaintiff.

20. The 1st Plaintiff's claim to the suit property was based upon the oral will of his late grandfather. He stated that this wish was communicated to his grandmother Njoki and the 1st Defendant. The said grandmother is now deceased hence could not testify. The only other person who was said to be in the know was the 1st Defendant. The 1st Defendant completely refuted the 1st Plaintiff's assertion that he was to be the sole and absolute beneficiary of the suit property.

21. The 1st Plaintiff took refuge in the fact that the title deed which was issued to him did not describe him as holding the suit property in *trust* for the Defendants or any one of them. He, therefore, contended that he should be accorded all the rights of an absolute proprietor under the law.

22. It has been held in previous case law that a trust is not something which is necessarily noted in the land register. The Plaintiff's title was issued under the regime of the Registered Land Act (now repealed) which recognized the existence of a trust. In the case of **Gathiba Vs Gathiba NBI HCCC No. 1647 of 1984** it was held, *inter alia*, that;

“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interests under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has that piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee.””

23. The court is satisfied on a balance of probabilities that the 1st Plaintiff was not registered as absolute owner of the suit property but was to hold it on his own behalf and in trust for the rest of his family members for two main reasons. First, there was no logical reason why his grandfather could disinherit his own son (the 1st Defendant) and his wife (Njoki) by willing away his entire land to the Plaintiff. Second, all the Defendants continued to reside on the suit property for several decades and established their homes on the suit property without objection by the 1st Plaintiff. They undertook extensive developments including cultivating cash crops thereon without objection by the 1st Plaintiff. All those developments could not be done by mere licencees.

24. The court does not accept the 1st Plaintiff's contention that no trust could exist in favour of the Defendants because most of his siblings were not yet born at the time. There is no legal requirement that all the intended beneficiaries of a trust must all be alive at the commencement of the trust obligation. In any event, there is evidence on record that at least the 1st Defendant, or the 1st and 2nd Defendants were alive at the material time.

25. The 2nd issue is whether the Defendants were all residing on the suit property as licencees of the 1st Plaintiff. Following the court's finding and holding on the 1st issue, it follows that the Defendants were not licencees of the 1st Plaintiff. This issue is, therefore, answered in

the negative.

26. The 3rd issue is whether the 1st Defendant had a lawful excuse for lodging a caution against the suit property. Whereas the 1st Plaintiff asserted that the registration of the caution was wrongful since he was the absolute owner of the property, the 1st Defendant stated that he lodged the caution to protect his interest pending resolution of the land dispute. The court finds the registration of the caution was reasonable and lawful in the circumstances. The Defendants had a claim on the suit property which they were entitled to protect, pending a formal adjudication. The 3rd issue is, therefore, answered in the affirmative.

27. The 4th issue is whether the 2nd Plaintiff was a *bona fide* purchaser for value of one acre out of the suit property without notice of the Defendants' claim in respect thereof. There is no doubt from the evidence on record that the 2nd Plaintiff purchased one acre from the 1st Plaintiff and paid the purchase price in full.

28. The only question for determination was whether such purchase was *bona fide* and without notice of the Defendants' interest or claim over the suit property. During cross-examination by the Defendants' advocate, the 2nd Plaintiff conceded that the Defendants were in occupation of the suit property at the time of purchase. He stated that he did not inquire from them why they were in occupation. It was also his evidence that the 1st Plaintiff did not explain to him the basis for the Defendants' occupation. He was not bothered with those details because the particular portion he was interested in was not occupied.

29. The court is of the opinion that although the 2nd Plaintiff was a purchaser for value, he was not a *bona fide* purchaser without notice of the Defendants' interest in the suit property. He was aware of their occupation but he did not make any inquiries at all on the basis of their occupation despite having had an opportunity to do so. It may be concluded that the 2nd Plaintiff simply shut his eyes to the obvious when he had an opportunity to know more. The court, therefore, holds that he was not a *bona fide* purchaser without notice.

30. The 5th issue is whether the 1st Plaintiff is entitled to the reliefs sought in the plaint. It would follow that since the court has found against the 1st Plaintiff on the first two issues, then the 1st Plaintiff is not entitled to the reliefs sought in the plaint or any one of them. The 1st Plaintiff simply failed to prove his case hence he is not entitled to the remedies sought.

31. The 6th issue is whether the Defendants are entitled to the reliefs sought in the counterclaim. In view of the fact that the court has found in favour of the Defendants on all the preceding issues, it would follow that the Defendants are entitled to the reliefs sought in the counterclaim.

32. The 7th issue is whether the 2nd Plaintiff is entitled to the reliefs sought in his suit. The reliefs sought against the 1st Defendant were for removal of the caution and costs. The court having found that the 2nd Plaintiff was not a *bona fide* purchaser without notice of the Defendants' interest in the suit property, then it would follow that he is not entitled to the reliefs sought.

33. The 8th and final issue is on costs of the suit and counterclaim. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Jannohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**.

34. The court has noted that all the parties, save the 2nd Plaintiff, are members of the same family. The court is of the opinion that the appropriate order on costs is that each party shall bear its own costs.

35. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' suit but finds merit in the Defendants' counterclaim. The court consequently makes the following orders;

- a. The 1st Plaintiff's suit is hereby dismissed.
- b. The 2nd Plaintiff's claim is hereby dismissed.
- c. The Defendants' counterclaim is hereby allowed in terms of prayer (b) thereof.
- d. Each party shall bear its own costs.

36. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 27th day of SEPTEMBER, 2018.

In the presence of Mr Muchiri for the 1st Plaintiff, Ms Nzekele holding brief for Ms Makworo for the 2nd Plaintiff, Mr. Muriithi holding brief for Mr Morris Njagi for the 1st – 5th Defendants.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

27.09.18.