



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

ENVIRONMENT & LAND CASE NO.184 OF 2013

BRENDA MUTONYI MUNIKA.....1ST PLAINTIFF

HADIJA WAMALWA MUNIKA.....2ND PLAINTIFF

VERSUS

CLARE NANG'UNDA BARASA.....1ST DEFENDANT

TOM KIBERENGE.....2ND DEFENDANT

JUDGEMENT

The scourge of **“home-made”** pleadings is with us again and, unfortunately, in a society where the majority of the litigants have no access to legal services, will continue to be with us.

The role of precision in pleadings cannot be overstated. While pleadings need not necessarily be elegant, they must however at least be able to inform the opposing party of what case he has to meet and secondly, communicate to the Court what issues have to be determined.

A Judge or Magistrate confronted with poorly drafted pleadings is like a captain in a cockpit with faulty or no navigational equipment. It is no wonder therefore that in her submissions at the end of the trial, Ms. Mumalasi Counsel for the 1st defendant stated as follows:

“In any event, the 2nd Plaintiff’s prayer is vague. She has sought for an order compelling the 1st defendant to sign transfer documents for sub-division and registration of new numbers but she has not disclosed in whole names the new numbers should be and how the sub-division should be done. Such vague prayers should not be countenanced by Court”.

In **BULLEN AND LEAKE AND JACOB’S PRECEDENTS OF PLEADINGS 12TH EDITION**, the authors have stated the following:

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the Parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the Court what are the issues between the parties which will govern the interlocutory proceedings

before the trial and which the Court will have to determine at the trial.”

As will shortly become clear in this judgment, the Plaintiffs pleadings fell for short of what is discussed above.

By an amended plaint dated 12th October 2009 and originally filed in the Chief Magistrate’s Court, Bungoma, the three Plaintiffs namely **WILLIAM WASIKE DOMIANO** (the 1st Plaintiff), **HADIJA NAMALWA MUNIKA** (the 2nd Plaintiff) and **BRENDA MUTONYI MUNIKA** (the 3rd plaintiff) sought from the defendants the main remedy as per paragraph eight (8) of their Plaint being:

“The Plaintiff’s claim against the defendants is for permanent injunction from trespassing, interfering, leasing upon the said land and this Honourable Court do compel the 1st defendant to sign transfer documents for sub-division and registration of new numbers in default executive Officers to be empowered to do so. E. BUKUSU/N. NALONDO/8.”

The basis of the Plaintiffs claim was that **MUNIKA MUKOLONGOLO** (the deceased) who was the proprietor of land parcel No. E. BUKUSU/N. NALONDO/8 (the suit land herein) died in June 1989 leaving behind three widows one of whom is the 1st defendant. That while the deceased was sick and bed-ridden, the 1st defendant secretly took the title deed to the suit land, chased away the other widows and their children and stated disposing off the suit land to strangers one of whom is the 2nd defendant despite the fact that the Land Disputes Tribunal had ordered her to surrender the title deed to the suit land for revocation. That necessitated this suit.

Later in the proceedings, the 1st plaintiff was removed from the suit. On 14th June 2013, the 2nd Plaintiff addressed a letter to **OMOLLO J** seeking to be removed from this suit and claiming that she did not instruct the firm of **J.W. SICHANGI ADVOCATES** to act for her in this matter which was filed without her consent. That left only **BRENDA MUTONYI MUNIKA** as plaintiff.

It is instructive to note at this point that the Plaintiffs and defendants all filed their pleadings in person. Both Ms. **MUMALASI ADVOCATE** for the 1st defendant and Mr. **SICHANGI ADVOCATE** for the Plaintiffs only came into the matter after the pleadings had been filed and neither Counsel amended their respective client’s pleadings.

In her defence, the 1st defendant **CLARE NANGUDA BARASA** averred that the suit land was given to her by the deceased who was her father as a gift in 1989 prior to his death. She denied having obtained the suit land fraudulently adding that prior to his death, the deceased had consented to the transfer of the suit land to her. She then pleaded that this suit is sub-judice and an abuse of the process of the Court since there have been other cases which she enumerated as follows:

1. SRM NO. 292 OF 1990
2. H.C.C.C. NO. 48 OF 1994
3. LDT NO. 1 OF 1997
4. LDT NO. 175 OF 2001
5. SPM NO. 32 OF 2002

I have gone through the pleadings including those in the Chief Magistrate’s Court where the suit was originally filed and I have not seen any defence filed by the 2nd defendant. I therefore proceed on the assumption that none was filed.

The trial commenced before **MUKUNYA J** on 5th May 2015 when **BRENDA MUTONYI MUNIKA**

the only Plaintiff remaining told the Court that the deceased was her father and he died when she was still young. That her late father had three(3) wives the first being the 1st defendant and also owned fifty (50) acres of land which was taken by the 1st defendant. She produced the green card of the suit land and added that the 1st defendant sold a portion of the suit land to the 2nd defendant and another portion to a school. When the plaintiff complained, the 1st defendant promised to give her a portion but later changed her mind after chasing away the Plaintiff's mother. The Plaintiff asked the Court to award her ten(10) acres out of the suit land.

SALOME PETRONILA NAMAGWA (PW2) told the Court that she was the second wife of the deceased and that Plaintiff is her daughter. She added that the deceased had three wives and left behind twenty five(25) acres of land. After the demise of the deceased, the 1st defendant demolished her house and transferred the deceased's land into her names even without doing succession. The 1st defendant then sold the land to third parties.

The 1st defendant **CLARE (DW1)** asked the Court to adopt her witness statement as her evidence together with her list of documents.

In that statement dated 29th May 2015 she has stated that the deceased was her father and transferred the suit land to her during his life time. That she had two other sisters **NAMALWA MUNIKA** and **NALIKA MUNIKA** who were still very young and therefore to protect the suit land from **WILLIAM WASIKE** and other male relatives who wanted to grab the suit land, it was transferred to her. That **WILLIAM WASIKE DOMIANO** and other clan members have always wanted to grab the suit land and have been fronting the plaintiff for that purpose. She denied that the plaintiff is her sister and added that **WILLIAM WASIKE DOMIANO** had even forged the signature of her sister **HADIJA NAMALWA MUNIKA** purporting that she had filed this suit.

TOM KIBERENGE (DW2) told the Court that in 1997, he purchased from the 1st defendant four (4) acres out of the suit land where he lives.

Submission have been filed both by **Mr. SICHANGI ADVOCATE** for the Plaintiff, **Ms. MUMALASI ADVOCATE** for the 1st defendant. Similarly, the 2nd defendant who was in person also filed his submissions.

I have considered the oral evidence by both parties, the documentary exhibits and written statements as well as the submissions filed.

This is the opportune time to revisit the issue of proper pleadings that I commenced with in this judgement. From a perusal of the amended plaint dated 12th October, 2009, it is not clear what cause of action the plaintiff's claim is based upon. Is she suing the 1st defendant as a trustee who is entitled to give her a portion of the suit land? Is her case that the two defendants fraudulently transferred the suit land to the 1st defendant? Is she claiming the suit land as a purchaser? What exactly is her interest in the suit land? Those are the issues that I have grappled with in this judgement and yet my role should be to determine the dispute based on the pleadings by the parties. As was held in **JONES V NATIONAL COAL BOARD 1957 2 QB 55:**

“In the system of trial which we have evolved in this Country, the Judge sits to hear and determine the issues raised by the Parties, not to conduct an investigation or examination on behalf of Society at large as happens, we believe, in some foreign Countries.”

That dicta was approved locally in **DAKIANGA DISTRIBUTORS (K) LTD V KENYA SEED COMPANY LTD 2015 eKLR.** Surely a party moving to Court in a dispute over land must have an identifiable stake or interest in the land in question. That should form the crux of the dispute which the Court will then determine. The Plaint herein is silent on that crucial requirement. This Court will nonetheless examine the pleadings for whatever they are worth and the other documents to see what claim

the Plaintiff could possibly have had in mind.

It is clear from the title deed to the suit land that the same is registered in the names of the 1st defendant since 5th October 1989. That registration was under the repealed Registered Land Act and by dint of the provisions of Sections 27 and 28 of the repealed law, the 1st defendant is the absolute owner of the suit land subject only to any leases, charges and other encumbrances shown on the register or the overriding interests under Section 30 of the said Act. The 1st defendant is however not relieved of any duty or obligation to which she is subject as a trustee. Similar provisions are found in Sections 24 and 25 of the new Land Registration Act of 2012. In her statement dated 11th May 2015 filed in support of her claim, the Plaintiff has stated that her mother was the third(3rd) wife of the deceased and was entitled to ten (10) acres out of the suit land because the other two (2) houses also got their shares. She adds that the clan shared the suit land between the deceased's three (3) wives and even took the dispute to the Tribunal which filed an award. She is therefore entitled to a portion of the suit land since it is ancestral land. That suggests, therefore, that her claim to the suit land is based on trust. However, no trust is pleaded in her plaint. Parties are bound by their pleadings although in some cases, a Court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the Court for its decision – **ODD JOBS V. MUBIA 1970 E.A. 476.**

Even if this Court applies the decision in the Case of **ODD JOBS (supra)**, no evidence was adduced by the plaintiff to demonstrate that the suit land is held by the 1st defendant (or before her the deceased) in trust for her. Her claim to the suit land appears to be founded on the evidence that she is a daughter of the deceased. This is what she said when cross-examined by **Ms. MUMALASI**:

“I said my father had 3 wives. I do not know my father's 3rd wife. I was born in 1992. I was living in Kapchai when I grew up.”

The 1st defendant denied that the Plaintiff is her sibling. Infact she said she only saw the plaintiff in Court. Among the documents filed by **WILLIAM WASIKE DOMIANO** when he originally filed this suit in the subordinate Court is the death certificate of the deceased showing that he died on 1st June 1989. That being the case, he could not have fathered the Plaintiff in 1992. If the Plaintiff's claim is based on trust and specifically her shared ancestry with the 1st defendant and the deceased, then it is bound to fail because trust has not been proved. Trust is an issue of both law and fact. It must be proved through proper evidence by the party alleging its existence. As was held in **MBOTHU & OTHERS V. WAITITU & OTHERS 1986 KLR 171**, the Court will never imply a trust save to give effect to the intention of the Parties and such intention must be clearly demonstrated before a trust is implied. I see no such intention in the circumstances of this case. It must therefore be clear by now that even if the plaintiff had pleaded trust as the basis of her claim, there would be no evidence to sustain such a claim.

What if the Plaintiff is claiming that the 1st defendant obtained the suit land through fraud? Of course the Plaintiff would still have been required to demonstrate what interest she had in the suit land in the first place. Then the allegation of fraud, being a serious allegation, needed to be pleaded and proved to the required standard. That standard may not be so heavy as to require proof beyond reasonable doubt. However, something more than a balance of probability is required – **PATEL V MAKANJI 1957 E.A. 314.**

In the course of her cross examination, the Plaintiff stated that the 1st defendant registered herself as the proprietor of the suit land following the death of the deceased. It is common ground that the deceased died on 1st June 1989 which is the same year that the 1st defendant acquired ownership of the land. The Plaintiff therefore knew as far back as 1989 that the 1st defendant had been registered as the proprietor of the suit land yet it took her upto 2009 to file this suit. His claim is therefore statute barred because under Section 7 of the Limitation of Actions Act, this suit should have been filed before the expiry of twelve (12) years. Clearly, even if the plaintiff had any genuine claim to the suit land, it was always going to be a herculean task to prove it given the nature of her pleadings and the paucity of the evidence.

The up-shot of the above is that the Plaintiff's suit lacks merit. It is dismissed with costs only to the 1st defendant.

The 2nd defendant did not file any pleadings and is not therefore entitled to any costs.

BOAZ N. OLAO

JUDGE

20TH SEPTEMBER, 2018

Judgement dated, delivered and signed in open Court at Bungoma this 20th day of September 2018.

Mr. Otsyula for Ms. Mumalasi for 1st defendant present

Mr. Waswa for Mr. Sichangi for Plaintiff present

2nd defendant present

Plaintiff present

1st defendant - Absent

Right of Appeal

BOAZ N. OLAO

JUDGE

20TH SEPTEMBER 2018