



REPUBLIC OF KENYA

IN THE ENVIRONMENT LAND COURT AT MERU

ELC CASE NO. 5 OF 2018

MADALINA WAMBUI MARETE.....1ST APPLICANT

JOSEPH MUCIJIA..... 2ND APPLICANT

VERSUS

JULIUS KIGUTURESPONDENT

(FORMELY MERU HCC NO. 30 OF 2012)

JUDGMENT

1. The relationship between the parties herein is family based. 1st plaintiff, Madalina Wambui is a wife of Cosmas Marete (deceased) who in turn was a brother of 2nd plaintiff and defendant. The three brothers are children of one M'Tuerandu M'Anampiu (deceased) who also had another son called Miriti who is also deceased.
2. Defendant is the registered owner of parcel of land no. NYAKI/KITHOKA/685 measuring 4 acres. Plaintiffs and defendant stay on the suit land.
3. Plaintiff's claim is that their father is the one who bought the suit land but caused it to be registered in the name of defendant to hold it in trust on behalf of his siblings.
4. The plaintiffs are therefore seeking for a declaration that defendant holds the suit land in trust for plaintiffs and they are also seeking for an order for the defendant to transfer the suit land to plaintiffs.
5. Defendant on the other hand has pleaded that the land is not ancestral land that he was not given the land by his father, that he bought the land in 1968 and that he only allowed plaintiff's to utilize land as licensees. He avers that he doesn't hold the land in trust for plaintiffs.
6. This file has shuttled back and forth in various courts. It was initially filed as a high court case no. 30 in 2012. On 22.3.2016 the suit was transferred to Chief Magistrate's court by consent of the parties and with concurrence of the court. By then, 1st plaintiff had given her testimony, had been cross examined and re-examined.
7. Thereafter, a miscellaneous application no. 16/17 was filed before this court seeking to transfer the case from CM's court to this court. By then, the file had been registered as CMCC No. 117 of 2016. The application to transfer the file back to this court was allowed by consent of the parties on 9.10.2017. The file acquired a new number ELC No. 5/2018.
8. I took over this case for the first time on 7.2.2018 and I gave directions for the suit to proceed from where matter had stopped. The proceedings had not been typed but I have no problem discerning the court record, particularly the testimony of the witnesses recorded before Judge Njoroge M.

Case for plaintiff

9. The two plaintiffs testified and also called one witness. PW 1 (1st plaintiff) testified that she is Madalina Wambui and that she was married to Marete, a brother of defendant. She avers that she has always stayed on the suit land which was bought by her father in law M'twerandu. She avers that the suit land is 2.40 acres and she is claiming 1/3 of the same. She was emphatic that the land belongs to her father in law. PW1 further stated that defendant got registered as the owner of the land only because he was the eldest son. She also claimed that herself, and her husband and her brother in laws (2nd plaintiff and defendant) have always lived on the suit land.
10. PW 2 is the second plaintiff (Joseph Muchinjia) whose evidence is more or less similar to that of his sister in law. He however states that

their father M'Tuerandu M'Anampiu had gone to stay at Ruirii Rwarera leaving the children on the suit land. He also added that he was present when his father bought the suit land. PW 2 further stated that their father died in 1992 and before he died, he had discussed with defendant and that they had agreed that plaintiffs were to continue staying on the land.

11. PW 3, one David Gituma testified that he knew M'Tuerandu and that the latter had sold his cows in order to buy the suit land. He avers that he was present when the land was bought. According to PW 3, M'Tuerandu had caused defendant to be registered as the owner of the land as he was the eldest son and M'Tuerandu was old.

12. In support of their case, plaintiffs produced as exhibit the green card containing the history of the suit land as well as a grant issued to 1st plaintiff in respect of the estate of her husband Cosmas Marete.

Defence case

13. Defendant testified and he also adopted his statement recorded on 20.3.2012 as his evidence. He avers that he was born in 1947 and that he bought the suit land in 1968 from one Igweta Ikiare and he was eventually issued with a title on 22.5.1997. He avers that his father had never owned the suit land and so he could not have given it to defendant to hold it in trust for the other siblings.

14. Defendant avers that their father's land is at a place called Ruirii Rwarera (3 acres) and that this is where their father used to stay and that their father has never occupied the suit land.

15. Defendant's explanation as to how his siblings came to stay on the suit land is that Ruirii Rwarera was a remote area without schools. That is why he brought his siblings unto the suit land.

Determination

16. The relationship between the parties is admitted that 2nd plaintiff, defendant and husband of 1st plaintiff are sons of one M'Tuerandu M'Anampiu. It is also not disputed that the suit land is registered in the name of defendant. It is also not disputed that plaintiffs have been in occupation of the suit land (along with defendant) for a long time.

17. The issue for determination is one; **“whether defendant is holding the suit land in trust for his siblings (or the siblings' family?)”**.

18. Section 28 of the land registration act provides that;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (b) trusts including customary trusts.”

19. A claim on trust has to be proved. Plaintiffs are not saying that the suit land is ancestral land. They say it is family land as it was bought by their father. I however find that there are weak and or missing links in this claim.

20. Firstly, the green card shows that the land was initially owned by one Igweta Ikiare and the title passed on to Julius Kirutu M'Tuerandu on 22.4.1974. A sum of Shs.1000 was the consideration. Thus from this record, it is defendant who bought the land. Plaintiffs have advanced a reason as to why their father preferred the land to be registered in name of defendant, that the father was rather old.

21. However, M'Tuerandu, according to his son, Pw2 died in 1992, about 24 years after the land was bought in 1968. Certainly M'Tuerandu could not have been old in 1968, or even by 1974, when the land was being registered in the name of defendant.

22. Secondly, there is no evidence to indicate that during his lifetime, M'Tuerandu tried to assert his claim on the suit land. The green card doesn't show that M'Tuerandu cautioned this land at any one time. The first caution to be lodged was done on 7.10.2010 many years after the death of M'Tuerandu in 1992.

23. Further, it is noted that even if plaintiffs were young when the land was bought in 1968, 1st plaintiff got married to Cosmas a year thereafter in 1969 meaning that her husband was not a child when the land was bought. How comes from 1968 to 1992 when M'Tuerandu died, (a period of 24 years), the plaintiff's did not get their alleged share of the land from their father. The logical conclusion to make is that there was no trust. It is noted that by the time M'Tuerandu died, PW 2 was 33 years old.

24. The third issue to note is the existence of the land at Ruirii Rwarera. Defendant has stated that this was the land of their father which is now utilized by all of the children of M'Tuerandu. Defendant has stated that their father lived on the land at Ruirii Rwarera. Plaintiff's side has not denied the existence of this land. For PW 3, he stated that M'Tuerandu had land at Ruirii Rwarera.

25. As for PW 2, he stated that **“Father died at Ruirii Rwarera. The land is still existing. It is used by all of us. That is Julius Kigutu, Miriti M'tuerandu and Joseph Mwichijia.....”**.

26. PW 2 had also stated that before his father went to Ruirii Rwarera, he left the children on the suit land. PW 1 also states that the Ruirii Rwarera land existed and that her father in law had subdivided the Ruirii land to his sons before his death.

27. The foregoing evidence is an indication that M'Tuerandu had identified himself with the land at Ruirii Rwarera and not the suit land.

28. I have also found the witness of plaintiffs (PW 3) to be wanting in credibility. He presented himself as someone who knew M'Tuerandu and his family well. PW 3 had stated that they were from same village, that he was present when M'Tuerandu bought the land and he even remembers one black bull. He saw the process of how the money was being passed on to the seller of the land.

29. However, during cross examination PW 3 could not even tell how many children M'tuerandu had. He further stated that **“I came to know M'Tuerandu when he was going to the lands office. We were going to lodge a caution so that the land is not sold”**. As I have stated earlier on, M'Tuerandu never lodged a caution on the suit land.

30. All in all, I find that a claim based on trust has not been established. The plaintiff's claim fails and is hereby dismissed.

31. This being a family dispute, each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28th NOVEMBER, 2018 IN THE PRESENCE OF:-

C/A: Kananu

Plaintiff

Defendant

Karuti for plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE