



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC SUIT NO. 164 OF 2017

ESTHER SYOMBUA.....1ST PLAINTIFF

MARY NDUKU.....2ND PLAINTIFF

VERSUS

CHRISTOPHER MBUVI.....DEFENDANT

JUDGMENT

1) The Plaintiff herein are sisters of the Defendant. They are all children of the late NgaathiKikumo who according to the averments in paragraph 3 of their plaint dated 20th February, 2015 and filed in court on 11th March, 2015 was the owner of plot numbers 141, 161 and 1858 situated in Kilome Adjudication Section. The Plaintiffs have pleaded that the said parcels of land numbers 141, 161 and 1858 comprised ancestral land to which they as children of the late NgaathiKikumo together with the Defendant, had equal rights to.

2) The Plaintiffs have further pleaded in paragraph 5 of their plaint that during the adjudication process, the Defendant secretly and fraudulently had the said parcels of land registered in his name. The particulars of fraud have been indicated in the plaint.

3) In their plaint, the Plaintiffs pray for judgment against the Defendant for;

a) A declaration that the Defendant holds the parcel number 141, 161 and 1858 in trust for the Plaintiffs.

b) An order directing that the parcels number 141, 161 and 1858 within Kilome Adjudication Section be shared equally among the 2 Plaintiffs and the Defendant.

c) Costs of the suit and interest thereon

d) Any such other or further relief as this honourable court may deem fit and just to grant.

4) Their claim is denied by the Defendant vide his statement of defence dated 31st March, 2015 and filed in court on 14th April, 2015.

5) On the 5th February, 2018, the Plaintiffs filed a reply to defence the same being dated 5th February, 2018.

6) Hearing of the Plaintiffs' and the Defendant's case commenced on the 10th July, 2018. In their respective evidence in chief, the first Plaintiff as well as the defendant adopted their statements filed in court as their evidence.

7) The first Plaintiff in her evidence in chief told the court that she as well as the second Plaintiff are sisters of the Defendant. That they are all children of the late NgaathiKikumo. She said that their father owned plot number 141, 161 and 1858 all located within Kilome. According to her, the three parcels comprised ancestral land which the three of them as children of the late NgaathiKikumo had equal rights to. That she and the second Plaintiff are single mothers who have never been married. The first Plaintiff went on to say that in 1998. Their father invited Amuti clan as he wanted to give each of his children their own portions of land. She produced the letter dated 2nd February, 1998 and its translation as PEX NO. 1. She also produced letters dated April, 2003 and 27th August 2003 as PEX No. 2 and 3 respectively. She said that the clan visited their home and divided the land into 3 portions and proceeded to plant sisal plants along the boundaries but the Defendant uprooted the said plants leaving the Plaintiffs with only small portions where they have built their homes.

8) The first Plaintiff said that it is after their father died that she learnt that the Defendant had secretly and fraudulently caused himself to be

listed as the sole owner of the three (3) parcels during the adjudication process.

9) She reiterated in her evidence in cross-examination that her father had directed that the land be subdivided into 3 equal parts. She went on to say that she was not aware that in 1981, her father transferred parcels numbers 161, and 141 to the Defendant. She said that she was aware that the Defendant had constructed houses on the suit land since 1981 and that he has been collecting rent ever since. She also said that the Defendant has not planted any coffee on the suit land and maintained that the land in questions belongs to her late father. The first Plaintiff maintained that the Defendant holds the land in trust for her and her sisters.

10) The Plaintiffs called Joseph KyevaMumo (PW1) who told the court that he knows parties to this suit. He went on to say that he is the chairman of Amuti clan, a position he has held since 1989. He said that in 1998, NgaathiKikumo who was one of their clan members wrote to the clan seeking clan's assistance in the subdivision of his land amongst his three (3) children.

11) Mumo (PW1) said that the clan responded by going to his land where they subdivided it into 3 portions and proceeded to plant sisal plants along boundaries of the three parcels. He said that he later learnt that the Defendant had taken most of the land for himself.

12) Mumo's (PW1) evidence in cross-examination was that he was not aware that two of the parcels had been allocated to the Defendant. He said that he was not aware that the late Ngaathi had transferred parcels numbers 141 and 161 to the Defendant.

13) He said that he was not aware if the Defendant had permission to plant coffee. He said that he was aware that the Plaintiffs had declined to accept the portions of land that were given to them. In his evidence in re-examination, Mumo (PW2) clarified that the land that the Plaintiffs declined to accept was given to them by the Defendant and were smaller than what he got.

14) The Defendant's case was that his late father NgaathiKikumo had his family land demarcated in the 1973/74 where he got two separate portions namely 141 and 161 registered in his name. That land number 161 was allocated to the two Plaintiffs as well as ZipporahMbuvi. That the Defendant was allocated Plot number 141 and another portion set aside for all his daughters and denied that the land in question was divided into three portions as claimed by the Plaintiffs. That the book produced as DEX no. 2 was issued to him by the adjudication officer. It confirmed him as the new owner of plot number 141 and 161 which parcels of land he holds legally after they were transferred to him. He said that apart from apportioning parcel number 141 to his daughters, his father did not apportion any of his lands equally. It is also his case that he has built houses from 1977 to 1980 on a parcel of land that was excised from land parcel number 141.

15) His evidence in cross-examination was that land parcel numbers 141 and 161 are in his name. He said that he has constructed in land parcel number 1858 which was excised from land parcel number 141. He said that he had no document to show that his father subdivided land parcel number 161 to his sisters and gave most of land parcel 141 to him. He admitted that the second Plaintiff's parcel of land measures 25 feet by 25 feet. He said that the adjudication book (PEXno. 2) that he produced was undated and that his father had a book similar to DEX no. 2.

16) By the time of writing this judgments, it is only the Plaintiff's counsel who had filed her submissions. Her submissions were that the Plaintiff's claim is founded on two legal principles namely customary trust and the right to land for unmarried woman.

17) Regarding the customary trust, the counsel submitted that whereas the Plaintiffs allege that the Defendant fraudulently had the suit land registered in his name. The Defendant says that their father voluntarily registered the land in his name. The counsel was of the view that even if the land was registered in the Defendant's name upon the direction of their father the Defendant would still be holding it in trust for the other beneficiaries land legally entitled to the land. The counsel cited the case Geoffrey Mbugua Dedan & Another V Joseph Ngwegwa Dedan Gachumi & Another [2014] eKLR where J.M Mutungi, J stated thus,

“in the case of a voluntary transfer as in the present case when the Defendants were transferred the parcels of land Limuru/Ngecha/1240 and 1241 as gifts by their father, Section 29 of the repealed Registered Land Act provided such transfer would be subject to any unregistered rights or interest that the transfer held the property. Section 29 RLA provided thus:-

29. Every proprietor who has acquired land, lease or charge by transfer without valuable consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it, and subject also to the provisions of the Bankruptcy Act and to the winding up provisions of the Companies Act, but save aforesaid the transfer when registered shall in all respects have the same effect as a transfer for valuable consideration.

The effect of the foregoing provision is that if as in the instant case the deceased father of the 1st Plaintiff was obligated under the Kikuyu Customary Law not to disinherit the 1st Plaintiff, he did make any transfer as he did to the 1st and 2nd Defendants such transfer would be subject to such obligations as he may have had as the transferor as at the time he made the transfer. It is my holding that as at the time he effected the said transfers he was under an obligation to provide for the 1st Plaintiff as concerns his inheritance under the Kikuyu Customary Law.

While under the Land Registration Act NO. 3 of 2012 section 25 replaced the previous section 28 of the Registered Land Act Cap 300 Laws of Kenya the new Act under section 28 expressly recognized customary trust as an overriding interest that does not require to be noted in the proprietorship register. Section 28 (b) of the land Registration Act No. 3 of 2012 provides thus:-

28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may for the time being subsist and affect the same, without being notice on the register:-

a) Spousal rights over matrimonial property,

b) Trust including customary trusts,

c)

d)

e)”

18) The counsel was of the view that on the basis of the aforementioned proposition plus the Defendant’s own testimony that his father had wanted him to be an administrator of the suit land, the court should find that the defendant holds the parcels of land in trust for the Plaintiffs.

19) Regarding thesecond principle on the right to land for [an married] women, the counsel cited Article 27 of the Constitution that affords equal protection for both men and women under the law. The counsel cited the case of Silas Mburung’aMathu& Another Vs MathioMugane [2017] eKLR where this principle was applied.

20) The counsel submitted that it would only be equitable that if the 3 parcels of land in contention be shared equally between the two (2) Plaintiffs and the Defendant.

21) Regarding the developments in parcel number 1858 the counsel pointed out that the Plaintiffs havenot expressly land claim on them but to the land itself. He asked the court to make a decision based on the totality of the evidence before it.

22) I have read the evidence on record as well as the submissions by the Plaintiffs. There is no doubt that the Defendant admits that he inherited land parcel number 141 and 161 from his father. The Defendant said that the two parcel of land were registered in his name at the written request of his late father. He also said that parcel number 1858 was excised from land parcel number 141. Given those circumstances, I am in agreement with the Plaintiff’s counsel that the Defendant holdsthe land in trust for the two Plaintiffs under customary trust.

23) The Defendant has no basis for allotting to himselfbigger portions than those of the two Plaintiffs as that would amount to discrimination contrary to article 27(4) of the Constitution. It is also not lost on this courtthat the Plaintiff have the consent dated 25th August, 2014 from the District Land Adjudication OfficerKibwezi to file this suit, the same having been issued pursuant to section 30(i) of the Land Adjudication Act Chapter 284 of the Laws of Kenya.

24) The upshot of the foregoing is that I hold that the Defendant and the two Plaintiffs ought to share land parcel number 141,161 and 1858 equally between themselves. Being satisfied that the Plaintiffs have a cause of action against the Defendant. I hereby proceed to enter judgment for them and against the Defendant in terms of prayers (a) (b) and (c) of the Plaint. It is so ordered.

SIGED, DATED and DELIVERED at MAKUENIthis 23RDday of NOVEMBER, 2018.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF:

1st Plaintiff

Defendant

No appearance for the Plaintiff

No appearance for the Defendant

KyangaMwiwa Court Assistant

MBOGO C.G, JUDGE

23/11/2018