



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 211 OF 2017

PETER KYALO MUTINDA.....PLAINTIFF

VERSUS

ELIZABETH KATETE MUTINDA.....DEFENDANT

JUDGMENT

1) This suit commenced by way of a plaint dated 17th February, 2015 and filed in court on 26th February, 2015. In the plaint, the Plaintiff has averred that land parcel number Makueni/Kimundi/1388 measuring about 12.95 hectares and currently registered in the Defendant's name is family land and as such, the Defendant holds it in trust for the family. The Plaintiff prays for judgment against the Defendant for orders:-

1. A declaration that the Defendant holds parcel No. Makueni/Kimundi/1388 in trust of the other family members and the same should be divided equally.

2. Costs of the suit.

2) The claim is denied by the Defendant in her defence dated 25th March, 2015 and filed in court on even date. On the 5th May, 2015 the Plaintiff filed his reply to defence dated 5th May, 2015.

3) During the hearing, the Plaintiff adopted his witness statement filed in court on 26th February, 2015 as his evidence. The Plaintiff's case is as follows:-

His mother and father are deceased. The Defendant is his stepmother who is the registered owner of land parcel number Makueni/Kimundi/1388 (hereinafter referred to as the suitland). That the suit land is their ancestral land where both the Plaintiff and the Defendant reside. That in the interest of fairness, the suit land should be subdivided equally between the two wives of his father and title deeds issued accordingly.

4) The Defendant's case is that the suit land was bought by her mother in law who gave it to her exclusively. That when she married her husband who is also the father of the Plaintiff in 1971, she found out that he was previously married to one Kalondu Mbithuka whom he subsequently separated with. That her husband and Kalondu lived elsewhere before they divorced. That the Plaintiff's mother is buried in the suit land having been taken there in her dying days. It is also her case that the Plaintiff moved into the land in the 1990s and she allowed him to stay. That he had another parcel of land at Kaveti which was given to him by his mother and father but he sold it.

5) The Plaintiff produced a certificate of official search dated 2nd April, 2013 and a letter from the office of the President dated 16th December dated 16th December, 2014 as PEX Nos. 1 and 2 respectively. The Defendant filed a copy of the same certificate of official search as DEX no. 1.

6) The Plaintiff's evidence in cross-examination was that he never objected to the Defendant being registered as the owner of the suit land. He said that the land in Kavete belonged to his mother. He added that it was his mother who sold the land in question. He said that he has never filed for probate and administration in respect of his father's estate and pointed out that he had nothing to show that the suit land was ever owned by his father.

7) The Defendant's evidence in cross-examination was that when she got married in 1971, she found her husband residing on the same parcel of land. The Defendant in her evidence in chief as well as in her evidence in cross-examination told the court that she was willing to allocate land to the Plaintiff just like she will do to the other four (4) children. She said that the land was purchased by her mother in law. She admitted that the Plaintiff's mother is buried on the suit land. She denied the suggestion by the Plaintiff's counsel that the land belongs to the family and asserted that the land cannot be subdivided into two portions since she has a title deed to it.

8) In his written submissions, the Plaintiff's counsel cited section 28 of the Land Registration Act, 2012 which states that unless the contrary is expressed in the register, all registered lands shall be subject to overriding interests without their being noted in the register and one such interest is a trust including customary trust. The counsel submitted that a trust need not be registered and cited the case of Kanyi vs- Muthiora [1984] KLR 712 where the Court of Appeal held that registration of land in the name of party under the Registered Land Act (Cap 300) did not extinguish the Respondent's right under the Kikuyu Customary Law. The Plaintiff's counsel further cited the case of Mukangu V Mbui [2004] 2KLR 256 where the Court of Appeal held that the land registered in the name of Mbui was ancestral land that devolved to him on the death of his father. The counsel concluded by submitting that there is sufficient evidence on record to make a finding that the Defendant holds the land in trust for the family based on the following facts:-

a) Parties who are all family members live n the said suit land.

b) The deceased husband and mother in law as well as the Plaintiff's mother were buried on the same land.

c) There is evidence that there are several homesteads on the suit land.

d) The Defendant does not explain why he was the only one who was given the whole of the suit land.

e) That there is nothing in the repealed Registered Act under which the suit land was registered that precludes the declaration of a trust in respect of the registered land even if it is first registration.

9) On the other hand, the Defendant's counsel submitted that the Plaintiff's case is based on a constructive trust and the case of John Gitiba and Another VS Jackson RiobaBuruna in Kisumu Civil Appeal No. 89 of 2003 (UR) where the Court of Appeal stated thus,

“ A constructive trust will arise in connection with legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some late date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage installment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, where by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.

The final question to determine is the extent of the respective beneficial interest. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

10) Based on the above authority, the counsel was of the view that the Plaintiff did not place any material evidence before this court to prove a constructive trust on which this case is based on.

11) Having read the evidence on record as well as the submissions filed by both parties, my finding is that it is fact that the Plaintiff and the Defendant reside on the suit land. The Defendant has indicated that she is the registered owner of the suit land. She has acknowledged that the same was acquired by her mother in law who in my view is also the grandmother of the Plaintiff. The mother in law, the Defendant's husband as well as the Plaintiff's mother are all buried in the suit land. This would fit in with the concept of intergenerational equity where land is held by one generation for the benefit of succeeding generations. Based on the facts and the evidence on record, the irresistible conclusion to make is that the Defendant holds land parcel number Makueni/Kimondi/1388 in trust for all her family members who include the Plaintiff herein and the other four children. The upshot of the foregoing is that I am satisfied that the Plaintiff has on a balance of probabilities satisfied this court that he has a cause of action against the Defendant. In the circumstances, I hereby proceed to enter judgement for him and against the Defendant in terms of prayer 1 and 2 of the plaint.

Signed, dated and delivered at Makueni this 21st Day of November, 2018.

MBOGO C.G

JUDGE

IN THE PRESENCE OF:

MsWatta holding brief for Ms Kyalo for the Defendant

Mr. Mutune holding brief for Mr. Tamata for the Plaintiff

Mr. Kwemboi Court Assistant

MBOGO C.G, JUDGE

21/11/2018