



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 96 OF 2013

CONCEPTA NASIPWONI JACKA.....1ST PLAINTIFF

JANET AWUOR JACKA.....2ND PLAINTIFF

= VERSUS =

1. LYDIA AWUOR JACKA.....1ST DEFENDANT

2. PAUL OMILIA JACKA.....2ND DEFENDANT

3. AMOS OKWAROI JACKA.....3RD DEFENDANT

4. SIMON OMANYALA JACKA.....4TH DEFENDANT

J U D G M E N T

1. By a plaint initially dated 14/11/2013 and filed on 15/11/2013, the first Plaintiff – **CONCEPTA NASIPWONI JACKA** – instituted this suit against the four Defendants - **LYDIA AWUORI JACKA, PAUL OMILIA, AMOS OKWAROI and SIMON ONYALA**. At the time, the 1st Plaintiff was the only Plaintiff. The plaint was later amended, re-dated 4/3/2016, and re-filed on 11/3/2016. The amended plaint brought on board the 2nd Plaintiff – **JANET AWUORI JACKA**.

2. The 1st Plaintiff pleaded that she is the registered owner of land parcels Nos NORTH TESO/KOCHOLIA/2270 and No NORTH TESO/KOCHOLIA/2271. She does not however reside on these two pieces of land, having allegedly been chased away by the Defendants sometimes in year 2006. The 2nd Plaintiff pleaded that she is the registered owner of land parcel No NORTH TESO/KOCHOLIA/2268 and resides there with her children but the 1st Defendant has placed a caution on the title claiming beneficial interest. The two Plaintiffs feel aggrieved by the Defendants, hence this suit.

3. The 1st Plaintiff alleges that the Defendants have invaded and/or encroached on her two parcels of land, in effect rendering her landless yet they own alternative parcels of land, to wit NORTH TESO/KOCHOLIA/790, 2269 and 2272. She wants a declaratory order that she owns the pieces of land. She also prays for an order of eviction directed at the Defendants and an injunctive relief to prevent invasion, encroachment, tilling or interference with the parcels of land by the Defendants, their agents, relatives or nominees.

4. The 2nd Plaintiff wants an order of removal and/or cancellation of caution lodged by the 1st Defendant on land parcel No NORTH TESO/KOCHOLIA/2268. She wants also a declaratory order that she is the registered owner of the said parcel of land and that she holds the same in trust for her children. The two Plaintiffs would also wish to get costs of the suit plus interests at court rates.

5. The Defendants filed a joint defence dated 15/10/2014 and counter-claimed. They denied the 1st Plaintiff's claim of ownership of parcels Nos 2270 and 2271. They denied the alleged allocation to them of parcel No 790. To them, the 1st Plaintiff's alleged registration of parcels Nos 2270 and 2271 was obtained fraudulently. In the counter-claim, the Defendants alleged that parcels Nos 2270 and 2271 were resultant subdivisions of land parcel No NORTH TESO/KOCHOLIA/625 done without their involvement. The subdivision was said to have omitted to provide for roads of access. Further, the subdivision was faulted for not adhering to established customs, particularly one that would not allow interference with established matrimonial home.

6. In the counter-claim the Defendants want all land parcels arising from subdivisions of land parcel No. 625 cancelled. After cancellation the Defendants desire that a restriction be placed on the title pending commencement of probate and administration process with a view to sub-dividing the land equitably among the beneficiaries. The court was asked to dismiss the plaintiffs' case and enter judgement for the

Defendants in terms of the counter-claim.

7. The court started hearing the matter on 3/4/2017. The two Plaintiffs testified as PW1 and PW2 and called one PHILEMON EKISA ODERA as PW3. PHILEMON was said to have been the village elder of the area in the years 2000/2001. There is a clear narrative that emerges from the evidence of the three witnesses. It became clear that the two Plaintiffs and the 1st Defendant are wives of the late Shem Jackah. The 2nd, 3rd and 4th Defendants are sons of the 1st Defendant. The late Shem Jackah owned land parcels NORTH TESO/KOCHOLIA/625 and NORTH/KOCHOLIA/790.

8. At some point, Shem decided to apportion his parcels of land to his sizeable family. He is said to have caused subdivision of land parcel No. 625 into parcel Nos 2268, 2269, 2270, 2271, and 2272. Of these resultant parcels, the 2nd Plaintiff got parcel No. 2268 which was 12.72Ha. The 1st Defendant got parcels Nos 2269 and 2272 which were 6.49Ha and 3.15Ha respectively. The 1st Plaintiff got parcels 2270 and 2271 which were 7.52Ha and 4.04Ha respectively. Parcel No 790 was not subdivided and was allocated to 1st Defendant. The allocation was done according to the late Shem's houses, each house being represented by a wife. Parcel No 790 was 5.0Ha.

9. According to availed evidence, the allocation of land by the late family patriarch was preceded by a family meeting. The recorded minutes of that meeting were produced here as PEX No 7. All were said to have been involved and everything was done above-board. From there, the official process leading to subdivision and transfer started. But the 1st Defendant was apparently not satisfied with what was happening. The process nevertheless went on and three years later the late family patriarch ordered his family members to settle according to the parcels of land allocated to them. That is when the problem started, with 2nd Defendant attacking the 1st Plaintiff, who in turn caused his arraignment in court and eventual conviction. Then sometimes in the year 2006, the Defendants chased the 1st Plaintiff from her parcels of land.

10. It appears clear that the 1st Defendant has placed cautions on the two Plaintiffs parcels of land. The two Plaintiffs want the cautions removed.

11. The Defence evidence also has a clear narrative. Defence evidence has it that the 1st Defendant was married in 1960. She and the late Shem were blessed with 10 children. Her late husband put up a permanent home for her on land parcel No 625 and that is where she lives. The 1st Plaintiff, her co-wife, also has a permanent house on the lower part of the same land. The second Plaintiff, another co-wife, is on the uppermost part of the same land. To 1st Defendant, it is a lie to say she is living on 1st Plaintiff's land. To her, parcel No 625 was not subdivided by her late husband. She however admitted that they went to the Land Control Board of the area. She could recall too that the area D.O then and the area chief went to the land. A meeting was held but she was turned away. According to 1st Defendant, her late husband was sick then and therefore not in full control of his mental faculties.

12. A time also came when the family went to the office of the area D.O. She got to learn of the subdivision of land parcel No 625 and she wondered when her late husband sub-divided the land. She raised objections and her late husband was told to go and settle issues with the family first. No settlement or meeting ever took place and the 1st Defendant only got to know later that the Plaintiffs had obtained titles to some portions of the land.

13. The 1st Defendant expressed her wish that the title deeds resulting from sub-division of parcel No 625 be cancelled so that the land reverts to its original number. Thereafter, the land should be sub-divided according to the number of children that the late Shem had. While the 1st Defendant testified as DW1, 2nd Defendant testified as DW2 while 3rd Defendant testified as DW3. Both DW2 and DW3 were generally in support of DW1's evidence. DW2 in particular said the other wives of Shem – meaning the two Plaintiffs – took advantage of 1st Defendant's illiteracy and manipulated things in their favour. He also made reference to a meeting called by the late Shem to resolve differences surrounding the land. To him, the meeting ended without any agreement.

14. There was also DW4 who said he belongs to the clan of the late Shem Jackah and could not recall any time the late Shem involved the clan to try and resolve land disputes. According to this witness, land is sub-divided according to the number of children a man has under Teso customs. A wife is also not supposed to be shifted from the house where she lives during sub-division of land. And where the family head does not adhere to these customs, the elders are allowed to intervene to ensure fairness.

15. Both sides filed written submissions. The Plaintiffs' submissions were filed on 23/7/2018. According to the Plaintiffs' counsel, it was well shown that the Plaintiffs are the registered owners of the parcels of land they claim to own. This, it was submitted, was shown by availing copies of the title deeds and copies of searches showing ownership.

16. It was further submitted that the late Shem Jackah subdivided land parcel No 625 creating five new parcels to wit: NORTH TESO/KOCHOLIA/2268, 2269, 2270, 2271 and 2272. The sub-division was done according to Teso customary law. Each wife got land to give to her children. To the Plaintiff their late husband was the registered owner of the land and had the right to distribute the land the way he pleased.

17. In any case, Plaintiffs further submitted, the Defendants based their defence and counter-claim on customary law but never brought evidence to support the alleged customs. To the Plaintiffs, expert witnesses ought to have been called to prove the customs. The Plaintiffs sought reliance on the case of **ERNEST KINYANJUI KIMANI Vs MWIRU GIKANGA & Another: [1965] EA 735** where the court held, *inter alia*, where a custom is neither notorious nor documented, it must be established for the court through evidence by a party intending to rely on it. And that needs to be done by way of evidence or expert opinions adduced by the parties.

18. For the counter-claim, the Plaintiff submitted that fraud was never proved. It was the Plaintiffs' position that while the Defendants felt disinherited or cheated, the available evidence shows they were well catered for in the distribution of assets by the late Shem. They got 14.64Ha while the 1st and 2nd Plaintiffs got 11.56Ha and 12.72Ha respectively. And contrary to Defendants averment that the alleged sub-division of parcel No 625 did not make provision of access roads, the record availed clearly showed that such roads were provided for. A

point was also made that the 2nd Plaintiff claim is not defended as the Defendants continued to rely on the defence they had made when the 1st Plaintiff was the only party to the suit. The court was asked to allow the Plaintiffs' suit and dismiss the counter-claim.

19. The Defendants' submissions were filed on 25/4/2018. According to the Defendants, the court is called upon to decide whether land parcel No 625 was ancestral land which the late Shem Jackah held in trust for himself and the succeeding generations. Crucial for determination also is whether the subdivision of the same parcel of land carried out in 2004 was in accordance with Teso Customs and, finally, whether the parties are entitled to the relief they are seeking.

20. As to the issue of trust, the Defendants were said to have known parcel No 625 all along as their home, with all the wives (Plaintiffs and 1st Defendant) having their permanent homes thereon. Shem himself was said to have inherited the land from his father, Noah Ojulut. In this context therefore that land was ancestral land and the late Shem held it as such. For guidance and/or persuasion, the decided case of **Mukangu Vs Mbui: CA No 281 of 2000, NAIROBI**, was availed. The case involved a father who wanted to evict a son from what the court deemed to be ancestral land. The court inferred a customary trust in favour of the son.

21. On whether the land was fairly subdivided, the Defendants submitted that the subdivision was done **"in the most perverse manner"** since the long established homesteads of the Defendants were curved out to fall into an area belonging to the Plaintiffs. To the Defendants, the late Shem was sickly and the Plaintiff unduly influenced him to carry out sub-divisions the way he did. The Defendants urged for nullification of the sub-division, with the decided cases of **KANYI MUTHIORA Vs MARITHA NYOKABI MUTHIORA [1984] eKLR** and **DORCAS WAIRIMU NJUGUNA Vs JOSEPH MUIGI NJUGUNA: ELC No 115 of 2014, BUSIA**, availed to lend weight to the urged position. The cases involved instances where excess land held contrary to applicable custom was ordered to be allocated to the right or deserving party.

22. Ultimately the court was asked to make a finding that the Plaintiffs' failed to prove their case, which therefore should be dismissed with costs, while the Defendants' counter-claim should be allowed.

23. I have had a look at the pleadings, evidence, and rival submissions. This is a family dispute largely focussed on sub-division of land parcel No NORTH TESO/KOCHOLIA/625 and subsequent ownership of the resultant parcels. But the issue of ownership seems incomplete without mention or inclusion of land parcel No NORTH TESO/KOCHOLIA/790. It is common ground that the late family patriarch, Shem Jacka, owned land parcels Nos 625 and 790. Parcel No 790 is still intact, or undivided if you like. Parcel No 625 no longer exists as a single entity. It was sub-divided; fraudulently and/or unlawfully according to Defendants, but properly and lawfully according to Plaintiffs. The decision I am called or invited to make ultimately hinges on the manner or mode of subdivision and the distribution that subsequently took place among family members.

24. In a contextual and conceptual sense, both sides invoked customs, with one side alleging adherence and compliance while the other side alleged violation and/or abuse. The custom invoked relates to sharing or distribution of property among or between family members under Teso customary law. Both sides are not agreed as to what the custom is or how it operates. According to the Plaintiffs, distribution or sharing is done according to houses that a man has. Each house is represented by a wife. The property is allocated to the wife who in turn shares it out among her children. The Defendants however have a different view. Distribution or sharing out, they said, is according to the number of children that a man has. To the Defendants, the critical consideration has to do with children, not houses.

25. In the course of hearing, it became clear that the plaintiffs are indeed the registered owners of the parcels of land – parcels Nos 2270, 2271 and 2268 – that they claim to own. It became clear too that the Defendants were allocated alternative parcels of land but they felt cheated and were not willing to abide by the arrangement that the late Shem Jackah had made. To the Defendants, fraud was perpetrated against them and the late Shem Jackah was unduly or fraudulently influenced by the Plaintiffs to make the arrangements he is said to have made. It appears to me that in addition to finding out what the applicable custom is, it is also important to find out if there was fraud surrounding registration of Plaintiffs as owners of their respective parcels of land.

26. Due to the different positions espoused by the parties concerning the applicable custom in sharing out property, the court had difficulties trying to establish the correct position. But things became clearer when the court decided to look up for researched written material to clear the confusion. In this endeavour, Eugene Conran's **"Restatement of African Law (Kenya) the Law of Succession, Volume 2"** came in handy. The book covers various customary practices of several communities in Kenya in matters to do with Succession and/or distribution of property.

27. In Conran's book, chapter 16 focuses on the Teso community. In that chapter, it is clear that inheritance under Teso customary law is patrilineal. In this regard, the male head of the family decides who gets what. In so deciding, such family head is required to have regard to customary usages and practices applicable to the family setting. And such setting could be either of monogamous or polygamous nature. In a monogamous setting, the distribution is done in such a manner that each son receives a share which is slightly bigger than that given to his immediate junior. But in a polygamous setting the distribution is according to the house of each wife, but taking into consideration the number of sons in each house, with the house with more sons getting a bigger share than the house with fewer sons.

28. In the matter at hand, the late family patriarch, Shem Jackah, headed a polygamous family. It is therefore easy to appreciate that the custom applicable is the one relating to a polygamous setting. There was submission by the Defendants that the Plaintiffs claim is repugnant to custom and morality. The dispute herein, as pointed out earlier, mainly revolves around subdivision of land parcel No 625 and the sharing of the resultant parcels among the three households of the late Shem Jackah.

29. From the evidence availed, the 1st Plaintiff got parcels No 2270 and 2271. The total size of her parcels is 11.56Ha. The second Plaintiff got parcel No 2268. Its size is 12.72Ha. The 1st Defendant's household got a larger share than each of the other two households. The other two households are not complaining. The custom applicable gives the family head a right to distribute his property in his lifetime subject only to the requirement that the distribution can be smaller or bigger depending on the size of the household.

30. It appears to me that the late Shem tried to follow customs. But the Defendants allege fraud. They averred that the late Shem was sick and the two Plaintiff took advantage of him. But the evidence availed seems to show something different. For instance, Shem is shown to have called a meeting. The written minutes of that meeting were availed here. The area village elder then, PW3, participated. It would appear that the late Shem tried to do things above-board. It was not enough for the Defendants to allege that the late Shem possibly had mental impairment resulting from sickness. If the Plaintiff had not denied it, the court would probably be persuaded to believe it. But it was denied and the Defendants therefore needed to do more than that. I think some medical evidence was needed to back-up the allegation. As things stand, and considering the evidence availed by the Plaintiff, I am unable to believe this allegation.

31. I need to point out that particulars of fraud were given in the defence but evidence to back them up during hearing was lacking. It was for instance alleged that the Defendants were not involved during sub-division. But the Plaintiffs' evidence, and even the evidence of 1st Defendant herself, points to awareness that such subdivision was in the offing, with the 1st Defendant clearly intimating that she was opposed to the way it was proposed to be done. There were also allegations that roads of access were not provided for. But the document availed shows that such roads were factored in the subdivision.

32. It is clear to me that the Defendants have not proved fraud against the Plaintiff or even the late Shem. The particulars of fraud remain allegations made on paper but not substantiated or proved through evidence. And while the claim is one that revolves around custom, let us not forget that the late Shem Jackah was the registered owner of the parcels of land. He therefore could, as such owner, deal with the parcels of land in a manner that was not in strict conformity with custom. He could, for instance, use the parcels of land to obtain financial credit to develop himself or his family. I do not think there is a custom with a provision for such arrangement.

33. The Defendants would wish that the subdivision and sharing can start afresh. To me, nothing is offered to persuade the court to intervene. What the evidence on record credibly shows is that the late Shem shared out his property in the manner he desired. He did not flout customs. He even tried to involve the Defendants. But they seemed to have an agenda which was not acceptable to him. He shared out his properties and even if the Defendants were opposed to his plans, he provided reasonably well for them. He was fair, not unfair. It seems to me he meant well for all.

34. The Defendants' counsel tried to avail the cases of **Mukangu Vs Mbui: CA No 281/2000, NAIROBI**, to persuade the court to intervene in this case. As well pointed out by the counsel, the case involved a father who was trying to evict his own son from land. A question arises: Was the late Shem trying to do so? And the obvious answer is **NO**. The late Shem tried to provide for all his family. He had a reasonably large family and it is clear that the exercise of sharing out could not satisfactorily please everybody. But overall, what he did was fair and this court is not persuaded that it should intervene.

35. I need to point out also that the Defendants did not oppose the 2nd Plaintiff's claim. The defence they filed addressed only what the 1st Plaintiff had filed at the time. The 2nd Plaintiff wants removal of a caution placed on her land. The defence filed does not even mention a caution.

36. The upshot, in light of the foregoing, is that the Plaintiffs' claim succeeds in terms of prayers (a) in the amended plaint. The prayer is as formulated in paragraphs 10 and 10A in the same plaint. The Defendants' counter-claim has not succeeded. It is hereby dismissed. When it comes to costs, I note that this is a delicate and inevitably divisive family dispute. Each side should bear its own costs. I do not deem it necessary to condemn one side to pay costs to the other.

Dated, signed and delivered at Busia this 13th day of November, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff: Present

2nd Plaintiff: Present

1st Defendant: Present

2nd Defendant: Present

3rd Defendant: Present

4th Defendant: Present

Counsel of Plaintiffs: Absent

Counsel of Defendants: Present

Court Clerk: Nelson Odame