



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 28 OF 2014**

**(FORMERLY KERUGOYA ELC NO. 441 OF 2013)**

**KIRIAMBURI TIRIBI MWANIKI.....1<sup>ST</sup> PLAINTIFF**

**DAVID NJERU TIRIBI.....2<sup>ND</sup> PLAINTIFF**

**JAMES NDWIGA TIRIBI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**KITHINJI TIRIBI.....DEFENDANT**

**JUDGEMENT**

1. By a plaint dated and filed on 17<sup>th</sup> January 2005, the Plaintiffs sought the following reliefs against the Defendant;

*a. A declaration that the Plaintiff was holding land parcel No. Ngandori/Kiriari/897 in trust for himself and for the Plaintiffs; and is now holding land parcels No. Ngandori/Kiriari/4100, 4101, 4102, 4103 and 4104 in trust for himself and the Plaintiffs.*

*b. That the said trust be terminated.*

*c. That the sub-division of parcel No. Ngandori/Kiriari/897 into Ngandori/Kiriari/4100, 4101, 4102, 4103 and 4104 was illegal, irregular and calculated to defeat the Plaintiffs' claims.*

*d. That the title deeds to land parcels number Ngandori/Kiriari/4100, 4101, 4102, 4103 and 4104 be cancelled and the title deed to land parcel No. Ngandori/Kiriari/897 be reinstated; and the same be sub-divided equally between the parties herein.*

*e. The Defendant be ordered to transfer two and a half (2 ½) to each of the Plaintiffs out of land parcel No. Ngandori/Kiriari/4100, Ngandori/Kiriari/4101, Ngandori/Kiriari/4102, Ngandori/Kiriari/4103 and Ngandori/Kiriari/4104.*

*f. The costs of this suit.*

*g. Any other relief that this honourable court may deem fit to grant.*

2. It was pleaded in the plaint that all the parties herein were sons of the late *Tiribi Yarubi* (hereinafter called *the deceased*) and that sometimes in 1962 the family of the deceased bought *Title No. Ngandori/Kiriari/897* (hereinafter called *the suit property*). It was further pleaded that the suit property was registered in the name of the Defendant to hold it on his behalf and in trust for the Plaintiffs.

3. The Plaintiffs further pleaded that the Defendant had refused or neglected to terminate the trust and grant them their rightful shares of the suit property. It was also pleaded that the dispute had been referred to the Land Disputes Tribunal (hereinafter the *Tribunal*) for resolution and that the Tribunal had given an award in favour of the Plaintiffs which was consequently adopted as a judgement in *Award Case No. 1 of 2002*. The Defendant was, however, said to have subdivided the suit property into *Title Nos. Ngandori/Kiriari/4100 – 4104* with the intention of frustrating the Plaintiffs and defeating their claim.

4. The Defendant filed a statement of defence dated 25<sup>th</sup> February 2005 in response to the said plaint. The Defendant denied the Plaintiffs' claim in its entirety and stated that he was lawfully registered as absolute proprietor of the suit property on 23<sup>rd</sup> June 1964. He disputed the existence of any trust in favour of the Plaintiffs.

5. The Defendant further stated that he lawfully sub-divided the suit property into five (5) parcels for the purpose of sharing it with his children. He also stated that the instant suit was time-barred and that there were two other pending suits or proceedings in respect of the same cause of action and between the same parties.

6. According to the record, the 1<sup>st</sup> Defendant died before the hearing hereof and he was substituted with his son James Mwaniki Tiribi.

7. At the trial hereof, the 2<sup>nd</sup> Plaintiff testified on his own behalf and in behalf of the rest of the Plaintiffs. His evidence was that their deceased father was not given any clan land during the process of land demarcation and land adjudication. It was his further evidence that the 1<sup>st</sup> Plaintiff and his late mother pooled resources and bought the suit property which was paid for by instalments between 1962 and 1970. The purchase price was said to have been Kshs 5000/- and the Defendant was the one who would be sent to deliver the purchase price to the vendor.

8. It was the 2<sup>nd</sup> Plaintiff's case that prior to the purchase of the suit property all the members of the family of the deceased were residing on a parcel of land which belonged to the 1<sup>st</sup> Plaintiff. They all moved to the suit property upon its purchase save for the 1<sup>st</sup> Plaintiff who remained on his land. They used to work on the land in common since it was not formally sub-divided.

9. The Defendant, on the other hand, testified on his own behalf as the sole defence witness. It was his case that he solely purchased the suit property and was registered as sole proprietor thereof. He denied that the 1<sup>st</sup> Plaintiff contributed any money towards the purchase of the suit property. It was his contention that the money the 1<sup>st</sup> Defendant used to send him was for the purpose of meeting the daily basic needs of the entire family and not for the purchase of land. It was his case that he only allowed some of the Plaintiffs to occupy his land until such time that they were to buy their own parcels of land.

10. When the hearing was concluded on 21<sup>st</sup> June 2018, the Plaintiffs were given 45 days to file and serve their submissions whereas the Defendant was to file his within 45 days thereafter. However, by the time of preparation of the judgement, only the Defendant had filed his submissions.

11. The court has considered the pleadings on record, the evidence tendered by the parties as well as the documents on record. There is no indication on record of the parties having filed an agreed statement of issues for determination. The court is of the opinion that the following issues fall for determination in this suit.

- a. Whether the Defendant was registered as absolute proprietor of the suit property or on his own behalf and in trust for the Plaintiffs as well.
- b. Whether the Plaintiffs are entitled to the reliefs sought in the plaint.
- c. Who shall bear the costs of the suit.

12. The court has considered the entire evidence on record on the 1<sup>st</sup> issue. The court is aware that the burden of proof vests upon the Plaintiffs to demonstrate the existence of the alleged trust. On the basis of the material on record, the court is satisfied that there is sufficient material from which it may be inferred and concluded that a relationship of trust existed.

13. First, there is evidence on record that upon the acquisition of the suit property the entire family of the deceased moved into the land. The only exception was the 1<sup>st</sup> Plaintiff who had already settled in his own land hence had no reason to relocate. In the court's opinion, it would not have made any sense for an entire family to move from one member's land to another member's land in the same status as mere licencees. There must have been a reason for the *en masse* movement. The court is satisfied that they must have relocated to the suit property on the understanding that it was family land.

14. Second, there is evidence on record that the mother of the parties and the 1<sup>st</sup> Plaintiff contributed towards the purchase price. There was evidence that the 1<sup>st</sup> Plaintiff was at the material time gainfully employed in Nairobi and that he used to send some money through the Defendant as his contribution towards the purchase of family land. The Defendant admitted that he used to collect the funds from the post office but claimed that the funds were for the general upkeep of the family members. The court believes the evidence of the 2<sup>nd</sup> Plaintiff on the contribution by the 1<sup>st</sup> Plaintiff. The 2<sup>nd</sup> Plaintiff impressed the court as a candid and truthful witness.

15. Third, there is evidence on record that the Defendant's siblings settled on the suit property and developed it for many years without objection from the Defendant. Although the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs did not undertake permanent developments on the suit property, the 2<sup>nd</sup> Plaintiff appeared to have constructed a house and cultivated long term cash crops such as tea and coffee stems. The 2<sup>nd</sup> Plaintiff appears to have occupied and worked on about ¼ of the suit property since 1964. It would be strange for a land owner to allow a mere licensee to put up permanent developments on his land for over 50 years without a good reason. There is also evidence on record that when the mother of the parties died, she was buried on the suit property.

16. Fourth, there is evidence on record that during the process of the Defendant's registration as proprietor, the 2<sup>nd</sup> Plaintiff and the Defendant attended the Land Control Board (LCB) for consent under the Land Control Act. The court does not agree, as suggested by the Defendant, that the 2<sup>nd</sup> Plaintiff accompanied him to the LCB merely for cosmetic purposes. The court is satisfied that the understanding amongst the members of the family of the deceased was that the suit property was family land. Consequently, the other members of the family had an interest in ensuring that the registration was successfully concluded.

17. The Defendant put great emphasis on the fact that the title deed for the suit property was issued solely in his name and that no trust was

noted in the register in favour of his siblings. The court agrees that no such trust was noted in the register. It is also true that the Plaintiffs were not registered as co-proprietors of the suit property at the material time. However, a trust is not always required to be noted in the register. Although it may be noted in the register at the instance of the concerned parties, there is no mandatory legal requirement to that effect.

18. It is worth pointing out that under the provisions of **section 30 of the Registered Land Act** (now repealed) trusts were recognized as overriding interest without being expressly noted in the register. The Defendant's title was issued under the said Act. The provisions of **section 28 of the Land Registration Act, 2012** also recognize the doctrine of trusts and there is no mandatory requirement for all trusts to be noted in the register.

19. The material provisions of **section 28 of the Land Registration Act, 2012** provide, *inter alia*, that;

**“28. Unless the contrary is expressed in the register, registered land shall be subject to the following overriding interest as may for the time being subsist and affect the same, without their being noted on the register –**

**(a) .....**

**(b) Trusts including customary trusts;**

20. In the opinion of the court, therefore, the registration of a person as a proprietor of land does not automatically exclude any obligation to which such proprietor may be subject as a trustee. It may still be possible for a claimant to plead and establish the existence of a trust in a given case. As was held in the case of **Isack M'inanga Kiebia Vs Isaaya Therui M'Lintari & Another, Petition No. 10 of 2015 [2018] eKLR**, it is not sufficient for a claimant to simply allege trust and leave the matter in the hands of the court. There must be evidence tendered to establish and demonstrate the existence of the trust.

21. In the said case, the Supreme Court of Kenya held, *inter alia*, that;

**“...Each case has to be determined on its own merits and quality of evidence. It is not every claim of right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie Vs Kinuthia, that what is essential is the nature of the holding and the intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land...” [Emphasis added].**

22. For reasons given hereinbefore the court finds and holds that the Defendant was not registered as absolute proprietor of the suit property to the exclusion of any trust obligations owed towards his siblings. The court finds and holds that he was registered as proprietor on his own behalf and in trust for the plaintiffs as well.

23. The 2<sup>nd</sup> issue is whether or not the Plaintiffs are entitled to the reliefs sought in the plaint. Since the court has found that the Defendant holds the suit property subject to the trust obligation towards his siblings, the court is satisfied that the Plaintiffs are entitled to the reliefs sought in the plaint. The mere fact that some or all of the Plaintiffs have since bought their own parcels of land cannot extinguish or diminish the trust obligation of the Defendant. The 2<sup>nd</sup> issue is, therefore, answered in favour of the Plaintiffs.

24. The 3<sup>rd</sup> issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. Consequently, a successful litigant should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court is aware that all the parties herein are siblings. The court is of the opinion that the appropriate order to make is for each party to bear his own costs.

25. The upshot of the foregoing is that the court is satisfied that the Plaintiffs have proved their case against the Defendant to the required standard. Accordingly, there shall be judgement for the Plaintiffs against the Defendant in the following terms;

a. The Plaintiffs' suit be and is hereby allowed in terms of prayers (a) (b) (c) and (d) of the plaint dated 17<sup>th</sup> January 2007.

b. Each party shall bear his own costs of the suit.

26. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this 20<sup>th</sup> day of **DECEMBER, 2018**.

In the presence of Mr Njagi Wanjeru holding brief for Ms Wairimu for the Plaintiff and Ms Muriuki holding brief for Mr Ithiga for the Defendant.

Court clerk Mr Muinde.

**Y.M. ANGIMA**

**JUDGE**

20.12.18