



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 261 OF 2013

BEATRICE MUKAMI KIRIMI.....1ST PLAINTIFF

LEWIS MAWIRA KIRIMI.....2ND PLAINTIFF

EMMACULATE KAIGONGI KIRIMI.....3RD PLAINTIFF

SILAS MUTUGI KIRIMI.....4TH PLAINTIFF

VERSUS

BENJAMIN KIRIMI NGAINE.....1ST DEFENDANT

FRANCIS KRIMI NGARUNI.....2ND DEFENDANT

JUDGMENT

Background

In a plaint dated 26th September, 2013 the plaintiffs averred that sometime in 1990's or thereabouts the 1st defendant deserted them at their home at parcel No. Nkuene/Nkumari/834 registered in his name measuring 13 acres. The plaintiffs further averred that in the year 2009 or thereabouts, the 1st defendant came back and started causing havoc within the family chasing the 1st plaintiff from her home and threatening to evict the 2nd and 4th plaintiffs and forbidding the 3rd plaintiff from accessing or using the suit land and threatening to sell the same. The plaintiffs further averred that the suit land is ancestral/family land and that the 1st defendant holds the same in trust for them. It is further averred that in breach of the trust aforesaid, the 1st defendant transferred ownership of the suit land to the 2nd defendant. He set out particulars of the breach in the plaint. The plaintiff therefore sought the follow orders:

- (1) A declaration that the 1st defendant held parcel no. Nkuene/Nkumari/834 in trust for the plaintiffs and that the 1st defendant is in breach of the trust and the transfer to the 2nd defendant is null and void abinitio.
- (2) An order directing the land registrar to amend the land register by cancelling the name of the 2nd defendant as owner and replacing it with the plaintiff's names to hold jointly with the 1st defendant.
- (3) A permanent injunction restraining the defendants from interfering with the plaintiff's beneficial and registered ownership of parcel no. NKUENE/NKUMARI/834
- (4) Costs of the suit and interests at court rates.

In a joint statement of defence dated 10th October 2013 the defendants denied the plaintiffs claim and all particulars of trust and/or breach and put the plaintiff's to strict proof. In particular the defendant deny that the suit property is ancestral/family land or that he hold the same in trust for the plaintiffs or anybody else. The defendants also averred that the caution that had been placed on the suit land was illegal and was procedurally lifted. The defendant seek to have the case dismissed with aggravated costs.

PLAINTIFFS CASE

The plaintiff gave sworn testimony and stated that the 1st defendant is her husband. The 2nd, 3rd & 4th plaintiffs are her sons and daughter. She got married to the 1st defendant in 1980. She stated that the 1st defendant chased her from their matrimonial home in 2009. She placed a caution on the suit property which was registered in his name. She later did a search and found that the caution was lifted and the suit

property transferred to the 2nd defendant as a purchaser. She stated that she was not asked to give consent to the transfer of the property to the 2nd defendant.

PW 2 was Silas Mutugi Kirimi. He is the 4th plaintiff. He associated himself with the testimony of PW 1 who is his mother. He stated that he lives in the suit land with his sister Emmaculate and brother Lewis. He has a family and children who live in the suit land. They have done development on the suit land.

PW 3 was Emmaculate Kirimi. She said that the 1st plaintiff is her mother while the 1st defendant is her father. She lives in the suit land where she has done developments. She associated herself with the evidence of PW 1. She sought to have her witness statement adopted in her evidence dated 26.9.2013.

PW 4 was Lewis Mawira. He is the 2nd plaintiff. He was referred to his statement dated 26/9/2013 which was adopted in his evidence. He stated that he was born in the suit property in 1980 and he occupies 1 ½ acres of the suit property. He has a wife and children who also occupy the suit property. He associated himself with the evidence adduced by the co-plaintiffs especially his mother (PW 1).

DEFENDANTS CASE

The defendant did not offer any evidence despite having been given several opportunities to do so. The defence counsel therefore closed the defence case.

SUBMISSIONS BY THE PLAINTIFFS

The plaintiffs through their counsel referred to section 28 (b) of the land registration Act which recognizes trust as one of the overriding interests and submitted that the 1st defendant was not an absolute owner of the subject matter. The plaintiffs submitted that though registered in his name the 1st defendant held the suit property in trust and that he was in breach of that trust when he dealt in a manner that was adverse to the interest of the plaintiffs. He cited the case of **ROSE GACHERI M'ARIMI VS GEDION M'IKUNYUA ARIMI (2017) eKLR**. The plaintiffs also cited the case of **MBUI MUKANGU VS GERALD MUTWIRI MBUI (2004) eKLR**.

DEFENDANTS SUBMISSIONS

The defendant submitted that the plaintiffs have not proved that the 1st defendant held the suit land in trust for the plaintiffs. The defendants cited the following cases in support of their defence in this case.

- (i) **Silas Mburung'a Mathiu & another vs Mathiu Mugane ELC no. 45 of 2007 (Meru) (unreported).**
- (ii) **Stella Mokeira Matara vs Thaddeus Moses Mangenya CA No. 63 of 2014 (Kisumu) (unreported).**

ANALYSIS EVALUATION & DECISION

I have considered the oral evidence adduced by the plaintiffs and submissions by the rival parties. The evidence adduced by the plaintiff in this case was not controverted or challenged by the defence who opted not to call witnesses.

The issues for determination in this case is whether land parcel number NKUENE/NKUMARI/834 was being held in trust by the 1st defendant for the plaintiffs?

The other issue is whether the transfer of the suit property by the 1st defendant to the 2nd defendant was fraudulent?

To start this analysis, I have noted that in her evidence the 1st plaintiff stated that she is married to the 1st defendant and were blessed with children who are the 2nd, 3rd and 4th plaintiffs in this case. Those averments were not controverted or challenged by the 1st defendant who did not offer any evidence. Though the 1st defendant denied being husband to the 1st plaintiff, he however admitted that the 2nd and 3rd and 4th plaintiff are his children. If the 1st defendant admits having sired the 2nd, 3rd and 4th plaintiffs the averments by the 1st plaintiff on oath that she is married to the 1st defendant is therefore admitted as no evidence was offered to controvert the same. I therefore find and hold that the 1st plaintiff is indeed married to the 1st defendant.

Having arrived at that finding I find section 28 (b) of the land registration act recognizes trust as an overriding interest in land which provides as follows:

“28 unless the contrary is expressed in the register all registered land shall be subject to the following overriding interests as may be for the time being subsist and affect the same without being noted on the register”.

(b) Trusts including customary trusts”

Under the **Blacks Law Dictionary tenth edition**, the word trust is defined as follows:

“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds, the legal title, property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)”.

In the instant case, the 2nd, 3rd and 4th plaintiff who the 1st defendant admitted are his biological children are men and women of majority age who were born and brought up in the suit land. They also testified on oath that they have built houses, got married and have their families in the suit land. They even till and plant food crops in the suit land which they use to feed their own families. It is my view that where a parent who is the proprietor of a title to land other than ancestral land who becomes philanthropic to his son or daughter of majority age and allows him or her to enter into such land and construct his /her house, marry and get children till the land plant crops for food and upkeep and keep animals and connect services such as water and electricity and occupies that land openly the irresistible conclusion is that the parent holds part of that land in trust for that son or daughter.

In a similar case between **Rose Gacheri M’Arimu vs Gedion M’Ikunywa Arimu (2017) eKLR** the learned judge Lady Justice Mbugua observed as follows:

“The undisputed fact is that plaintiff was born on the suit land, was raised on this land and she is raising her own children on this land. The only logical conclusion to make is that the defendant holds part of the land in trust for the plaintiff”.

I find that though the plaintiff did not prove that the suit property was ancestral, the conduct of the 1st defendant by allowing the 2nd 3rd and 4th plaintiffs who are his own biological children upon maturity to continue tilling the suit land, getting married, raising children, constructing houses, planting crops and keeping animals are undisputed facts that can make this court draw a logical conclusion that the 1st defendant holds the suit property in trust for his sons and daughters and are therefore entitled under equity to a portion of the same.

In the upshot I find and hold that there existed a trust between the 1st defendant and the plaintiffs in terms of my analysis herein above and that the 1st defendant breached his trust by fraudulently removing the caution and transferring the suit land to the 2nd defendant. I therefore find the plaintiffs have proved their claim against the defendants to the required standard. Consequently I enter judgment for the plaintiffs against the defendants as follows:

(1) A declaration that the 1st defendant held the suit land parcel no. NKUENE/NKUMARI/834 in trust for the plaintiffs and that the 1st defendant is in breach of the trust and the transfer to the 2nd defendant is null and void abinitio.

(2) An order directing the land Registrar to amend the land register by cancelling the name of the 2nd defendant as owner and substituting it with the plaintiff’s names to hold jointly with the 1st defendant.

(3) A permanent injunction be and is hereby issued restraining the defendants from interfering with the plaintiffs beneficial and registered ownership of parcel no. NKUENE/NKUMARI/834.

(4) This being a family matter and in order to foster family unity I order each party to bear his own costs of this suit.

READ, DELIVERED AND SIGNED BY

E. C. CHERONO,

ENVIRONMENT AND LAND COURT JUDGE

KERUGOYA AT MERU THIS 7TH DAY OF DECEMBER, 2018.

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In the presence of:

M/s Wambugu holding brief for E.G Mwangi for the defendant

Mr. Gikunda Anampiu holding brief for Mwanzia for the plaintiff

C/A Janet