



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC NO. 614 OF 2015

JACKTON OYOKO OJERO.....PLAINTIFFS

VERSUS

BISHOP HABBAKKUK ABOGNO

(As official & Representative of the Church of Christ Africa).....**1ST DEFENDANT**

COUNTY COUNCIL OF SIAYA.....2ND DEFENDANT

JUDGMENT

By a plaint dated 28th June 2011 the plaintiff herein sued the defendants seeking for the following orders:

- a) A declaration of a resulting trust of the proprietary interest in the suit property in favour of the plaintiff and an order that a subdivision of the parent title be duly completed and a transfer be duly executed and registered in the name of the plaintiff.
- b) A permanent injunction restraining the defendants by themselves, their servants, agents or any other persons purporting to derive authority from them from trespassing upon, remaining in or any manner interfering with the plaintiff's quiet possession and enjoyment of the suit parcel of land.
- c) Costs of the suit and interest thereon.

PW1 gave evidence and stated that the suit land belongs to his late father who donated 0.07 Ha to the 1st defendant and the same was fenced with euphorbia. It was his evidence that the church is in occupation of part of the land and the remaining portion is occupied by his family.

PW1 further testified that he was aware that the land was registered in the name of the 1st and 2nd defendant and that his late father Peter Ojero died in 2005. He produced a green card which indicates that the land measuring 0.7 Ha is registered in the 1st and 2nd defendants' names, a letter from Siaya County Council and minutes of the site visit by the surveyor dated 26th August 2009.

The plaintiff stated that he does not know how the defendants were registered as owners of the suit land Gem/Nyawara/29. He stated that he would like the church to remain with 0.07 Ha and he be given their portion.

PW 2 stated that he is retired chief who got information from the church, the 1st defendant, that someone was putting up a building in the church compound and he told the person to stop the construction. The witness later called the church members and Peter Ojero and from that time he has not heard of any other complaint concerning the church compound. The witness was not present when the late Peter Ojero was donating land to the church.

The plaintiff therefore closed his case.

Defence case

The defence called one witness, Bisho Habbakkuk Abogno, who stated that Peter Ojero the father of the plaintiff, donated land to the church measuring 0.7Ha where they constructed a church and classrooms for a Bible college which they still occupy to date.

During cross examination the defence witness confirmed that he was present when the land was being given to the church and he produced a copy of the proceedings from the Principal Magistrate's court at Siaya land case No. 54 of 2009 in which the court endorsed the decision of the land Tribunal in which the Tribunal found that the plaintiff had no legal right whatsoever to interfere with the church's occupation of land

parcel No. EAST GEM/NYAWARA 1/29. He stated that the plaintiff was aware of this decision and he never appealed against the said decision. He urged the court to dismiss the plaintiff's case with costs.

Plaintiff's Submissions

Counsel for the plaintiff filed the following issues for determination by the court.

- 1) Whether or not the plaintiff's father gave the 1st Defendant the whole of the suit parcel.
- 2) Whether the Defendants fraudulently transferred the suit parcel into the names of the 2nd Defendant on behalf of the 1st Defendant.
- 3) Whether the suit parcel was held in trust for the Plaintiff under Luo customary laws.
- 4) Who should bear costs of these proceedings?

It was Counsel's submission that the plaintiff's father donated to the 1st Defendant the church a portion of the suit parcel measuring 0.07ha parcel which was prior to land adjudication process and that the portion was marked by a live euphorbia fence which is still intact.

Counsel further submitted that from the evidence adduced, it is clear that there has been a dispute over the suit property pitting the plaintiff's family and the 1st defendant's church prior and after the death of Plaintiff's father.

Counsel submitted that the Plaintiff stated that their family has been in actual occupation of the remaining portion prior and after the death of his father. That the matter ended up at the Siaya Land Dispute Tribunal Case No. 53 of 2009 which again referred the dispute back to the 2nd defendant. It was Counsel's submission that the 1st defendant's church in collusion with the 2nd defendant caused the whole parcel to be registered in the name of the 1st defendant and in trust for the 2nd defendant's church.

Counsel cited the provisions of the Trust Land Act Cap 288.

Section 7 of the Act was not adhered to. It provided that:-

"Where written notice is given to a council, under subsection (1) of Section 118 of the Constitution, that an area of Trust land is required to be set apart for use and occupation for any of the purposes specified in subsection (2) of that section, the council shall give notice of the requirement and cause the notice to be published in the Gazette.

(2) Before publishing a notice under subsection (1) of this section, the council may require the Government, within a specified reasonable time –

(a) to demarcate the boundaries of the land, and for this purpose to erect or plant, or to remove, such boundary marks as the council may direct; and

(b) to clear any boundary or other line which it may be necessary to clear for the purpose of demarcating the land, and, if the land is not demarcated within the time fixed by the council, or if the person or body on whose application the land is to be set apart so requests, the council may carry out all work necessary for the demarcation of the land and require the applicant to pay the cost of the demarcation.

(3) A notice under subsection (1) of this section shall specify the boundaries of the land required to be set apart and the purpose for which the land is required to be set apart, and shall also specify a date before which applications for compensation are to be made to the District Commissioner.

(4) Where the whole of the compensation awarded under Section 9 of this Act to persons who have applied before the date specified in the notice given under

Section 8 of Act provides that where trust land is set apart, full compensation shall be promptly paid by the Government to any resident of the area of land set apart who –

a. Under African customary law for the time being in force and applicable to the land has any right to occupy any part thereof; or

b. Is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.

(2) A notice of setting apart published under Section 7 of this Act shall also be published by displaying a copy at the District Commissioner's office and at some other public or conspicuous place in the area concerned.

Section 13(2) of the Trust Land Act Cap 288, provides for the following procedure where a council intend to set apart of the trust land:-

a) The council shall notify the chairman of the relative Divisional Board of the proposal to set apart the land and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform the council of the day and time of the meeting;

b) The council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;

c) The Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;

d) The recommendation of the Divisional Board shall be considered by the council, and the proposal to set apart the land shall not be taken to have been approved by the council except by a resolution passed by a majority of all the members of the council: Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council.

(3) Where the council approves a proposal to set apart land in accordance with subsection (2) (d) of this section, the council shall cause a notice of the setting apart to be published in the Gazette.

It was Counsel's submission that, neither the 1st nor the 2nd Defendant adduced evidence to confirm that they complied with this mandatory provisions of the law. The 2nd defendant had a fiduciary duty of ensuring that the provisions of the law were observed to the later.

Counsel therefore submitted that the parcel was held in trust for the Plaintiff and other Ojero family members and that customary trust gives the plaintiff locus standi to institute these proceedings. He cited the case of **Mukangu versus Mbui Nyeri Civil Appeal No. 281 of 2000**, where the Court of Appeal held that:-

a) *The very purpose of subjecting land held under customary tenure to the process of land consolidation under the Land consolidation Act or the Land Adjudication Act and subsequently registering it under the Registered Land Act is Ipso facto to change the land tenure system. The assumption is that all rights and interests of persons in the land subjected to such new system would have been ascertained and recorded before registration.*

b) *Rights under Customary law are subject to rights under written law and are excluded under the clear language of section 27 and 28 of the Registered Land Act. Customary Law rights in land are extinguished upon registration of that land under the Act and rights under customary law are not overriding interests under section 30 of the Act.*

c) *However, since the same registration recognizes trusts in general terms without specifically excluding trusts originating from customary law and since African customary laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in fiduciary capacity under any of the customary laws had the piece of land registered in his name under the Act with the relevant instrument of an acquisition either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act, of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Act because, according to the proviso to Section 28, such registration does not "relieve a proprietor from any duty or obligation to which he is subject as a trustee."*

d) *A trust arose from the possession and occupation of the land by Gerald which has the protection of Section 28 and 30 (g) of the Act.*

Counsel further cited the case of **Mwangangi & 64 Others – Versus – Wote Town Council Machakos HCC No. 113 of 2004 Wendoh J.** held inter alia that:-

Section 114 of the Constitution of Kenya confers the status of trust land to, inter alia, all land which was in special areas or reserves and which was registered in the name of the Trust Land Board, or land which was situated outside Nairobi (area as of 12/12/1964) the free hold title to which was registered in the name of a county council.

Section 115 (2) of the Constitution provides that each County Council holds the trust land vested in it for the benefit of the persons who ordinarily reside on that land.

If the land in issue is trust land then the applicants who claim to be residents of Kitui and doing business on it would have an interest in what the council does with land and thus, they have locus standi in the matter.

Under section 166 of the Local Government Act, council has a right to replan and carry out development projects; it can acquire and sell land under section 114 of the Act; Section 177 (2) of Local Government Act disposal of land is subject to conditions.

Even if there is consent from the Minister to a council to sell land under Section 144, the same is subject to the provisions of the constitution, which sets out the manner and objects for which land can be divested by the council i.e section 117 of the Constitution.

A plaintiff may have two remedies available in law and the court cannot force the applicant to come in a particular way.

The applicant had satisfied the conditions necessary for the grant of a temporary injunction.

Counsel urged the court to find that the Plaintiff has proved his case on a balance of probabilities against the defendants and enter judgement as prayed with costs.

Defendant's Submission

It was Counsel's submission that the plaintiff has failed to prove that the defendant is holding the suit property in trust for him, and that his major complaint is that the defendant registered the whole parcel of land contrary to the 0.07 Ha donated to them. He stated that the plaintiff's father in his life time never raised any complaint against the church yet he was the one who donated the said property.

Counsel also submitted that it is not disputed that the suit property was donated by one PETER OJERO, deceased, before the adjudication process, that there was no document written between the said PETER OJERO and the church further that it is however not disputed that they went through the process of adjudication with the deceased PETER OJERO who allowed the adjudication board to register the said property in the name of the church. The only dispute that was raised from 1972 when the suit property was registered in the name of the defendants is the dispute before the land Tribunal in the year 2009. The dispute was heard and determined and the plaintiff never appealed against the said decision.

Counsel therefore submitted that the plaintiff has failed to prove his case on a balance of probabilities and specifically that the late PETER OJERO had only donated a portion measuring 0.07Ha and not 0.7Ha hence the suit should be dismissed with costs to the defendant

Analysis and Determination

The issues for determination in this case are as to whether the plaintiff's father the late Peter Ojero donated to the 1st defendant 0.07 Ha or the whole parcel measuring 0.7Ha, whether the defendants fraudulently transferred the suit parcel of land into the names of the 1st and 2nd defendants and whether the suit parcel of land was held in trust for the plaintiff under Luo customary law.

PW 1 testified that his father donated a portion of land measuring 0.07Ha to the church however during registration the whole parcel measuring 0.7Ha was registered in the name of the church. The plaintiff further confirmed that he was not present when his father was giving land to the church and that his father told him to build his home in a portion of the suit property and that he has been cultivating the said portion.

PW 1 also confirmed that there was no evidence before court that his father had complained and/or sued the defendants claiming that the parcel of land occupied by the church was bigger than what he had donated. It is on record that the suit land was registered in the name of the church and the 2nd defendant in 1972. The plaintiff stated that he could not remember when he went to the lands office and discovered that the land had been registered in the defendants' names and started the process of claiming the land.

It is not in dispute that the plaintiff's father donated land to the church in 1972 who is the 1st defendant herein. What is in dispute is whether amount of land that was donated. Was it 0.07 Ha as the plaintiff asserts or was it 0.7 Ha as per the green card produced in court and the assertion of the defendant?

In response as to the first issue which is essentially the major contention in this suit, it is unfortunate that the person who donated the land to the church is now deceased, having passed on in 2005. This transaction took place in 1972 and the register was opened in the same year and registration done in favour of the 1st and 2nd defendants as per the green card. The father of the plaintiff must have been aware all these years that the land that he had donated had been registered in the name of the defendants and therefore did not raise any questions. Why would someone complain of the anomaly after 37 years?

By the time the plaintiff was writing letters to Siaya County Council to complain about the suit parcel of land in 2002 the plaintiff's father was still alive. A site visit was convened by the County Surveyor on 26th August 2009, this was after the death of the plaintiff's father and the Surveyor advised the parties that he could not deal with the issue where there is a dispute and urged them to go to court.

The plaintiff had also filed a case vide Land case No. 53 of 2009 in Siaya whereby the Tribunal dismissed the claimant's claim on the grounds that Siaya County Council being the registered owner to address the issue of acreage and that the complainant had no legal right whatsoever to interfere in the Masogo CCA Church compound in any way with parcel No. East Gem /Nyawara 1/29

The award of the Tribunal was later adopted as the judgment of the court on 13th December 2011 and the plaintiff was given 30 days right of Appeal.

From the evidence on record it is clear that the plaintiff was given a right to appeal the decision of the Tribunal but he instead filed a fresh suit claiming proprietary interest through a resulting trust. Was this the right way to go or was he entitled to file another suit seeking for the same orders?

The Chief Justice issued Practice Directions as contained in Gazette Notice No. 16268 dated 9th November, 2012, as follows: ". Appeals from the Magistrates Courts and Tribunals in the foregoing paragraphs 5 to 10 shall lie in the Environment arid Land Court pursuant to Section 13 (4) of the Environment and Land Act."

The plaintiff also pleaded that the defendants registered the whole parcel of land fraudulently in their names Even though the plaintiff pleaded the particulars of fraud as required by law, it was incumbent upon him to specifically lead evidence and strictly prove the fraud.

In the case of **R. G PATEL –VS- LALJI MAKANJI 1957 E. A 314**, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

This was lacking on the part of the plaintiff. It was his word against the defendants that the father donated 0.07 Ha vis a vis the defendants claim that the whole portion was given to them.

Counsel for the plaintiff cited the provisions of Trust Land Act Cap 288(Repealed) which Act related to public land being held in trust for the people or residents of a community by the Government therefore it does not apply to the current case as this was private land donated to the 1st defendant and was held by the County Council in trust for the church during adjudication.

With due respect to Counsel for the plaintiff, the provisions extensively cited from the repealed Trust Land Act are not applicable to this case as this is not public but private land.

Further that this case cannot pass as a case of either resulting trust or customary trust as it is not proven that the defendants were holding the land in trust for the plaintiff and his family.

The Supreme Court held in the case of **Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another [2018] eKLR**

Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties.

The plaintiff did not prove any of the categories of customary trusts which he wants the court to find in his favour.

There is an elaborate process for land adjudication and this land could not have been registered in the names of the 1st and 2nd defendants without the consent of the person who was entitled as beneficiary one Peter Ojero the father of the plaintiff herein. We should also note that the register was opened way back in 1972, and if there was any dispute then the rectification could have been done then.

I find that this is a situation where land was donated, the church did developments and the plaintiff wants to renege on what the deceased had voluntarily given the church. This speaks to the fact why the late Peter Ojero did not feature anywhere in the complaints lodged by the plaintiff and yet he was alive. If his father was ailing, then he could have given him a power of attorney to deal with the issues concerning the suit land on his behalf.

I have considered the evidence on record, the submissions by Counsel and authorities cited and find that the plaintiff has not proved his case against the defendants and the same is therefore dismissed with costs.

DATED and DELIVERED at KISUMU this 3RD DAY OF DECEMBER, 2018.

M. A. ODENY

JUDGE

JUDGMENT READ, and SIGNED in open court in the presence of;

Ms. Orege holding brief for Mr. Ochuka for plaintiff, Court assistant Joanne, and in the

absence of the defendant’s counsel.

M. A. ODENY

JUDGE