



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 199 OF 2014 (O.S)

IN THE MATTER OF THE PARCEL OF LAND

L.R NO.TETU/UNJIRU/546

AND

PLOT NO. 295 NGARENG'IRO SETTLEMENT SCHEME

AND

IN THE MATTER OF ADMINISTRATION OF THE ESTATE OF STEPHEN RUIRU MBOCHE
alias STEPHEN RUIRU S/O MBOCHE ALIAS MUTHEE S/O MBOCHE (DECEASED)

AND

IN THE MATTER OF RULE 41(3) OF THE PROBATE AND ADMINISTRATION RULES

AND

IN THE MATTER OF DECLARATION OF TRUST

BETWEEN

EDWARD WANJOHI MBOCHE AND

MADLENA WANJIRU MWANGI APPLICANTS

-VERSUS-

ALICAJERA WANJIKU MBOCHE RESPONDENT

JUDGMENT

Introduction

1. The applicants herein, Edward Wanjohi Mboche and Madlena Wanjiru Mwangi, took up the originating summons dated **23rd September, 2014** for determination of the following questions:

(1) Whether Stephen Ruiru Mboche (deceased) held the parcel of land known as LR No. Tetu/Unjiru/546 subject to a customary trust in favour of them and himself in equal shares.

(2) Whether Stephen Ruiru Mboche (deceased) held Plot No. 295 Ngareng'iro Settlement Scheme subject to a trust in favour of them and himself in equal shares.

(3) Whether the administration of the estate of Stephen Ruiru Mboche (deceased) should be done with respect to the pleaded trust over the suit properties.

(4) What is the order as to costs?

2. The summons are supported by the affidavit of the plaintiffs/applicants sworn on **23rd September, 2014** where it is contended that land parcel **LR No. Tetu/Unjiru/546** was acquired by their father, Mboche Ruiru, who passed away in 1953, before land consolidation and registration.

3. It is the applicants' case that at the time of registration of the land in 1958, the land was registered in the name of the defendant/respondent's husband (Muthee S/O Mboche) to hold in trust for them and himself because he was the eldest son of their father. The plaintiffs/applicants further deposed that they have been in possession and use of the property pursuant to the pleaded customary trust.

4. In addition to the said parcel of land, the plaintiffs/applicants are also claiming Plot No. 295 Ngareng'iro Settlement Scheme, which they claim had been allocated to their mother, Elizabeth Wambui Mboche (deceased).

5. The suit/application is opposed through the defendant/ respondents' replying affidavit sworn on **30th September, 2014** in which the defendant/respondent has deposed that by the time their father passed on in 1953, all the children of their father were adults, fending for themselves.

6. It is the defendant/respondent's case that the deceased was registered as the absolute proprietor of the suit properties.

7. According to the defendant/respondent, her husband's siblings remained in the emergency villages and moved to their respective portions of land in 1960s.

8. It further contended that the applicants have never resided in the suit property and have not made any developments thereon.

9. It is also deposed that the applicants did not raise any claim before the deceased passed on in 2007.

10. The respondent admits that her mother in law lived in Tetu/Unjiru/546 but explains that they brought her to live with them in 1975.

11. After bringing her, they built a house for her and allowed her to cultivate on a small portion of the suit property, measuring about $\frac{1}{4}$ of an acre.

12. After their mother passed on, they allowed Mathenge, a son of the 2nd plaintiff, to use the portion their mother was using.

13. Concerning Plot No. 295 Ngareng'iro, she contended that it was exclusively allocated to her husband by the Settlement Fund trustee (SFT).

Analysis and determination

14. The undisputed/uncontroverted facts of the case are:-

- (a) Parties to this dispute are related. The 1st plaintiff and the husband of the 2nd plaintiff and the defendant are siblings;
- (b) The husbands of the 2nd plaintiff and the defendant have since passed on;
- (c) The defendant's husband was the eldest amongst the brothers;
- (d) That the 1st plaintiff and the husband of the 2nd plaintiff lived in the suit property when young.
- (e) That the 1st plaintiff and the 2nd plaintiff have never lived in the suit property or effected any developments thereon.
- (f) That the husband of the 2nd defendant and his mother are buried in the suit property.
- (g) That their mother lived in and occupied a small portion of the suit property, about a quarter an acre.
- (h) That after their mother passed on, the 1st born son of the 2nd plaintiff moved into the suit property and began living in the portion that was occupied by their mother.
- (i) That the coffee trees in the suit property were planted by the defendant and her husband.

15. Whereas the plaintiffs claim that the suit property belonged to their father, they did not lead any evidence capable of proving that fact. The evidence led merely shows that the property was first registered in the name of the defendant's husband. Yet the mere fact that their mother lived thereon and that the husband of the 2nd defendant was buried there is not enough evidence to prove that the defendant's husband held the land in trust for them.

16. Given the conduct of the parties to this dispute, I am not persuaded that the defendant's husband held the suit property in trust for them. I say this because, the plaintiffs only lived in the suit property when young. Upon getting their families, they moved to their own parcels of land and never used or staked a claim to the suit property when the defendant's husband was alive. I find the allegation that they had asked the defendant to share the suit property with them during his lifetime to be unsubstantiated.

17. Even though alive to the fact that 2nd defendant's son lives in the suit property, and in particular, the portion occupied by their mother, I am not satisfied that that fact alone, is proof of trust relationship between the family of the 2nd plaintiff and the defendant's husband.

18. Before I leave the issue of the parties' entitlement to the suit property, I must address an issue that was raised by the 2nd plaintiff concerning her interest to the suit property, although the same was not pleaded. The issue relates to the 2nd plaintiff's claim that the portion her son occupies was given to her by her mother-in-law as a gift.

19. My view of that issue, is that apart from being a violation of the law on pleadings, the 2nd plaintiff did not lead any evidence capable of proving that fact. Her testimony concerning that claim, appeared to contradict the 1st plaintiff's testimony to the effect that he is the one who told her son to go and live in the portion their mother occupied.

20. The question to answer is why the 1st plaintiff or any other person would ask the 2nd plaintiff to go and live in a portion of land that already belonged to them, yet there appears to have been no objection to that entry by the defendant or her husband.

21. Another issue arising from that contention, is whether their mother not being the registered proprietor of the suit property and there being no evidence that the defendant held the suit property in trust for her,

she could legally give the portion of the land she occupied to the 2nd plaintiff.

22. My answer to that question is negative. I say this because, the 2nd plaintiff's mother could not in law give the 2nd plaintiff what did not belong to her. That kind of arrangement can only be given effect if the plaintiffs proved that the suit property was family land, which fact they have failed to prove.

23. In view of the foregoing, I find and hold that the plaintiffs' have not proved that the defendant's husband held Tetu/Unjiru/546 in trust for himself and themselves in equal shares.

24. With regard to 295 Ngareng'iro, I find the plaintiffs' claim that it was allocated to their mother; having seen the documents relied on by the defendant in support of her claim and upon considering the explanation offered by the defendant in support of that claim, which explanation I find plausible (the defendant's registered the suit property in the name of his mother to hold in trust for him to avoid conflict of interest-was a member of the committee which was allocating the land), to be unsubstantiated.

25. The conduct of the plaintiffs' does not support their contention that they had any interest in the suit property. They never lived, utilised or staked a claim to the property when their mother and/or the defendant husband were alive.

26. As trust must be proved by way of evidence and there been no evidence to prove the alleged trust relationship in respect of 295 Ngareng'iro, the plaintiffs claim to this property also falls.

27. Having found that the plaintiffs have not proved that Tetu/Unjiru/546 and 295 Ngareng'iro were held by the defendant's husband subject to their half share interest therein, I return a negative verdict to the question as to whether the estate of the deceased should be administered subject to the plaintiffs' alleged interest in the suit property.

28. The upshot of the foregoing is that the plaintiffs' claim fails in its entirety.

29. As this is a dispute pitting family members, I order that parties bear their own costs.

Dated, signed and delivered in open court at Nyeri this 22nd day of February, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Nderi for the defendant

Mr. Bwonwonga h/b for Mr. Kingori for the plaintiff

Court clerk - Esther