



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 64 OF 2014

RALPH KIVUTI NJOKA.....PLAINTIFF

VERSUS

JESSI NYAGA KARUAGI.....DEFENDANT

JUDGMENT

This case, as will become clear later on in this judgment, illustrates why it is important for both counsel and parties acting in person, to draft their pleadings properly. There should be no reason whatsoever why a Court should have difficulties making out what case a party is pleading particularly where the party has the benefit of a legal advisor as is the case with the Plaintiff herein.

RALPH KIVUTI NJOKA, the Plaintiff herein, filed this case on 10th July 2013 seeking judgment against his elder brother **JESSI NYAGA E. KARUAGI**, the Defendant herein, in the following terms:

a. Vacant possession of the land.

b. An order that during the pending of this suit, the property known as KYENI/KIGUMO/5657 be preserved and not to be sub-divided, sold charged and transferred or dealt with in any manner howsoever by the Defendant, his agents and/or servants until further orders of the Court.

c. An injunction do issue restraining the Defendant whether by himself, servants, agents or any other person from putting up for sale, sub-dividing of or dealing in any way howsoever with the said property pending the hearing and determination of this suit or until further orders of the Court.

d. A declaration that the Title deed issued to the Defendant for title No. KYENI/KIGUMO/5657 is null and void ab initio and incapable of conferring any proprietor rights.

e. An order to the District Land Registrar Embu to register the Plaintiff as the co-proprietor of L.R No. KYENI/KIGUMO/5657.

f. A declaration that the alleged registration of the Defendant as the absolute proprietor of the suit land was illegal, null and void ab initio.

g. order for sub-division of the suit land.

h. Costs of this suit.

i. Any other or further relief that the Court may deem fair and expedient to grant.

The claim is premised on the following pleadings:

- ***That at all material times to this suit, the Plaintiff was and is still the beneficial owner of part of real property known as title No. KYENI/KIGUMO/377 situated within Embu County.***
- ***That the Plaintiff and Defendant are brothers from the same mother being children of the late ELKANA NJOKA KARUAGI (deceased) who, during his life time, was the registered proprietor of land parcel No. KYENI/KIGUMO/377 measuring approximately 20 acres which was given to the Defendant to hold in trust for himself and his two brothers being the Plaintiff and OBADIAH NJAGI NJOKA.***
- ***Following the death of their father, all his sons got their share of the land except the Plaintiff whose share was registered in the defendant's names.***
- ***The Defendant has refused to give the Plaintiff his share and this made the other brother OBADIAH NJAGI NJOKA to file at RUNYENJE'S MAGISTRATE'S COURT CIVIL CASE NO. 27 OF 2006 before the Defendant gave him 5 acres leaving 15 acres being L.R. No. KYENI/KIGUMO/5657 registered in the Defendant's name.***
- ***Family member held a meeting where the Defendant agreed to surrender 5 acres of to the Plaintiff but refused forcing the Plaintiff to approach all relevant authorities for assistance but to no avail and so on 9th March 2010, the Plaintiff placed a caution on the land to protect his interests and thereafter filed this suit after the Defendant refused to give him his share.***

The Defendant filed a defence denying those averments and adding that he is the absolute registered owner of KYENI/KIGUMO/5657 a resultant subdivision of parcel No. KYENI/KIGUMO/377 but denied that he holds the same in trust for the Plaintiff or anybody else. He therefore urged this Court to dismiss the Plaintiff's suit with costs.

In a reply to the defence, the Plaintiff reiterated the contents of his plaint.

The trial commenced on 13th May 2016 when the Plaintiff produced his list of exhibits (Plaintiffs exhibit 1 to 10) and asked the Court to adopt his statement filed herein as his evidence. He told the Court that the Defendant is his elder brother both being the children of **ELKANA NJOKA KARUAGI** (deceased) who had eleven (11) sons and five (5) daughters. That land parcel No. KYENI/KIGUMO/377 measuring 20 acres was given to the Defendant to share with his other brother **OBADIAH** who was to get five (5) acres the Plaintiff five (5) and the Defendant to retain ten (10) acres. However, following their father's death in 1990, and notwithstanding several family meetings held on 19th May 1999, 20th May 1999 and 28th August 1999 and although the Defendant had agreed to give the Plaintiff his five (5) acres, he refused to do so insisting that the Plaintiff buys him a goat before he could give him his share. And although the Plaintiff gave the other brother Kshs.1500/= to give the Defendant to buy a goat, the Defendant insisted that the money be taken to him in Naivasha where he lives. **OBADIAH** decided to file a suit at **RUNYENJES MAGISTRATE'S COURT** being Civil Case No. 27 of 2006 (Plaintiff Exhibit 3) which was referred to the Tribunal and only then did the Defendant give **OBADIAH** his share of five (5) acres. The Plaintiff also decided to file a suit at the Tribunal (Plaintiffs Exhibit 4) which was referred to the High Court and he appealed to the Provincial Tribunal which ordered that he be given five (5) acres. He then placed a caution on the land and filed this suit. He asks the Court to award him the land adding that he is the only son of his late father who was not awarded land and he currently occupies a portion belonging to his mother.

The plaintiff called as his witnesses his other brothers **SOLOMON KAUMBUTHU ELKANA** (PW2), **JAPHETH NJERU ELKANA** (PW3) AND **RICHARD KAMAU NTHURAKUH** (PW4). They all asked the Court to adopt their statements as their evidence and added that the deceased had two wives but the Plaintiff and Defendant are from the same mother. They added that whereas their father gave them their share, the land subject of this suit and which measures (twenty) 20 acres was to be held in trust for the Plaintiff, **OBADIAH** and the Defendant who was to get ten (10) acres and the others five (5) acres each. However the Defendant only gave **OBADIAH** his five (5) acres but refused to give the Plaintiff his share.

In his defence the Defendant who also asked the Court to adopt his statements as his evidence told the Court that the original land parcel No. KYENI/KIGUMO/377 measuring twenty (20) acres was given to him by the clan through his father during the demarcation period between 1958-1962. It was then registered in his names and he does not hold it in for trust for anybody. However, he gave **OBADIAH** five (5) acres since he (**OBADIAH**) had no land while the Plaintiff told him that he had land in Nanyuki and had no interest in the land subject of this suit. So the Defendant sub-divided the original land parcel no. KYENI/KIGUMO/377 into 3 portions and retains parcel No. KYENI/KIGUMO/5657 (the suit land). He denied knowledge of any family meetings nor having seen any minutes thereof and stated that the suit land is his property which he cannot be forced to give the Plaintiff.

At the end of the trial, submissions were filed both by **MR. MASESE** instructed by **MR. OMWOYO MASESE AND COMPANY ADVOCATES** for the Plaintiff and **MR. ITHIGA** instructed by **NJERU ITHIGA AND COMPANY ADVOCATES** for the Defendant.

I have considered the oral and documentary evidence by the parties and the submissions by counsel.

This is the right time to revert to the concern I raised earlier about the not so elegant pleadings by the Plaintiff's counsel. It is clear from paragraphs (b) and (c) of the prayers sought by the Plaintiff in this judgment that those are infact remedies to be applied for at an interlocutory stage through a Notice of Motion and prior to the main hearing of the suit. One cannot apply for preservation of the suit land or an injunction pending hearing of the suit as final prayer in the plaint. Most significantly however, it is only after hearing the evidence of the Plaintiff and his witnesses that I was able to discern that the Plaintiff's case is in fact premised on a claim of trust. Pleadings should be properly drawn, particularly those filed by counsel so that from a mere reading of the plaint or defence, the Judge or Magistrate can know what case is before the Court for determination. That was not easy in this case and that explains why in his submissions, counsel for the Defendant **MR. ITHIGA** stated that neither fraud or trust was pleaded. Nonetheless, in paragraph five (5) of the plaint, it is pleaded as follows:-

“Prior to the death of their father, the Defendant was given land title No. KYENI/KIGUMO/377 measuring approximately twenty (20) acres to hold it in trust for the benefit of himself and his two brothers namely RALPH KIVUTI NJOKA (Plaintiff) and OBADIAH NJAGI NJOKA”.

Then in paragraph 18 (g) of his prayers, the Plaintiff pleads for:-

“An order for sub-division of the said suit land”.

The above pleadings, taken together with the fact that the Plaintiff, his witnesses and the Defendant made references to a trust in their testimonies makes it clear that that was the issue brought out for this Court's determination. Parties and their counsel should however take note that it is not the responsibility of the Court to panel beat their disjointed pleadings, in order to discover what their cases are. Clarity of pleadings is essential if the Courts are to effectively play their role of delivering justice efficiently and expeditiously and while lay litigants can be excused when they fall short of this requirement, there can be no reason why the Courts should be made to struggle to make out what a party's claim really is in a situation such as this where counsel has been instructed. I do not think that **Article 159 of the Constitution** was designed to encourage complacency or sloveny on the part of litigants and their counsel.

Having said so, however, I am guided by the decision in **ODD JOBS V MUBIA 1970 E.A. 476** where it was held that the Court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue was left to the Court to decide. It is clear from the testimony of the parties in this case and the submissions of counsel that the key issues to be determined is whether the Defendant holds the suit land in trust for the Plaintiff who should therefore be awarded five (5) acres out of the same.

Trust is matter both of fact and law and a party pleading it is required to lead proper evidence in support of that claim. As was held in **MWANGI MBOTHU VS. GACHIRA WAITIMU C.A APPEAL No. 22 of**

1984 [1980 e KLR], the law never implies, the law never presumes a trust but in a case of absolute necessity. The Court will not imply a trust save in order to give effect to the intention of the parties. The following facts are not really in dispute in this case:

1. **That the parties are siblings with the defendant being the eldest in their mother's house.**
2. **The suit land is registered in the defendant's names.**
3. **That the suit land which is a resultant sub-division of the original land parcel No. KYENI/KIGUMO/377 measuring twenty (20) acres belonged to the parties' father who in turn was given the same by the clan.**
4. **That the defendant has since sub-divided the original land parcel No. KYENI/KIGUMO/377 and given five (5) acres to his other brother OBADIAH leaving the suit land which now measures fifteen (15) acres.**

The Defendant's case is that the original land parcel No. KYENI/KIGUMO/377 was given to him as his own property. He said as follows in his evidence in chief:

"The original land parcel No. KYENI/KIGUMO/377 measuring 20 acres was given to me by the clan through my father. That was between 1958 – 1962 during the demarcation process. I later obtained the title deed. I am the first registered owner of that land which is registered in my sole names and not in trust for anybody. The land is my own property and my father never told me to share it with Plaintiff and Obadiah. However, I decided to give Obadiah 5 acres because he had no land. The Plaintiff told me he had a place in Nanyuki where he could live"

The Defendant is therefore of the view that since the suit land is registered in his names, it is his sole property and he cannot hold it in trust for the Plaintiff or any other party. His counsel has also submitted as much stating that a trust cannot be implied in this case and he has cited the case of MWANGI MBOOTHU (supra). It is however now well settled both through precedent and the law itself that the registration of land in one's names does not relieve him of his responsibility as a trustee. See for instance the following cases:

1. **KANYI VS MUTHIORA 1984 K.L.R 712**
2. **GATHIBA VS GATHIBA (2002) 2 E.A.L.R 342**
3. **GATIMU KINGURU VS MUYA GATHANGI 1976 K.L.R 253**
4. **MUMO VS MAKAU 2004 1 K.L.R 13**
5. **MUKANGU VS MBUI 2004 2 K.L.R 256.**

While Section 25 (1) of the Land Registration Act makes it clear that the registration of land in one's names entitles him to all the privileges and appurtenances belonging thereto and free from all other interests except those noted in the register and any overriding interests recognized under Section 25 (1) of the same, there is a provisos in Sub-section (2) in the following terms:

"Nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee"

A similar provision is found in Section 28 of the repealed Registered Land Act under which the title to the suit land was issued. It is clear from the above therefore that notwithstanding the registration of the suit land in the Defendant's names, that does not relieve him of any duty to which he is subject as a trustee.

Before I consider the issue of trust, the Defendant's counsel submitted that this suit is infact time barred under **Section 7 of the Limitation of Actions Act**. It is submitted by the Defendant's counsel that the Plaintiff only started claiming the suit land after their father died in 1990 and this suit is time barred having been filed on 10th July 2013. However, in **STEPHENS VS STEPHENS 1987 K.L.R.**, it was held that in a case founded on trust, no plea of limitation is available to a fiduciary in possession of trust property who abuses such trust and converts such property for his own benefit. That is essentially the Plaintiff's claim in this case. It is a claim in customary trust which cannot be defeated by the provisions of **Section 7 of the Limitation of Actions Act**. In the case of **MACHARIA KIHARI VS NGIGI KIHARI C.A CIVIL APPEAL No. 170 of 1993**, the Court of Appeal addressed that issue in the following terms:

“Limitation period prescribed in Section 20 (2) of the Limitation of Actions Act will not apply to a trust coming into existence under customary law. Under Customary Law, the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law”.

It is therefore clear that the plea of limitation does not aid the Defendant in this case.

Has the Plaintiff established his claim in trust against the Defendant? It is not in dispute that the original land parcel No. KYENI/KIGUMO/377 was clan land which was first awarded to the parties' deceased father and thereafter to the Defendant. It was therefore not private property purchased by the Defendant as his own property. It is therefore property held for the benefit of the current and future generations of the deceased's family and this Court, by virtue of **Section 18 of the Environment and Land Court Act**, is required while exercising its jurisdiction to be guided by the principles of intergenerational and intragenerational equity. That is evidence upon which this Court can make a finding, which I hereby do, that the Defendant holds the suit land in trust for himself and the Plaintiff.

There is also evidence that the Defendant has infact already given their other brother **OBADIAH** some five (5) acres out of the original land parcel No. KYENI/KIGUMO/377. If indeed it was properly held solely for himself, then he was under no obligation to give five (5) acres thereof to his other brother **OBADIAH**. The fact that he did so lends credence to the Plaintiff's evidence, as supported by his other brothers, that the Defendant infact held the original land parcel No. KYENI/KIGUMO/377 and thereafter the suit land in trust for the Plaintiff as directed by their late father. In his testimony, the Plaintiff said:

“My father had two wives. The suit land KYENI/KIGUMO/377 measuring 20 acres was given to the Defendant to share between me, the Plaintiff and our other brother OBADIAH. I was to get 5 acres, OBADIAH 5 acres and the Defendant to retain 10 acres.”

On his part, **SOLOMON KAUMBUTHU ELKANA** (PW2) said:

“The land subject of this suit was to be shared between the Plaintiff, Defendant and OBADIAH. It was in Defendant's names because he is the eldest of the three. The land was 20 acres and the Defendant only gave OBADIAH his share after he was taken to Court. He did not give the Plaintiff his share”

On his part, **JAPHET NJERU ELKANA** (PW3) said as follows:

“The Defendant was holding the land in trust for the Plaintiff and OBADIAH. The Defendant was to get 10 acres and the Plaintiff and OBADIAH 5 acres each. The land was 20 acres”

Finally, on his part, **RICHARD KAMAU NTHURAKUH** (PW4) had this to say:

“The Defendant and Plaintiff were to share 20 acres with OBADIAH. The Defendant only gave OBADIAH 5 acres but he refused to give the Plaintiff his share. OBADIAH took him to Court before he agreed to give him his share”

It was also clear from the testimony of the Plaintiff and his witnesses that whereas their late father gave

all of them their portions of land during his life time, the land parcel No. KYENI/KIGUMO/377 was to be shared between the Plaintiff, the Defendant and **OBADIAH**. It cannot therefore be correct, and neither would it be equitable, that the parties' late father would have wanted all his sons to have a share in his land except the Plaintiff and **OBADIAH** who had to seek the Court's intervention before he got his share. That is cogent evidence upon which this Court can find that a trust has been proved in favour of the Plaintiff and it also rebuts the Defendant's evidence in which he denies holding the suit land in trust for himself and the Plaintiff. It is also not lost to this Court that the parties herein are Kikuyu and Kikuyu customary law recognizes the concept of a trust – see **GATHIBA VS GATHIBA** (supra) and also **MBUI MUKANGU VS GERALD MUTWIRI C.A CIVIL APPEAL No. 281 of 2000 NYERI** among other cases. There is also judicial authority that under Kikuyu customary law, the eldest son, such as the Defendant herein, holds family land in trust for his siblings – see **NJENGA CHONGERA VS MARIA WANJIRU KIMANI & OTHERS C.A CIVIL APPEAL No. 322 of 2003** which also cited the cases of **KANYI** (supra) and **GATIMU KINGURU** (supra). I am therefore satisfied from the evidence herein that the Plaintiff's claim to a portion of the suit land in trust is founded on solid ground and must be allowed. In paragraph 18 (g) of his plaint, the Plaintiff sought an order that the suit land be sub-divided which really means that the trust be determined and he be awarded the five (5) acres as per his evidence. I am persuaded that he is entitled to that order.

Ultimately therefore, there shall be judgment for the Plaintiff against the Defendant in the following terms:

- 1. That the Defendant holds land parcel No. KYENI/KIGUMO/5657 in trust for himself and the Plaintiff.***
- 2. That trust is determined and an order is made that the Defendant sub-divides the land and transfers five (5) acres to the Plaintiff within 45 days of this judgment.***
- 3. In default of (2) above, the Deputy Registrar of this Court will be at liberty to sign all the relevant documents on behalf of the Defendant to facilitate that transfer and the Land Registrar may dispense with any documents in possession of the Defendant.***
- 4. The parties are siblings and therefore each will meet their own costs.***

B.N. OLAO

JUDGE

19TH MAY, 2017

Judgment dated, delivered and signed in open Court this 19th day of May 2017

Mr. Mwangi for Mr. Ithiga for the Defendant present

Mr. Masese for the Plaintiff absent

Right of appeal explained.

B.N. OLAO

JUDGE

19TH MAY, 2017

Further order

This file be returned to the Environment and Land Court registry at Embu for safe custody. The advocates for the parties be informed accordingly.

B.N. OLAO

JUDGE

19TH MAY, 2017