



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 319 OF 2013

MUTHII KIBINDU KARUME.....PLAINTIFF

VERSUS

STEPHEN NJINE KIBINDU.....1ST DEFENDANT

ANTONY KINYUA GACHOKI.....2ND DEFENDANT

JUDGMENT

By his plaint filed herein on 12th November 2009 **MUTHII KIBINDU KARUME** (later substituted by **HANNAH MUTHII KIBENDU**) suing as the registered proprietor of land parcel No. MWERU/GITAKU/184 sought judgment against the defendants in the following terms:

(a) A declaration that the plaintiff is the absolute proprietor of land parcel No. MWERUA/GITAKU/184 which the defendants did not have jurisdiction to order for sub-division of the said land.

(b) A declaration that the award given by Baricho Land Disputes Tribunal and adopted in Baricho Resident Magistrate's Court LDT No. 18 of 2006 is null and void ab initio.

The basis of that claim is that the defendants had filed a suit at the Baricho Land Disputes Tribunal (the Tribunal) which ordered that the land parcel No. MWERUA/GITAKU/184 be sub-divided into three portions:

- 1. STEPHEN NJINE KIBUNDU - 2 acres**
- 2. ANTONY KINYUA GACHOKI - 2 acres**
- 3. MUTHII KIBINDU KARUME - 3.8 acres**

However, it is the plaintiff's case that the Tribunal had no jurisdiction to order for that sub-division.

The defendants originally filed a defence in person which was later amended on 5th December 2016 when they instructed **MS WANGECHI MUNENE** to act for them. In that defence, the defendants pleaded that this suit is res-judicata and that the award of the Tribunal was infact set aside by the Provincial Appeals Committee on 23rd April 2009 and therefore it does not exist. The defendants pleaded further that land parcel No. MWERUA/GITAKU/184 does not exist.

In a counter-claim of their own, the defendants pleaded that the 1st defendant is a brother to the plaintiff

(now deceased) who was also a brother to the 2nd defendant's father. That land parcel No. MWERUA/GITAKU/184 was registered in the names of the deceased plaintiff **MUTHII KIBINDU** to hold in trust for the defendants and therefore the Tribunal rightfully ordered the sub-division thereof so that the defendants get one (1) acre each while the plaintiff gets 5.18 acres. Therefore, the defendants' titles being MWERUA/GITAKU/1382 and MWERUA/GITAKU/1383 are valid. The defendants therefore sought judgment in their counter-claim in the following terms:

*(a) A declaration that the deceased **MUTHII KIBINDU KARUME** was registered against the original land parcel No. MWERUA/GITAKU/184 to hold in trust for himself and the defendants herein and a declaration that the defendants titles No. MWERUA/GITAKU/1382 and 1383 are therefore valid.*

(b) An eviction order against the plaintiff and his agents to vacate from land parcels No. MWERUA/GITAKU/1382 and 1383 and a permanent injunction against himself, his agents and servants restraining them from entering, remaining or cultivating, utilizing, charging, transferring and/or any other way interfering with the defendants' use and occupation of land parcels No. MWERUA/GITAKU/1382 and 1383.

(c) Costs and interest of the counter-claim.

The hearing date for this suit was taken in the registry on 16th January 2017 with both **MR. IGATI MWAI** advocate for the plaintiff and **MS WANGECHI MUNENE** advocate for the defendants present. However, on 17th May 2017 when the suit was called for hearing, neither the plaintiff nor her advocate **MR. MWAI** was present and therefore, upon application by **MS MUNENE**, the plaintiff's suit was dismissed with costs and the defendants were allowed to proceed with their counter-claim.

STEPHEN NJINE KIBINDU (DW1) the 1st defendant herein testified in support of the defendants' counter-claim. He told the Court that the deceased plaintiff **MUTHII KIBINDU** who was later substituted by his wife **HANNAH KIBINDU** was his brother while the 2nd defendant **J. ANTONY KINYUA GACHOKI** is a son to their other brother **JOHN GACHOKI KIBINDU** now deceased. He added that the late **MUTHII KIBINDU** was the eldest of the siblings and that the land parcel No. MWERUA/GITAKU/184 which belonged to their later father **KIBINDU KARUME** was registered in the names of their deceased eldest brother (**MUTHII KIBINDU**) to hold in trust for the family. However, in 1975, **MUTHII KIBINDU** chased the 1st defendant and father to 2nd defendant from the land. So the 1st and 2nd defendants filed a suit at the Baricho Land Disputes Tribunal being LDT Case No. 2 of 2007 which ordered that land parcel No. MWERUA/GITAKU/184 be divided into three portions with the defendants each getting two (2) acres. On appeal to the Appeal Committee, their share was reduced to one (1) acre each. That decree was executed and the 1st defendant was registered as proprietor of land parcel No. MWERUA/GITAKU/1382 while land parcel No. MWERUA/GITAKU/1383 was registered in the names of the 2nd defendant. The official certificates of search in respect to those two parcels were produced in evidence (Exhibits 4 and 5 respectively). Notwithstanding the fact that the defendants were registered as proprietors of the land parcels No. MWERUA/GITAKU/1382 and 1383, the deceased **MUTHII KIBINDU** refused to allow the defendants access to those land parcels thus necessitating the filing of this suit.

Counsel for the defendants elected not to file any submissions at the end of the trial.

I have considered the oral evidence adduced by the 1st defendant as well as the documentary evidence produced. The plaintiff did not attend Court during the trial and no explanation was given for both her absence and that of her advocate **MR. MWAI**. The defendants' evidence was therefore not rebutted.

From the evidence on record, the following are not really in dispute:

1. That the original deceased plaintiff **MUTHII KIBINDU**, the 1st defendant and the deceased father to the 2nd defendant were siblings being the children of the late **KIBINDU KARUME**.

2. That the land parcels No. MWERUA/GITAKU/1382 and 1383 are resultant sub-divisions of the original land parcel No. MWERUA/GITAKU/184 which was registered in the names of the deceased **MUTHII KIBINDU** on 21st April 1960 as per the Green Card (Exhibit 4).

3. That the dispute involving the parties over land parcel No. MWERUA/GITAKU/184 was the subject of litigation at the Baricho Land Disputes Tribunal and an appeal to the Appeals Committee culminating in the sub-division of land parcels No. MWERUA/GITAKU/184 into three portions two of which MWERUA/GITAKU/1382 and 1383 were registered in the names of the two defendants.

The defendants' case is that the original land parcel No. MWERUA/GITAKU/184 was registered in the names of the deceased **MUTHII KIBINDU** to hold in trust for the family as their father was away from home. It was also the defendants' case that the land parcel No. MWERUA/GITAKU/184 was originally clan land and both their deceased parents were buried there. This evidence was not rebutted and this Court can only make a finding, which I hereby do, that the original land parcel No. MWERUA/GITAKU/184 was indeed registered in the names of the deceased **MUTHII KIBINDU** to hold in trust for himself and the family of their late father which obviously included the defendants in this case. The legal burden to prove a trust in their favour was upon the defendants and from the evidence on record, they have discharged it. It is trite law that the mere registration of land in the name of one party does not extinguish any trust in favour of other parties notwithstanding the fact that such trust is not reflected in the register – **KANYI VS MUTHIORA 1984 K.L.R** and also **GATIMU KINGURU VS MUYA GATHANGI 1976 K.L.R 253**. It is also widely accepted under Kikuyu customary law that the eldest son inherits land as a '*muramati*' to hold it in trust for himself and the other heirs – see **NJUGUNA VS NJUGUNA 1984 K.L.R 527**, and **JOSEPH GITAU GITHONGO VS VICTORIA MWIHAKI MUNYA C.A CIVIL APPEAL No. 227 of 2005 (2014 e K.L.R)**. See also **HENRY MWANGI VS CHARLES MWANGI C.A CIVIL APPEAL No. 245 of 2004 (2013 e K.L.R)**. The 1st defendant's evidence, which was not rebutted, is that the original land parcel No. MWERUA/GITAKU/184 was clan land registered in the names of the deceased **MUTHII KIBINDU** to hold in trust for himself and the family of their late father. He added that the registration was done in the names of the deceased **MUTHII KIBINDU** because their father was not at home and also because he (**MUTHII KIBINDU**) was the eldest son. That is sufficient evidence upon which this Court can find that the deceased **MUTHII KIBINDU** was registered as the proprietor of land parcel No. MWERUA/GITAKU/184 in trust both for himself and the defendants and therefore the resultant sub-divisions thereof which are land parcels No. MWERUA/GITAKU/1382 and 1383 are similarly subject to the same trust.

In my view, however, the defendants have an even stronger claim to land parcels No. MWERUA/GITAKU/1382 and 1383. It is clear from the certificates of search in respect to those parcels of land (Exhibits 4 and 5) that the land parcel No. MWERUA/GITAKU/1382 is registered in the names of the 1st defendant while land parcel No. MWERUA/GITAKU/1383 is registered in the names of the 2nd defendant. By virtue of that registration, the defendants are entitled to all the rights and privileges belonging or appurtenant thereto as provided under **Section 24 of the Land Registration Act**. Similar provisions exist under **Section 27 of the repealed Registered Land Act** under which the land parcels in dispute were registered. The defendants' title to the land parcels No. MWERUA/GITAKU/1382 and 1383 can only be defeated or challenged on grounds that the same was obtained through fraud, misrepresentation or through an illegal or corrupt scheme. No such evidence has been placed before this Court. Indeed in his claim which has now been dismissed, the deceased **MUTHII KIBINDU** was only seeking a declaration that he is the absolute proprietor of land parcel No. MWERUA/GITAKU/184 which of course no longer exists. It is of course true that the land parcel No. MWERUA/GITAKU/1382 and 1383 only came into being following orders issued by the Land Disputes Tribunal at Baricho and confirmed by the Provincial Appeals Committee which ordered the sub-division of the original land parcel No. MWERUA/GITAKU/184. It is also true that the said Tribunal could not make such an order as it had no jurisdiction to determine a dispute involving registered land. However, the deceased **MUTHII KIBINDU** did not appeal against that decision as he was entitled to under **Section 8 of the repealed Land Disputes Tribunal Act**. This Court must therefore protect the rights acquired by the defendants over the land parcels No. MWERUA/GITAKU/1382 and 1383 as provided under **Section 24**

of the Land Registration Act. And as the registered proprietors of those parcels of land, the defendants are entitled to orders to evict the plaintiff as sought in their counter-claim.

Ultimately therefore, judgment is entered for the defendants in their counter-claim as follows:

1. A declaration that the deceased MUTHII KIBINDU KARUME was registered against the original land parcel No. MWERUA/GITAKU/184 to hold in trust for himself and the defendants herein and a declaration that the defendants' title Nos MWERUA/GITAKU/1382 and 1383 are therefore valid.

2. An order that the plaintiff and her agents do vacate from the land parcels No. MWERUA/GITAKU/1382 and 1383 within three (3) months of the decree herein being served upon them. Failure to which the plaintiff, her agents and all others occupying the said land parcels shall be evicted therefrom.

3. An order of permanent injunction restraining the plaintiff, her agents and all claiming through her from entering, remaining, cultivating, utilizing, charging, transferring or in any other way interfering with the defendants' use and occupation of land parcels No. MWERUA/GITAKU/1382 and 1383.

4. As the parties are family, each shall meet their own costs. In that regard, the order dated 17th May 2017 in which I dismissed the plaintiff's suit with costs is varied to the extent that each party shall meet their own costs.

B.N. OLAO

JUDGE

21ST JULY, 2017

Judgment delivered, dated and signed in open Court this 21st day of July 2017

Mr. Maina for Ms Wangechi for Defendants present

Mr. Mwai for Plaintiff absent

Defendants also present

Right of appeal explained.

B.N. OLAO

JUDGE

21ST JULY, 2017