



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 30 OF 2015

FAITH WARUGURU.....1ST PLAINTIFF
PHYLIS MUTHONI MWANIKI.....2ND PLAINTIFF
FLORENCE WANJIRU KARATI.....3RD PLAINTIFF
MARGARET WANJIKU.....4TH PLAINTIFF

VERSUS

MUGANE NJAGI.....1ST DEFENDANT
DANSON NJAGI MUGANE.....2ND DEFENDANT
LYDIA NJERI MUCHIRI.....3RD DEFENDANT
JOYCE WANJIKU WAMBUGU.....4TH DEFENDANT

JUDGMENT

The parties herein are a family. The plaintiffs are sisters to the 1st defendant who it would appear is the only son in the family. The 2nd and 3rd defendants are his children while the 4th defendant is his daughter in law.

The plaintiffs' case is that land parcel No. BARAGWE/GUAMA/1460 (the suit land herein) was registered in the names of the defendant to hold in trust for the whole family including the plaintiffs who have been raised thereon. That this dispute was previously heard by the **GICHUGU LAND DISPUTES TRIBUNAL** (the Tribunal) in Case No. LDT 43 of 2010 which ordered that the plaintiffs be awarded one (1) acre thereof. To facilitate that process, the 3rd plaintiff removed a caution which had been placed thereon but the defendants took advantage of that to fraudulently change the proprietorship of the suit land in the joint names of the defendants. Particulars of fraud are pleaded in paragraph nine (9) of the plaint. That necessitated the filing of this suit on 19th March 2015 in which the plaintiffs seek judgment against the defendant in the following terms:

- 1. A declaration that the plaintiffs are entitled to one acre out of land parcel No. BARAGWE/GUAMA/1460.***

2. ***A declaration that the registration of the 2nd, 3rd and 4th defendants as joint proprietors was illegal, null and void.,***

3. ***Costs of this suit.***

4. ***Any further or alternative relief.***

The defendants filed a defence in which they conceded that the Tribunal had ordered that the plaintiffs be given one (1) acre out of the suit land in Case No. 43 of 2010. However, the defendants pleaded further that the one (1) acre was only for the plaintiffs usage for farming but not to be registered as proprietors thereof. They also denied the particulars of fraud and pleaded further that this suit is res-judicata and should be dismissed with costs.

The trial commenced on 6th October 2015 when the 3rd plaintiff (**FLORENCE WANJIRU KARATI**) testified and told the Court that the other plaintiffs are her sisters while the 1st defendant is their brother and the 2nd and 3rd defendants his children while the 4th defendant is his daughter in law. She added that the suit land was registered in the 1st defendant's names because their father died before the land demarcation process and therefore the 1st defendant was to hold it in trust for them because land was not being registered in names of women. The suit land measures about six (6) acres but the 1st defendant has refused to give them one acre which is what they are claiming. They therefore filed a case at the Tribunal (Plaintiff's Exhibit 1) which directed that the 1st defendant gives them one (1) acre. To facilitate this process, the plaintiffs took the decree (Plaintiff's exhibit 2) to the Land office and removed a caution that she had placed thereon. Instead, the 1st defendant registered the suit land in his names and those of the other defendants without even consulting the plaintiffs. That led to the filing of this suit.

That evidence was fully adopted by her sisters **FAITH WARUGURU** (PW2), **PHYLIS MUTHONI MWANIKI** (PW3) and **MARGARET WANJIKU** (PW4) who are the other plaintiffs in this case.

The 1st and 2nd defendants testified on behalf of the other defendants.

The 1st defendant **MUGANE NJAGE** (DW1) confirmed that the plaintiffs are his sisters and the other defendants his children. He asked the Court to adopt his statement filed herein as his evidence. That statement which is un-dated but was filed together with defence states that the plaintiffs do not live on the suit land and only entered one (1) acre thereof following the orders issued by the Tribunal. It is his case that the plaintiffs can only occupy the one (1) acre and nothing more. He also questions why the plaintiffs are suing him again.

His son the 2nd defendant **DANSON NJAGE MUGANE** (DW2) also asked the Court to adopt as his evidence his un-dated statement filed in Court. He also produced the defence Exhibits. That statement is much more elaborate than his father's in that he clarifies that the suit land is a resultant sub-division of land parcel No. BARAGWE/GUAMA/220 registered in the names of **MUGANE NJAGE** Alias **MUGANE NJOGU** who must be the 1st defendant because in paragraph four (4) of that statement, he refers to him as his father who in 1996 agreed with the family to give $\frac{1}{4}$ acre thereof to a tea buying center thus resulting in its sub-division into BARAGWE/GUAMA/1460 and BARAGWE/GUAMA/1461. Then in 2010, the plaintiffs filed a suit at the Tribunal which was later adopted by the Resident Magistrate's Court at Gichugu and a decree was issued on 19th March 2013 that the plaintiffs be awarded one (1) acre out of the suit land to occupy but the order did "**not grant them a proprietary interest or title deed to the 1 acre**". The plaintiffs were therefore showed one acre by the surveyor but a mutation was later issued and the suit land was sub-divided to give rise to land parcel No. BARAGWE/GUAMA/3376 and BARAGWE/GUAMA/3377 measuring 1.0 Ha and 0.40 Ha respectively. It was then that the 1st defendant decided to register the suit land in the joint names of the defendants. The plaintiffs are however still working on one (1) acre of the suit land which is however the property of the 1st defendant.

At the end of the trial, both **MR. NDUKU NJUKI** advocate for the plaintiffs and **MR. MUNENE MURIUKI** advocate for the defendants filed their submissions.

I have considered the evidence by all the parties including their documentary exhibits as well as the submissions by counsel.

The plaintiffs' case, as is clear from the plaint herein, is based both on trust and fraud. However, before I interrogate those claims, I must determine whether this suit is infact res-judicata because if it is, then the claim cannot be considered.

Although the defendants pleaded that this suit is res-judicata, that issue was not really canvassed and even the parties submissions are silent on it and for good reasons. Res-judicata is provided for under **Section 7 of the Civil Procedure Act** in the following terms:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”.

Before res-judicata can apply the issues in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, the former suit should be between the same parties or parties under whom they or any of them claim litigating under the same title and lastly, the Court or tribunal before which the former suit was litigated was competent and determined the suit finally – **KARIA & ANOTHER VS THE ATTORNEY GENERAL & OTHERS 2005 1 E.A 83**. While it is clear that the suit land was the subject of the dispute between the plaintiffs and the 1st defendant in Land Disputes Case No. 43 of 2010 where a decree was drawn awarding the plaintiffs one (1) acre out of the suit land, it is clear that the issues now before this Court involve trust and fraud. Those issues were not and could not have been canvassed at the Tribunal because it would not have had the jurisdiction to determine issues of trust and fraud. In **JOSEPH MALAKWEN LELEI & ANOTHER VS RIFT VALLEY LAND DISPUTES APPEALS COMMITTEE & OTHERS C.A CIVIL APPEAL No. 82 of 2006 (2014 e K.L.R)**, the Court of Appeal made it clear that a Tribunal established under the repealed **Land Disputes Tribunal Act** did not have jurisdiction to determine issues of trust. Further, in **JONATHAN AMUNAVI VS THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL No. 256 OF 2002**, the Court of Appeal similarly stated that a Tribunal established under the **repealed Land Disputes Tribunal Act** had no jurisdiction to determine a dispute involving ownership of registered land. It is clear therefore that the doctrine of res-judicata does not apply in this case and it is no wonder that the defendants did not pursue it and just left it in the pleadings.

As indicated above, part of the plaintiffs' case is based on trust and this must be a customary trust as they alleged that their brother the 1st defendant was registered as the proprietor of the suit land because their father died before the demarcation process and land was not being registered in the names of women. It was therefore the duty of the plaintiffs to lead evidence to prove the existence of a trust in their favour. This is because, as was held in the case of **MBOTHU & OTHERS VS WAITIMU & OTHERS 1986 K.L.R 171**:

“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”.

It is common knowledge that the suit land is registered in the names of the defendants as at 3rd July 2013. Prior to that, it was registered in the names of the 1st defendant as from 8th August 1996 following a sub-division of land parcel No. BARAGWE/GUAMA/220. Counsel for the defendants has submitted that by virtue of that registration, it cannot be said that the 1st defendant is registered as a trustee. It is now trite law, however, that the registration of land in the names of a party does not relieve him of his duty or obligation as a trustee. That is provided for under **Section 25 of the new Land Registration Act 2012** and also **Section 28 of the repealed Registered Land Act** under which the suit land was registered.

See also MUMO VS MAKAU 2004 1 K.L.R 13, KANYI VS MUTHIORA 1984 K.L.R 712 and MUKANGU VS MBUI 2004 2 K.L.R 256.

What then is the plaintiffs' evidence to prove a trust in their favour? It is clear from the evidence of the plaintiffs that the suit land was only registered in the 1st defendant's names because their father had died before the land demarcation process. FLORENCE WANJIRU KARATI PW1 said as follows in her evidence in chief:

“The land parcel No. BARAGWE/GUAMA/1460 was registered in the names of the 1st defendant to hold in trust for the family. It was originally family land and we are the only children of our parents. This land was registered in the names of the 1st defendant because our father had died before land demarcation so it was decided that it be registered in 1st defendant's names”.

No evidence was led by the defendant to suggest, for instance, that he purchased the suit land as his own property. Indeed in cross-examination, by the plaintiffs' counsel MR. NJUKI, the 1st defendant confirmed the assertion by PW1. He said:

“The land in dispute was originally BARAGWE/GUAMA/220. I was ten (10) years old when that land was registered in my names. Land parcel No. BARAGWE/GUAMA/1460 came into existence in 1996 after land parcel No. BARAGWE/GUAMA/220 was sub-divided”.

The only reason why the original land parcel No. BARAGWE/GUAMA/220 was registered in the 1st defendant's names at the age of 10 years must have been for him to hold it in trust for the family of his father who had died before the land demarcation process. He was the only son and evidence has been adduced that land was not being registered in the names of women. There is also evidence from the 1st defendant that the plaintiffs used to live on the suit land. He stated as follows also in cross-examination:

“It is not true that the plaintiffs have grown up on that land. They are married. They used to live there with our mother who died in 2001. It is true that the 4th plaintiff is currently living on land parcel No. BARAGWE/GUAMA/1460”

The plaintiffs could only have been living on the suit land because it was family land held by the 1st defendant in trust for them.

Finally, on the issue of trust, it would appear from the 1st defendant's evidence that he has no problem with the plaintiffs occupying and working on the suit land. What he is opposed to is the registration of one (1) acre thereof in their names. In his statement filed in Court on 30th April 2015, he says the following at paragraph three (3):

“They planted tea bushes which are about one year old and they are enjoying the said occupation to date”

His son the 2nd defendant has in his statement also filed in Court on 30th April 2015 stated that:

“This has not affected their daily workings on the land since then and I believe that our father as the sole proprietor had a right to transfer and or have us registered together”.

While the defendants acknowledge the rights of the plaintiffs to occupy and work on the suit land, they appear to harbour the misguided notion that being women, and married for that matter, the plaintiffs have no right to have any portion of the suit land registered in their names. This Court must disabuse them of that belief by reminding them that Section 27 of the Constitution provides that a person shall not be discriminated on account of race, sex, marital status, age, disability etc. Further, that Article 40 of the Constitution protects the plaintiffs' rights to own property. It is clear to me therefore that there is enough evidence upon which this Court can make a finding, which I hereby do, that the 1st defendant held the original land parcel No. BARAGWE/GUAMA/220 and subsequently, the 1st, 2nd 3rd and 4th defendants

hold the suit land being a sub-division thereof in trust for the plaintiffs who are therefore rightly entitled to have one (1) acre registered in their names.

The plaintiffs also seek the declaration that the registration of the 1st, 2nd, 3rd and 4th defendants as proprietors of the suit land is illegal, null and void. Fraud is a serious issue which must be proved to the required standard. In ***R.G. PATEL VS LALJI MAKANJI 1957 E.A 314***, the Court of Appeal stated thus:

“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”.

And in ***KOINANGE & OTHERS VS KOINANGE 1968 K.L.R 23***, the Court stated:

“It is a well established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud in this case the plaintiffs had the burden of proving it and they had to discharge that burden”.

Have the plaintiffs herein discharged the burden of proving fraud? I am persuaded on the evidence before me that they have done so. The evidence of **FLORENCE WANJIRU KARATI** (PW1) was that she had placed a caution on the suit land which she only removed after the decree was issued in Gichugu Principal Magistrate’s Court LDT Case No. 43 of 2010 that one (1) acre of the suit land be registered in their names. That decree was issued by **HON. T.M. MWANGI** Principal Magistrate on 8th May 2013 and on 27th May 2013, the plaintiffs removed the caution. However, from the evidence on the Green Card (Plaintiff’s Exhibit 3), the defendants instead of facilitating that decree, proceeded to transfer the suit land in their names on 3rd July 2013 and a title deed was issued in their names on 15th July 2013. That was clear evidence of fraud and even if they did not agree with that decree, their option was to appeal the decision by the Court and not to circumvent its orders. Secondly, and as I have already found above, the suit land was held by the 1st defendant in trust for himself and the plaintiffs. Even if he wanted to give a share to his children the 2nd, 3rd and 4th defendants, he could only do so with the consent of the plaintiffs and after giving them their share. He could not deal with the suit land as his own private property. The registration of the 2nd, 3rd, and 4th defendants as joint proprietors of the suit land was therefore illegal, null and void and must be cancelled.

Ultimately therefore and upon considering all the evidence herein, I am satisfied that the plaintiffs have established their case against the defendants as required in law. There will be judgment for the plaintiffs against the defendants in the following terms:

- 1. The registration of land parcel No. BARAGWE/GUAMA/1460 in the names of the 2nd, 3rd and 4th defendants is illegal, null and void. It be cancelled.***
- 2. The 1st defendant holds land parcel No. BARAGWE/GUAMA/1460 in trust for the plaintiffs. That trust is hereby determined and one (1) acre thereof be registered in the joint names of the plaintiffs. As much as possible, that one (1) acre should include the portion that the plaintiffs currently occupy.***
- 3. As the parties are family, each shall meet their own costs.***

B.N. OLAO

JUDGE

14TH JULY, 2017

Judgment delivered, dated and signed in open Court this 14th day of July 2017

Mr. Munene for the Defendants present

Mr. Ngigi for Mr. Nduku for Plaintiffs present

Right of appeal explained.

B.N. OLAO

JUDGE

14TH JULY, 2017