



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 127(B) OF 2014

ELIJAH GATHOGO KAMAKU.....PLAINTIFF/APPLICANT

VERSUS

KARIUKI KAMAKU KIMOTHO.....1ST DEFENDANT/RESPONDENT

REBECCA NJOKA KARIUKI.....2ND DEFENDANT/RESPONDENT

SIMON MAINA KARIUKI.....3RD DEFENDANT/RESPONDENT

GEORGE NJOGU KARIUKI.....4TH DEFENDANT/RESPONDENT

DAVID WACHIRA KARIUKI.....5TH DEFENDANT/RESPONDENT

RULING

By a plaint filed herein on 19th May 2014, the plaintiff sought various orders against the defendants including that the 1st defendant holds land parcel No. MUTIRA/KAGUYU/219 in trust for himself and the plaintiff in equal shares and has no capacity to transfer the plaintiff's interest to the 2nd to 5th defendants and that the said trust be dissolved and the land be sub-divided into two equal shares.

The 1st defendant filed a defence admitting that he is the registered proprietor of the suit land but denied that he holds it in trust for the plaintiff adding that he was given the same due to his contribution to the clan. He added that he was the one who invited the plaintiff to live on the suit land and therefore no orders on adverse possession can be made against him.

The 2nd to 5th defendants also filed a joint defence in which they denied the existence of any trust between the plaintiff and 1st defendant and instead asked the plaintiff to talk to the 1st defendant so that he can get him share of 1 acre as discussed before their clan.

By a Notice of Motion dated 13th April 2017, the plaintiff moved this Court seeking the following orders:

1. That this Honourable Court be pleased to enter judgment on admission in favour of the plaintiff against the defendants herein granting three (3) acres of the land to be excised out of title No. MUTIRA/KAGUYU/219 as admitted by the 1st defendant and the 2nd to 5th defendants respectively.

2. That the costs of this application be provided for.

The application which is the subject of this ruling is premised on the grounds set out therein and is also supported by the affidavit of plaintiff. The gravamen of the application is that by his defence filed herein on 14th July 2014, the 1st defendant has admitted that the plaintiff owns 2 acres out of land parcel No. MUTIRA/KAGUYU/219 and even the Land Control Board's consent for the transfer had been granted. That this is also admitted by the 2nd to 5th defendants. The other issues deponed in the said affidavit really touch on the merits of the case and are not relevant for purposes of this application.

The 1st defendant filed grounds of opposition to the application stating that it does not meet the threshold of an application under **Order 36 Rule 2 of the Civil Procedure Rules** for the entry of judgment on admission. In any event, there is no admission by the 1st defendant that he owes the plaintiff three (3) acres but rather, the 1st defendant offered the plaintiff a gift which was refused and this application is a waste of time which should be dismissed with costs.

The 2nd to 3rd defendants did not file any replying affidavit or grounds of opposition to the application.

The application was canvassed by way of written submissions which have been filed both by **MR. MAHINDA** advocate for the plaintiff and **MR. MUNENE** advocate for the 1st defendant.

I have considered the application, the grounds of opposition and the submissions by counsel.

The application is premised under **Sections 1A and 1B of the Civil Procedure Act** and **Orders 13, 36 Rule 5 and 51 of the Civil Procedure Rules**. **Order 13 Rules 1 and 2** provide as follows:

13 (1) "Any party to a suit may give notice by his pleadings or otherwise in writing, that he admits the truth of the whole or part of the case of any other party"

(2) "Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admission he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give judgment, as the Court may think just".

Order 36 Rule 5 of the Civil Procedure Rules states that:

"If it appears that the defence set up in the affidavit by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount realized or any part thereof into Court, the taxation of costs, or otherwise as the Court thinks fit, and the defendant may be allowed to defend as to the residue of the plaintiff's claim"

In **CHOITRAM VS NAZARI 1984 K.L.R 327**, the late **MADAN J.A** (as he then was) while considering an application under the then **Order XII Rule 6 of the Civil Procedure Rules** which is similar to the provisions in **Order 13 Rule 2** stated as follows:

"For the purposes of Order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning" Emphasis added

Similarly, in **JOB KILACH VS NATION MEDIA GROUP & OTHERS C.A CIVIL APPEAL No. 94 of 2006 (2015 e K.L.R)**, the Court stated as follows:

"Before the grant of summary judgment, the Court must satisfy itself that there are no triable

issues raised by the defendant either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue?. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the Court during a full trial. The BLACK'S LAW DICTIONARY defines the term "triable" as, "subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed but just one that warrants further intervention by the Court" Emphasis added

The law is that a triable issue is not one that will necessarily succeed. It only needs to be bonafide.

Guided by the above principles, what is the basis upon which the plaintiff claims that there is an admission to his claim by the 1st defendant? This is found in paragraphs 8, 9 and 10 of the plaintiff's supporting affidavit in which he has deponed as follows:

8: "That the 1st defendant in the witness statement filed in Court on 14th July 2014, the 1st defendant admitted that the plaintiff is entitled to 2 acres out of the land title No. MUTIRA/KAGUYU/219"

9: "That the 1st defendant went further to state and acknowledges that they even applied for the consent to transfer which transaction was blessed with a Land Control Board consent in order to effect the transfer"

10: "That the 2nd to 5th defendants in their statement of defence dated 23rd June 2014, they acknowledged the plaintiff's 1 acre interest in the title No. MUTIRA/KAGUYU/219".

In his submissions, counsel for the plaintiff has picked out the following sentence from the 1st defendant's statement as evidence of an admission:

"That I have also invited the plaintiff to come and proceed to the Land Control Board so as to give him 2 acres. We did attend the same in 1966 and everything was allowed"

However, further on in the same statement, the 1st defendant states:

"I have 6 issues from my marriage hence since the plaintiff refused my gift, I have decided to give him 1 acre as my sons need to share what I got from the clan"

In his defence, the 1st defendant has denied holding the suit land in trust for the plaintiff alleging that it was given to him due to his contribution to the clan. The plaintiff's claim against the defendants is based on trust and adverse possession as is clear from paragraphs 11 (a) and (d) of his plaint where he avers that the defendant's title to the suit land "**has been extinguished**". Of course whether or not those claims will be proved will have to await the trial where evidence will be adduced by the parties. My understanding of the plain words as used by the 1st defendant in his statement is that he was only offering the plaintiff a "**gift**" of land and was not doing so on the basis of any trust. Those are two very different issues. It may very well turn out that infact the offer of a gift was pursuant to the 1st defendant's recognition that he holds the land in trust for the plaintiff. But as I have stated above, that will have to await the trial. I do not view the 1st defendant's statement to be a "**plain and obvious**" admission in the circumstances of this case and neither am I satisfied that the defence does not raise triable issues. It must be remembered that a gift is given voluntarily without any consideration. The **BLACK'S LAW DICTIONARY 9th Edition** defines a **gift** as:

"The voluntary transfer of property to another without compensation"

A trust on the other hand is a right which is enforceable in law. It is defined in the same dictionary as:

“The right, enforceable solely in equity to the beneficial enjoyment of property to which another person holds the legal title”

What I understand the 1st defendant to be stating in his defence is that he is the registered sole proprietor of the suit land and he only offered the plaintiff 1 acre as a gift and not pursuant to any obligation as a trustee. That issue will be put to rest at the trial but for now, it is certainly a triable issue.

The up-shot of the above is that the plaintiff’s Notice of Motion dated 13th April 2017 is dismissed. As the plaintiff and 1st defendant are siblings, each shall meet their own costs.

B. N. OLAO

JUDGE

3RD NOVEMBER, 2017

Ruling delivered, dated and signed in open Court at Kerugoya this 3rd day of November 2017

Mr. Magee for Mr. Mahinda for Applicant present

Mr. Muchira for Mr. Munene for Respondents present

3rd Respondent present.

B. N. OLAO

JUDGE

3RD NOVEMBER, 2017