



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 106 OF 2013

GEORGE WAWERU MURIUKI.....PLAINTIFF

VERSUS

JOSEPH GICHIRA MURIUKI.....DEFENDANT

JUDGMENT

Litigation belongs to the parties and experience has shown that what a litigant wants most is to stand in the witness box, be sworn or affirmed and give his story of the dispute. In some cases therefore, strict compliance with the provisions of *Order II of the Civil Procedure Rules* could actually result in delays thus militating against the expeditious disposal of cases which is a prime objective of the *Civil Procedure Act* and the Rules made thereunder. Therefore, where the parties have filed their respective pleadings and are prepared to go on with the trial without any of them being prejudiced, the Court should allow them to do so. That should be the case even if the parties elect to abandon their advocates and proceed on their own as is the situation in this case.

By a plaint filed on 3rd June 2010 originally at the High Court in Embu, the plaintiff **GEORGE WAWERU MURIUKI** sought judgment against his brother **JOSEPH GICHIRA MURIUKI**, the defendant herein, in the following terms:

- 1. A declaration that L.R No. MWERUA/KIANDAI/371 registered in the names of the defendant is held by the defendant as trustee for himself and the plaintiff as joint owners in equal shares.***
- 2. An order compelling the defendant to sub-divide L.R No. MWERUA/KIANDAI/371 into two equal portions and to register the sub-division in favour of the plaintiff and the defendant respectively.***
- 3. Costs of the suit and interest.***
- 4. Any other or further relief that this Honourable Court deem fit to grant.***

That claim was predicated on pleadings that the parties are brothers being the children of the late **ELIUD MURIUKI KARUIRU** (the deceased) who was the registered proprietor of land parcel No. L.R MWERUA/KIANDAI/371 measuring six (6) acres or thereabout (the suit property). That the suit property was registered in the name of the defendant who was then aged three (3) years during the land adjudication and consolidation exercise so that he could hold it in trust for the family since the deceased was already registered as the proprietor of another land parcel No. MWEA/MUTITHI/115 and it was not permitted to register a person as owner of more than one parcel of land. However, after the death of the deceased in 2008 and although it had been agreed in a family meeting that the suit land be shared equally

between the plaintiff and the defendant being the last and first born sons respectively and notwithstanding the fact that the plaintiff and his elderly mother live on part of the suit property, the defendant has refused to sub-divide it thus necessitating this suit.

The defendant filed a defence and counter-claim to the suit.

In his defence, he denied the plaintiff's averments that he holds the suit property in trust and stated that he is the absolute owner of the suit property and this case has been filed in bad faith. In his counter-claim, he sought the following orders:

(a) A declaration that the defendant is the absolute owner of land parcel No. MWERUA/KIANDAI/371.

(b) That the plaintiff be evicted from the land parcel No. MWERUA/KIANDAI/371 forthwith.

(c) Costs of the suit.

(d) Any other relief that this Court deems fit to grant.

Before I delve into the evidence, I need to comment on what transpired when the suit came up for hearing on 13th December 2017. Although both parties were represented by counsel when they filed their pleadings, the plaintiff's counsel **MR. WACHIRA** was not present and the Court was informed that he had been involved in an accident on his way to the Court and although the Court was prepared to accommodate counsel by granting an adjournment and even indicated to the plaintiff as much, he was adamant that he wanted to proceed on his own since his witness was old.

On the other hand, counsel for the defendant **MR. NGIGI** was present in Court although he had earlier filed an application to cease acting citing lack of instructions from his client. That application was yet to be prosecuted but the defendant too informed the Court that he wanted to proceed on his own.

Bearing in mind the parties' strong resolve to proceed in that manner taken together with the advanced age of their mother, the Court allowed them to prosecute their cases.

The plaintiff testified and called their mother **DAMARIS WANGU MURIUKI** (PW2) as his witness while the defendant called no other witness.

The plaintiff asked the Court to adopt as his evidence the statement and documents filed with his plaint. In that statement, he has indicated that the deceased owned two parcels of land being the suit property and land parcel No. MWEA/MUTITHI/115 and since it was not allowed for a person to be registered as owner of two parcels of land during the land demarcation and consolidation period, the suit property was registered in the defendant's names while he was still young so that he could hold it in trust for the plaintiff and himself since their other brothers had been given their shares in the other land parcel No. MWERUA/MUTITHI/115. The defendant has however refused to sub-divide the suit property despite repeated requests.

The parties mother **DAMARIS WANGU MURIUKI** confirmed that the defendant is the eldest of her five (5) children and the plaintiff the youngest and that the suit property which belonged to her late husband was registered in the names of defendant to hold in trust for the plaintiff. The defendant has however refused to sub-divide the suit property and share it with the plaintiff yet he had earlier agreed to do so before the elders.

The defendant's case is that the suit property belongs to him and the plaintiff and their other siblings have their own land and although the others have vacated, the plaintiff has refused to do so. He therefore urged this Court to order the plaintiff to vacate.

I have considered the evidence by the parties together with the documents filed. The following are not in

dispute:

1. The plaintiff and defendant are siblings with the plaintiff being the youngest and the defendant the eldest.
2. The suit property belonged to the deceased but is registered in the names of the defendant.
3. Both parties, including their mother **DAMARIS WANGU MURIUKI** live on the suit property.

This Court therefore has to determine only the following two issues:

1. ***Whether the defendant holds the suit property in trust for the plaintiff; or***
2. ***Whether the suit property solely belongs to the defendant and the plaintiff should therefore be evicted therefrom.***

Trust is a fact to be determined by the party alleging it through cogent evidence. Has the plaintiff proved that the defendant holds the suit land in trust for him? I think so. It is not in doubt that the suit property belonged to the parties' deceased father before it was registered in the defendant's names. Although the defendant now claims that it is his property, he conceded during cross-examination that it was registered in his names when he was still young. It is also clear from the evidence that both the parties including their mother live on the suit property which could not be registered in the names of their deceased father because he was registered as the proprietor of another parcel of land and it was not permitted during the land demarcation period for one to be an owner of more than one parcel of land. The fact that the suit property originally belonged to the deceased, that it was registered in the defendant's names when he was still young and that both parties and their mother continue to live thereon is evidence upon which this Court can conclude, which I hereby do, that the defendant indeed holds it in trust for the plaintiff. The defendant is the eldest of the two and it is now common knowledge that among the Kikuyu community to which the parties belong, the practice was to have family land registered in the names of the eldest son to hold in trust for the family. See for instance the following cases:

1. ***JOSEPHAT GITAU GITHONGO VS VICTORIA MWIHAKI MUNYA C.A CIVIL APPEAL No. 227 of 2005 (2014 e K.L.R)***
2. ***HENRY MUKORA MWANGI VS CHARLES GICHINA MWANGI C.A CIVIL APPEAL No. 245 of 2004 (2013 e K.L.R)***
3. ***NJUGUNA VS NJUGUNA 2008 1 K.L.R 889***

An explanation has been given by the plaintiff as to why the suit property was not registered in the names of the deceased. It is because he had another parcel of land and the practice was that he could not be registered as owner of two parcels of land. That has not been rebutted and is a plausible explanation. It has also been shown by evidence that the other siblings of the parties have been given a share in the other parcel of land i.e. MWEA/MUTITHI/115 which was registered in the deceased's names. No evidence has been adduced by the defendant to show that the plaintiff has been given a share in land parcel No. MWEA/MUTITHI/115. It is clear therefore that the defendant holds the suit property in trust for himself and the plaintiff who is entitled to an equal share of the same. The plaintiff has adduced sufficient evidence to prove his claim.

The defendant on the other hand appears to base his claim to the entire suit property solely on the fact that it is registered in his names. However, the law is that the mere registration of land in the name of one party does not extinguish the rights of others who may be entitled to it under a trust – ***MUKANGU VS MBUI 2004 2 K.L.R 256, KANYI VS MUTHIORA 1984 K.L.R 712*** and ***MUMO VS MAKAU 2004 1 K.L.R 13. Section 28 of the repealed Registered Land Act*** under which the suit property is registered also makes it clear that the registration of a party as a proprietor of land does not relieve him of any duty or obligation to which he is subject as a trustee. A similar provision is found in ***Section 25 of the new***

Land Registration Act 2012. Having found that the defendant holds the suit property in trust for himself and the plaintiff, there can be no basis upon which this Court can grant him the orders sought in his counter-claim to declare him the absolute owner thereof and to order the eviction of the plaintiff therefrom. The counter-claim must therefore be dismissed.

Ultimately therefore and upon considering the evidence by both parties, this Court makes the following orders:

1. Judgment is entered for the plaintiff against the defendant in the following terms:

(a) A declaration that L.R No. MWERUA/KIANDAI/371 registered in the name of the defendant is held by him as trustee for himself and the plaintiff.

(b) An order compelling the defendant to sub-divide L.R No. MWERUA/KIANDAI/371 into two equal portions and to register the sub-divisions in favour of the plaintiff and the defendant respectively.

(c) The Deputy Registrar of this Court shall be at liberty, upon application to him, to sign any relevant documents on behalf of the defendant to facilitate that sub-division should the defendant refuse to do so.

2. The defendant's counter-claim is dismissed.

3. As the parties are siblings, each shall meet their own costs.

B.N. OLAO

JUDGE

20TH DECEMBER, 2017

Judgment dated, delivered and signed in open Court his 20th day of December 2017 at Kerugoya

Plaintiff present in person

Defendant present in person

Right of appeal explained.

B.N. OLAO

JUDGE

20TH DECEMBER, 2017