



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 170 OF 2016

EVAGLYN WAIRIMU KAMAU.....1ST PLAINTIFF

ANTHONY KIROMO KAMAU.....2ND PLAINTIFF

CAROLINE WANJIKU KAMAU.....3RD PLAINTIFF

MARY WANGU KAMAU.....4TH PLAINTIFF

VERSUS

SHADRACK KAMAU KIROMO.....DEFENDANT

RULING

By their plaint filed herein on 24th October 2016, the plaintiffs sought judgment against the defendant for the main order that the defendant holds land parcel No. KIINE/KIANGAI/1690 in trust for himself and his entire family which includes the plaintiffs.

The basis of that claim is that the defendant who is father to the plaintiffs was allocated land parcel No. KIINE/KIANGAI/1069 by his father **KIROMO MWANIKI** i.e. paternal grandfather to the plaintiffs, during the land consolidation period so that the whole family could settle thereon. However, the said **KIROMO MWANIKI** later sold that parcel of land and used the proceeds to purchase land parcel No. KIINE/KIANGAI/117 on which he settled with his entire family. In September 1992, **KIROMO MWANIKI** shared out land parcel No. KIINE/KIANGAI/117 among his children and sub-divided it into parcels No. KIINE/KIANGAI/1689, 1690, 1691 and 1692. Land parcel No. KIINE/KIANGAI/1690 (the suit land) was given to the defendant to hold in trust for his entire family including the plaintiffs. The defendant has threatened to sell the suit land and has begun neglecting the plaintiffs following their mother's death and they fear that if the suit land is sold, they will be rendered destitute.

The defendant filed a defence denying those averments and added that the suit land belongs to him and the plaintiffs have no lawful claim against him as he does not hold the same in trust for them. The defendant also gave notice that he would be raising a Preliminary Objection to have the suit struck out.

By a Preliminary Objection dated 9th June 2017 and which is the subject of this ruling, the defendant seeks to have the entire suit struck out and has raised the following issues:

- 1. That the plaintiffs' suit does not have a cause of action against the defendant.***
- 2. That the parties herein are a father and his children and therefore he cannot hold the suit land in trust for them.***

3. That the claim by the plaintiffs can only arise after the demise of the defendant.

4. That the entire suit by the plaintiffs should be dismissed.

The Preliminary Objection has been canvassed by way of written submissions which have been filed by **MR. MACHARIA ADVOCATE** instructed by **C.S. MACHARIA ADVOCATES** for the plaintiffs and **MR. NDANA ADVOCATE** instructed by **J. NDANA & CO. ADVOCATES** for the defendant.

I have considered the Preliminary Objection and the submissions by counsel.

The thrust of **MR. NDANA's** submissions is that the plaintiffs have no cause of action against the defendant as he cannot hold the suit land in trust for them unless the register expressly states so. Counsel has relied on the case of **MURIUKI MARIGI VS RICHARD MURIUKI C.A CIVIL APPEAL No. 189 of 1996.**

On his part, **MR. MACHARIA** has submitted firstly that what is pleaded is an issue of trust which is a matter of fact to be proved by evidence at trial and does not therefore fall within the definition of a Preliminary Objection as set out in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696.** Secondly, counsel submitted that the case of **MURIUKI MARIGI** (supra) cited by counsel for the defendant is bad law having been over-taken by events since **Section 28 of the Land Registration Act** recognizes a trust as an overriding interest on land. It is therefore just that the plaintiffs be accorded an opportunity to adduce evidence at the trial.

A Preliminary Objection, as was stated in the **MUKISA** case (supra);

“..... is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”
Emphasis added

Citing the **MUKISA** case (supra), **OJWANG J.** (as he then was) added his own words in **ORARO VS MBAJA 2005 1 K.L.R 141** and said:

“A ‘Preliminary Objection’, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seek to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed”. Emphasis added.

That is the path that Courts in this country have consistently taken. A Preliminary Objection must plead pure points of law and must not raise issues of facts that are contested. The defendant's Preliminary Objection does not satisfy the above test. The defendant denies that he holds the suit land in trust for the plaintiffs and therefore they have no cause of action against him and further, that any claim they may have to the suit land can only arise after his demise. The issue of trust is a matter of fact which will be proved or not proved, after the parties adduce their respective evidence. Further, it is contested. It cannot therefore be properly raised as a Preliminary Objection.

And with regard to the case of **MURIUKI MARIGI** (supra) which is the fulcrum of the defendant's Preliminary Objection, the plaintiffs' claim, as per their pleadings, is that the suit land is a resultant subdivisions of land parcel No. KIINE/KIANGAI/117 which was family land which was purchased from the sale of land parcel No. KIINE/KIANGAI/1069 which was registered in the names of the defendant's father and plaintiffs' grandfather **KIROMO MWANIKI** during the land consolidation and demarcation process to hold in trust for future generations. It is therefore the plaintiffs' case that the defendant inherited the land from his father. That of course will be a matter for trial. It is important at this stage however, and because this issue has been raised, to point out that the case of **MARIGI** (supra), has since

been distinguished by other cases including *MBUI MUKANGU VS GERALD MUTWIRI MBUI C.A CIVIL APPEAL No. 281 of 2000 (2004 2 K.L.R 256), (K.L.R) E & L 1* at page 622. Therefore as to which of the two cases will aid the parties is a matter to be decided at the trial.

It is clear that the Preliminary Objection cannot be sustained. It is dismissed with an order that each party, being family, meet their own costs thereof.

B.N. OLAO

JUDGE

8TH DECEMBER, 2017

Ruling delivered, dated and signed in open Court this 8th day of December 2017 at Kerugoya

Mr. Macharia for Mr. Ngangah for Plaintiffs present

Mr. Kagio for Mr. Ndana for Defendant present

Mr. Gichia Court clerk present

1st Plaintiff present

4th Plaintiff present

Defendant present

B.N. OLAO

JUDGE

8TH DECEMBER, 2017