



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LAND COURT AT MERU
ELC CASE NO. 104 OF 1996

ALICE WANJIKU MUTHAMIA.....1ST PLAINTIFF

JAMES KIMATHI MUTHAMIA.....2ND PLAINTIFF

VERSUS

NEHEMIAH MUTHAMIA.....1ST DEFENDANT

FRANKLINE KINOTI GIKUNDA.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

In an originating summons (OS) dated 22nd July, 1996 the plaintiffs posed the following questions:-

1. Are the plaintiffs in adverse possession of the parcel of land described as LR NO. ABOGETA/U-CHURE/175.
2. Have the plaintiffs been in adverse possession for the last 12 years?
3. Alternatively was the defendant registered to hold the said parcel of land in trust for the plaintiffs and other children?
4. Should the plaintiffs be registered as proprietors of the said parcel of land in place of the defendants?
5. What incidental orders should be made to facilitate such registrations?
6. Who should bears the costs of this suits?

In a surprising affidavit sworn on 23/7/1996 the first plaintiff stated that she is the wife to the defendant and that the second plaintiff is their son. She stated that the defendant married her in the year 1959 where they lived in an ancestral land registered in her husband's name as L.R.NO. ABOGETA/U-CHURE/305. The first plaintiff further deponed that in the year 1980, they bought land parcel no. ABOGETA/U-CHURE/175 and again the same was registered in her husband's name. In the same year, the defendant sold LR.ABOGETA/U-CHURE/305 to one Joses Muindi Mburugu and bought another and at Chugu where he moved and married another woman with whom they have been living to date. Before the defendant deserted here in 1980, they were blessed with seven (7) children, five girls and two boys. She was continuously lived on that land with there seven children where they define their source of livelihood. On that land she has planted 5500 tea stumps whose proceeds she has been using to feed and

educate their seven children. She also avers that the second plaintiff has also planted 1500 tea stumps on the suit land. In addition, the 1st plaintiff stated that she has constructed a four(4) roomed semi-permanent house and installed piped water on the suit land.

The first plaintiff avers that sometimes in March 1996 the defendant secretly entered into an agreement to sell 2.00 acres of the land to one Frankline Kinoti Gikuknda at an alleged consideration of Kshs. 250,000. unknown to her the defendant applied for sub division of the suit land to three portions but she lodged a caution before registration of mutation forms.

When she learnt of these dealings, she complained at the district officer officer before the land control board could grant the consent. Subsequently the defendant filed CMCC case No. 285 of 1996 (Meru) where he obtained a consent order dated 15th April, 1996 in which he agreed to transfer the land to the intended buyer. She deponed that if the orders are executed and the transfer effected it will render her and her children landless and destitute. She avers in the alternative that the defendant was merely registered as a trustee to hold the subject land in trust for her and their children and that such reregistration did not grant him perpetual rights over the land and especially that of disposal to her detriment. Filed simultaneously with the originating summons was a chamber summons application under certificate of urgency dated 22/07/1996 in which the plaintiffs/applicants were seeking the following orders:-

1. That an order of inhibition do issue and be registered on title No. LR.ABOGETA/U-CHURE/175 till the suit herein (0S) is heard and determined.
2. An order that CMCC No.285 of 1996 and particularly the application herein dated 19th June 1996 be stayed pending the hearing and disposal of the originating summons herein filed.
3. Such further or better orders as the court may deem fit to meet the ends of justice in this case.
4. Costs be provided for.

Upon certifying the application urgent, the duly judge allowed the application on 26/7/1996. Several other interlocutory applications were filed and directions given by the court before hearing on 23/5/2017.

PLAINTIFFS' CASE

The first plaintiff testified on oath and stated that she lives in plot No. ABOGETA/U-CHURE/175. When she got married to Nehema Muthamia (1st defendant) in 1959 and lived on parcel No. ABOGETA/UPPER CHURE/305. In 1980, her husband sold the whole of their original parcel No. ABOGETA/U-CHURE/305 and bought L.R.NO. NYAKI/MUNITHU/3. Her husband subsequently married a second wife and settled on that parcel of land leaving her and their children on L.R.NO. ABOGETA/UPPER-CHURE/175 measuring 3.80 acres. On or about 1996, she got information that her husband wanted to sell their land and on 19/1/96 she placed a causation against the title and subsequently filed the current suit. In the intervening period, the 1st defendant hatched a plot to defeat her interests by filing two separate suits being CMCC NO.282 of 1996 and 285 of 1996 respectively. In the two case, the first defendant recorded consent order even before summons to suit appearance were issued. When she came to discover of the existence of CMCC No. 285 of 1996, she applied before this honourable court to have it stayed vide an order issued on 26/7/96. The first plaintiff further stated that defendants continued harassing the land officials and other Government officials using consent court orders form CMCC NO. 232 of 1996 until she moved this Honourable court who issued stay orders dated 15/10/98. By that time the defendants had bull dozed their way through land control board, survey offices and land registrar to sub divide and transfer the prime part of their original suit land No. ABOGETA/UPPER-CHURE/175. The land was sub divided into parcel Nos. 1919, 1920 and 1921. The prime part of the land was No. 1920 which was transferred to the second defendant leaving parcel Nos. 1919 and 1921 in the name of the first defendant. The two portions are rocky steep and not suitable for arable farming. The 1st plaintiff maintained that the suit land is matrimonial and was being registered in the name of the first defendant in trust for herself and their seven (7) children. It was therefore unconscionable for the 1st defendant to

transfer it to the 2nd defendant without her consent.

In conclusion she wants the purported sale and transfer by the 1st defendant to the 2nd defendant to be declared a nullity. The 1st plaintiff produced the twenty two (22) list of documents in her evidence which are as follows:-

1. Green card for L.R.NO. ABOGETA/U-CHURE/305.
2. Green card for L.R.NO. ABOGETA/U-CHURE/175
3. Green card for L.R.NO.ABOGETA/U-CHURE/1919.
4. Green card for LR.NO.ABOGETA/U-CHURE/1920.
5. Green card for LR.NO.ABOGETA/U-CHURE/1921
6. Official search for L.R.NO. NYAKI/MUNITHU/3.
7. Plaint in CMCC No. 282/96 (Meru) dated 15/4/96.
8. Consent letter dated 15/4/96 in an undisclosed suit but probably CMCC No. 282 of 1996 or 285/96 (Meru).
9. Consent order in CMCC No. 285/96 dated 15/4/96 (unsigned)
10. Proceedings in CMCC NO. 282/96 (Meru) showing orders granted on 15/4/96 through application by both defendants herein.
11. Application for contempt against D.O as chairman of Land Control Board in CMCC No. 285/96 (Meru) dated 19/6/96.
12. Notice of appointment of state counsel to act of the said D.O dated 17/7/96.
13. Order dated 26/7/96 staying CMCC No. 282/96 (Meru).
14. Application dated 9/5/97 in CMCC No. 282/96.
15. Notice of appointment of advocates by the plaintiff in CMCC No. 282/96 (Meru) dated 8/10/97.
16. Order in CMCC No. 282/96 (Meru) issued on 13/11/97.
17. Application in CMCC No. 282/96 dated 3/7/98.
18. Order in CMCC No. 282/96 issued on 16/7/98.
19. Chamber summons in this case dated 29/5/98 staying proceedings in CMCC No. 282/96 (Meru).
20. Order issued on 15/10/98.
21. Amended chamber summons dated 16/11/98.
22. Order issued on 17/12/98.

DEFENDANTS' CASE

The first defendant testified also on oath and confirmed that she married the first plaintiff in 1960's. He has two homesteads where each of his two wives live.

The first property they got was an ancestral land reference No. ABOGETA/UPPER CHURE/305 which he later sold. They later bought land parcel NO. ABOGETA/UPPER CHURE/175 where they built their matrimonial home. They also planted tea stumps. The land is approximately 3.8 acres. He stated that he sold two (2) acres of that land to the second defendant. The plaintiffs were not happy and started chasing the 2nd defendant. The 2nd defendant filed case No. CMCC 282/96 (Meru). They then filed a consent order transferring the two (2) acres to the 2nd defendant. The consent was also to remove the caution which had been placed on the property. That paved way for the transfer of the two (2) acres to be transferred in favour of the second defendant. He produced the sale agreement in evidence as P exhibit No. 1. They also went to the Land Control Board where they were granted consent to subdivide the land which he produced as D-Exhibit No. 3. He produced the application D. Exhibit No. 2.

DW2 was Frankline Kinoti Gikunda. He is the second defendant herein. His testimony is that he bought a portion of land from the 1st defendant herein around the years 1995. He conducted a search and confirmed that the property belonged to the first defendant. He stated that the first defendant sold him the portion containing tea stumps at a consideration of Kshs. 250,000/=measuring two (2) acres. He paid by installments. In April 1996 he visited the land and was greeted with hostility by the plaintiffs herein. The first plaintiff asked him if he was aware that there was a court case and he answered in the negative. He later conducted a search and found that there was a caution placed by the first plaintiff. He later went to court and filed a case where by the caution which had been placed was removed. Subsequently he was issued with a title deed which he produced as D exhibit No. 4. He has never used the land since he bought it.

ISSUE FOR DETERMINATION

The issues for determination can be framed as follows:-

1. Whether the 1st defendant was registered as the owner of the original parcel No. ABOGETA/UPPER CHURE/175 in trust for the plaintiffs?
2. Whether the 2nd defendant can be said to be a bona fide purchaser for value without notice?
3. Whether the trust if any ceased upon sub division and transfer of part of the original parcel No. 175?
4. Who will bear the costs of this suit?

ANALYSIS AND DETERMINATION

I have analyzed and evaluated the documents produced. The issues in contention are fairly straight forward. The plaintiffs are mother and son who have sued the defendants for a parcel of land which they allege they have a substantial interest on the first defendant is the first plaintiff's husband and the second plaintiff's paternal father. They both claim that by virtue of their relationship with them the first defendant had a fiduciary duty to consult them for their consent before dispose of the suit property or dealing with the same in a manner that their interest would be prejudiced. I agree with the plaintiff that the first defendant who was her husband and father respectively had a fiduciary relationship and that he should have sought their consent before dealing with the suit property in a manner that could prejudice their interest. While deciding a similar case where the wife had sued the husband for selling the family land without her consent the learned judge hon. Justice Ouko (as he then was) in **ESTHER NTIRA M'IKIUGU & TWO OTHERS -VS- M'IKIUGU M'MWIRANI & ANOTHER HCCC NO. 44 OF 2005 (MERU) UNREPORTED** held as follows:

“It was incompetent upon the 1st defendant husband, in view of this fiduciary relationship with the plaintiff that he sought their concurrence before commuting to exchange the land... the

registration of the 2nd defendant (buyer) as the proprietor of the suit land where there was objection from the rest of the persons who had interest on the land amounted to fraud.”

That case being similar to the instant case in all forms, I find it persuasive and do hereby adopt in this case. In addition I also find that the plaintiff’s interest on the suit propriety are overdue interest that are produced in law. Under section 28 of Land Registration Act (Cap 300) Laws of Kenya 2012, the law provides as follows:

“28 overriding interest unless the contrary is expressed in the register all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:

- a. spousal right over matrimonial property.***
- b. trusts including customary trusts...”.***

The plaintiff in this case had lodge a caution over the suit property which the defendant colluded and removed it through a civil case which was filed secretly and without involving the plaintiffs who had lodged the caution. These are actions committed in cohorts with the second defendant who in my view cannot be deemed to be a purchaser for value without notice. He even admitted that he was aware of the caution placed by the first plaintiff but chose to sue the first defendant and prompt to file a consent removing the same when he very well knew that the caution was placed by the first plaintiff in this case. I find that filing that suit by the second defendant herein and the consent to remove the caution fraudulent. In the result therefore, I find and hold that the sub division of the suit land and subsequent transfer by the first defendant to the second defendant was null and void. In the result I make the following orders;-

1. The proported sub division of land parcel No. ABOGETA/U-CHURE/175 into three portion and sale of a portion No.ABOGETA/U-CHURE/1920 measuring two(2) acres to the 2nd defendant herein was null and void.
2. The 1st defendant who is the husband to the first plaintiff was holding that land in trust with him.
3. The title deed transfered in favour of the 2nd defendant in parcel No. ABOGETA/U-CHURE/1920 to be transferred tho the first defendant.
4. The three parcels of land No. ABOGETA/U CHURE/1919 and 1920 shall be held by the first defendant in trust for the plaintiffs.
5. Thereafter a prohibition order is hereby issued restricting any dealings with the three parcels of land until further orders of this Honourable court.
6. The costs of this suit shall be borne by the defendants.

SIGNED AT GARISSA ELC COURT BY JUDGE E. CHERONO

DATED AND DELIVERED AT MERU ELC COURT THIS 7TH DAY OF DECEMBER ,2017 IN THE PRESENCE OF:-

Wanjohi Miss hb for Mwenda Mwarania for plaintiff

E.Mwangi hb for Mrs. Gitonga for defendant

Janet C/A

HON. L.N. MBUGUA

