



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 31 OF 2014 (O.S)

JOSHUA KAMOING..... PLAINTIFF

VERSUS

SIMON BARCHOK..... 1ST DEFENDANT

DANIEL BARCHOK.....2ND DEFENDANT

PHILIP KIPSANG MARITIM.....3RD DEFENDANT

JUDGMENT

(Suit claiming a trust; on the evidence, the trust, if any, was for the benefit of the plaintiff's deceased father; plaintiff thus needing to hold letters of administration; defendants not being title holders of the properties their owners being deceased; defendants have no capacity to be sued; suit dismissed)

This suit was commenced by way of an Originating Summons filed on **10 July 2014**. The Originating Summons was taken out pursuant to the provisions of **Order 37 Rule 1 (a) (g)** and **Rule 2 (b) and (c)** and **Sections 3A and 63 (e)** of the **Civil Procedure Act**. The same sought answers to the following questions :-

- i. Whether there exists a trust relationship between the applicant and the initial registered proprietors of **L.R No. Kericho/Boito/95** and **L.R No. Kericho/Boito/140**.
- ii. Whether there has been breach of trust by the registered proprietors of **L.R No. Kericho/Boito/95** and **L.R No. Kericho/Boito/140** and the respondents herein in the subsequent dealings in the land parcels, subdivisions and transfer inclusive.
- iii. Whether the title numbers **L.R No. Kericho/Boito/1218** and **L.R No. Kericho/Boito/1219** should be declared null and void for breach of trust.
- iv. Whether the applicant is entitled to 24 acres comprised in the **land parcel L.R No. Kericho/Boito/95** and subsequent titles on the one part and **L.R No. Kericho/Boito/140** on the other part by virtue of trust if any.
- v. Whether the applicant is entitled to costs of this suit.

The Originating Summons is supported by the affidavit of the applicant. Despite being served, the respondents did not enter appearance nor file any response to the Originating Summons. Neither did they attend any of the proceedings. Directions were taken that the Originating Summons do proceed by way of viva voce evidence and the applicant (whom I will refer to as the plaintiff) testified as the sole witness.

His case as stated in the supporting affidavit and oral evidence is as follows :-

The applicant is grandson of one Kiboldo arap Sitonik (now deceased). Arap Sitonik had three wives namely Tabela, Taprangwe and Tapargetet as his 1st, 2nd and 3rd wives respectively. Tabela had one son named Elijah Kamoing Boldo (now deceased). Elijah is father to the plaintiff. Taprangwe had one son named Mariko Kotit Boldo (now deceased). Tapargetet had two sons namely Samwel Boldo and Kimalel Boldo. Both are deceased with Kimalel having died before he got married and did not leave any descendants. Arap Sitonik settled all his three wives in land which later came to be registered as **Kericho/Boito/95** and **Kericho/Boito/140**. The registered proprietors of the said land were Mariko Kotit arap Boldo and Sowe arap Boldo and it will be noted that they are the sons of the 2nd and 3rd homes. It is claimed that their registration was fraudulent as this was family land. Tabela, the grandmother of the plaintiff lived on the land until her demise in 1960. Elijah, her son, and father of the plaintiff continued living on the land until his death in the year 1984.

Before his demise, Elijah had forwarded a complaint on the registration of the land to a panel of elders. The award was filed in the **Kericho Resident Magistrates Court as Civil Suit No. 19 of 1982**. In the award, it was noted that Mariko, and Sowe were brothers of Elijah. The award noted that Mariko Boldo is registered owner of the **land parcel Kericho/Boito/95** measuring 17 hectares while Sowe Boldo is registered as owner of the **land parcel Kericho/Boito/140** measuring 12 hectares. The panel of elders essentially ruled that the land ought to be shared amongst the three brothers so as to include Elijah. The award of the elders was adopted as a decree by the Kericho Resident Magistrate Court.

An appeal was preferred against the said decree. This was registered as High Court of Kenya at **Nakuru, Civil Appeal No. 32 of 1986**. Judgment was delivered on **31 March 1987** by Masime J. He allowed the appeal on the main ground that the matter ought not to have been litigated by the Magistrates Court and the panel of elders, as they had no jurisdiction. He was of the opinion that the claim, being one of trust, ought to have been filed at the High Court. The award of the elders and the subsequent decree were therefore set aside.

Nothing was filed until this suit was commenced. There are three respondents in this suit, namely Simon Barchok, Daniel Barchok and Philip Kipsang Maritim. Simon Barchok and Daniel Barchok are sons of Sowe Boldo. Philip Kipsang Maritim is son of Mariko Boldo. Both Mariko Boldo and Sowe Boldo are now deceased. The plaintiff testified that his grandfather had instructed that his land should be registered in the names of his sons Elijah, Mariko and Sowe but this was not done. Instead, Mariko and Sowe registered the land in their names and left out Elijah. Mariko became registered as proprietor of the **land parcel No. 95** whereas Sowe Boldo became registered as proprietor of the **land parcel No. 140**.

The **land parcel No. 95** was later subdivided on **15 July 1993** into the **land parcels No. Kericho/Boito/1218** and **Kericho/Boito/ 1219 (parcels No. 1218 and 1219)**. The **parcel No. 1218** measures 12.81 Ha and is registered in the name of Mariko Kotit Boldo. The **land parcel No. 1219** measures 1.39 Ha. It was initially registered in the name of Mariko Kotit Boldo but on **15 July 1993** a transfer was made to Paul Kipyegon Chepkwony and he is now the registered proprietor. Paul Kipyegon Chepkwony is not a party to this case. In the course of the proceedings, I did point out to counsel for the plaintiff that the proprietor of the **land parcel No. 1219** is not a party to the proceedings herein and counsel then withdrew the claim over the **parcel No. 1219**.

The **parcel No. 140** was subdivided into two portions on **15 December 1999**. The two portions are the land parcels **Kericho/Boito/1119** and **Kericho/Boito/1120 (parcels No. 1119 and 1120** respectively). They are both registered in the names of Sowe Boldo (deceased) and they measure 9.68 Ha and 2.32 Ha respectively.

In his supporting affidavit, the plaintiff deposed that in the year 1990, the respondents destroyed their houses and chased him and his family away. They forcefully took over the land including the portion occupied by his parents and took over their tea. He deposed that he and his family now live on the **land parcel 1219** measuring 3 acres which he stated can hardly sustain himself and his sons. I note however that in his oral evidence, the plaintiff testified that he now lives in 1/2 acre of land that he bought. He also testified that he has about 400 tea bushes in the **land parcel No. 1219**. He further testified that he occupies 18 acres of the **land parcel No. 1219**.

In his supporting affidavit, the plaintiff averred that the whole land of his grandfather measured 92 acres and the same ought to have been divided equally among his three homes. He has deposed that he has brought this suit in his quest for justice to have their fair share of the estate of Kibor arap Sitonik which the respondent's fathers registered in their names and are therefore trustees of the 1st house of arap Sitonik. In his evidence the plaintiff stated that he wants the **parcels No. 140 and No. 95** to be subdivided amongst the three houses.

Mr. Caleb Koech, learned counsel for the plaintiff, made fairly elaborate and well researched submissions. He inter alia submitted that the plaintiff has locus to file the suit in his personal capacity and sustain the claim of trust. He also covered the question whether the suit is time barred, for which he submitted that it is not, and finally concluded that the plaintiff is entitled to 24 acres comprised in the **land parcels No. 95 and 140** by virtue of a trust. On the issue of the capacity of the plaintiff, he submitted that the plaintiff need not have letters of administration to sustain the claim herein. He submitted that his claim is over what he believes he is entitled to as family/ancestral land. He relied on the case of *Isaya Theuri M'Lintari & Another vs George Mbithi Kiebia & Another (2009) eKLR*. He further submitted that the suit is not time barred owing to the provisions of **Section 20 (2) of the Limitation of Actions Act (Cap 22) Laws of Kenya** which essentially provides that there is no limitation in suits based on trusts. He relied on the case of *Macharia Kihari vs Ngigi Kihari (1994) eKLR*, to buttress this submission. He submitted that the registration of the land in the name of the respondents' father gave rise to a customary trust. He further submitted that the suit is a quest for justice in line with **Sections 1A, 1B, 3A of the Civil Procedure Act** buttressed by **Article 159 (2) (d) of the Constitution** and pointed at the case of *Maroa Wambura Gatimwa vs Sabina Nyanokwe Gatimwa & 5 Others (2010) eKLR*. On the question of a customary trust, he further relied on the cases of *Nancy Wanjiku Kabui vs John Kabui Mirio (2015) eKLR* and *Jason Gitimu Wangara vs Martin Munene Wangara & Others (2013) eKLR*.

I have considered the matter, and I am afraid that for all the industry of Mr. Koech, I have to dismiss this suit. It is not so much on the question of whether or not a trust exists, but rather I am of the view that the suit as drafted and as presented is fundamentally flawed, and incapable of being cured by **Article 159 of the Constitution**.

The suit essentially claims that the combined **land parcels No. 95 and 140** ought to be subdivided into three portions, for the reason that the same are ancestral land, which should be divided amongst the three brothers, Mariko Boldo, Sowe Boldo and Elijah Boldo, the latter of whom is the plaintiff's father. The two land parcels were registered in the names of the first two brothers. If a trust does exist, and I have not held whether or not one does, then such trust can only be in favour of Elijah Boldo and no other person. In fact the case of the plaintiff is that the two brothers registered themselves as owners, but that his father (Elijah), did have a 1/3 share in the combined acreage of the two land parcels. So far, there has been no determination as to whether or not Mariko and Sowe, held the land in trust for Elijah and I regret that such determination cannot be made considering the pleadings herein. The plaintiff cannot claim a trust on behalf of his late father unless he can demonstrate that he is a legal representative of the estate of Elijah (deceased). He has not claimed in this suit that he is legal representative and has not brought this suit in his capacity as legal representative of the late Elijah. I do not see how he can claim the land as his own, because the trust, if any exists, should be in favour of the late Elijah. If a trust is found to exist, then the 1/3 share will vest in the estate of the late Elijah and will be available for distribution to his dependants in line with the law of succession.

It has of course been argued that he can sustain the suit in his own capacity. I do not think so. I have looked at the case of *Isaya Theuri Lintari v George Mbithi Kiebia* relied upon by Mr. Koech, but I think the case is distinguishable to this one. In that case, the plaintiffs sued the defendants who were their uncles claiming to be entitled to land under customary law. The court was of the view that they could claim the land in their own right under customary law. I think the issue in that case was different from that in this case. In this case, the plaintiff is seeking to claim a share of what he believes belongs to his late father. For that, he does need to have letters of administration, and as I have mentioned earlier, if he succeeds, that share will vest in the estate of the deceased and not the plaintiff.

But even assuming the plaintiff can sustain the case in his own capacity, his case will still fail for another

fundamental reason. The plaintiff claims about 1/3 of the combined **land parcels No. 95 and 140**. These land parcels have been subdivided into the **parcels No. 1218 and 1219** for the **land parcel No. 95**, and **parcels No. 1119 and 1120** for the **land parcel No. 140**. Starting with the subdivisions of the **land parcel No. 95**, the **land parcel No. 1218** is registered in the name of Marko Kotit Boldo. He is deceased. It has been said that the 3rd respondent is his son. However, the fact that the 3rd respondent is son of Mariko does not mean that he has capacity to be sued on behalf of property held in the name of his father. He can only be sued if he is legal representative of Mariko and it has not been suggested that he holds any letters of administration for the estate of Mariko. With regard to the claim over the **land parcel No. 1219**, it will be recalled that the claim for a portion of this land was withdrawn. The plaintiff cannot therefore succeed in claiming any subdivisions of the **land parcel No. 95**, for he has sued a persons who has no capacity.

With regard to the **parcel No. 140**, the two subdivisions are in the name of Sowe Boldo who is also deceased. The plaintiff chose to sue Simon Barchok and Daniel Barchok because they are sons of Sowe. Again, they have no capacity to be sued. The land is still in the name of Sowe Boldo and only the legal representative of Sowe Boldo could be sued. It cannot be assumed that the land has automatically devolved and vested in the two persons. It is trite law, and I need not cite any authority, that only a person who is a legal representative of a deceased can sue or be sued in respect of the estate of the said deceased person. None of the persons sued herein are legal representatives of the deceased owners. The suit against them must automatically fail.

From the above discourse, I have little option but to dismiss this suit. I have already mentioned that I am unable to delve into whether or not a trust exist given the nature of the pleadings. The plaintiff is of course at liberty to file a proper suit for the determination of this question. Since the defendants did not bother to defend this case, I make no orders as to costs.

It is so ordered.

Dated, Signed and delivered on this 29th day of April, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT:

Mr. Mwitwa for the plaintiff

No appearance on the part of the defendants

Court Assistant: Mr. Kenei