



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYERI
ELC CASE NO. 1 OF 2014 (O.S)
IN THE MATTER OF A DECLARATION OF A TRUST
AND
IN THE MATTER OF
L.R NO.GAKAWA/GITHIMA/BLOCK 1/BURGURET/954
BETWEEN
PETERSON MAINA MAGANA PLAINTIFF
VERSUS
MACHARIA MAGANADEFENDANT

JUDGMENT

Introduction

1. The plaintiff herein, Peterson Maina Magana, took up the summons dated **9th January 2014** for determination of the following questions:-

1) Whether the defendant, Macharia Magana, holds half share of the parcel of land known as L.R No. Gakawa/Githima/block1/Burguret/954 (hereinafter to as “the suit property”) in trust for him;

2. If the answer to (1) above is in the affirmative, whether the trust so declared should be determined and an order issued for sub-division of the suit property into two equal shares to be transferred to the parties herein made?

3. Whether the executive officer of this court should be authorized to sign all necessary documents to effectuate the transfer of his half share and should the defendant fail to deliver up the original title deed, copies of identity card, PIN certificate and passport sized photographs, whether the same should be dispensed with during the registration of his half share of the suit property.

4. Who should bear the costs of the suit/application?

2. The application is supported by the plaintiff, sworn on 9th January, 2014 in which the Plaintiff has deposed that the suit property was purchased by their late mother, Tabitha Wanjiku through purchase of shares in Burguret Arimi Ltd (hereinafter called “the company”). He explains that on or about 1978 his mother, the defendant and himself settled in the suit property as a family.
3. It is the plaintiff’s case that from the onset, the suit property was meant to be owned by the defendant and himself in equal shares.
4. The plaintiff explains that after they took possession of the suit property it was sub-divided equally between the defendant and himself and that a clearance certificate was issued in their joint names for purposes of being issued with a title deed.
5. The plaintiff further explained that in 2011, he discovered that the defendant had fraudulently alienated the land by having himself registered as the sole proprietor. When he complained to the defendant about his registration, the defendant maintained that he was the exclusive owner of the property and began threatening him with eviction.
6. Pointing out that he sought assistance from the members of Provincial Administration in vain, the plaintiff explains that he has substantially developed his share of the suit property.
7. The plaintiff’s claim is opposed through the replying affidavit of the defendant sworn on 26th September, 2014 in which the respondent has deposed that he is the exclusive owner of the suit property. In this regard the defendant explains that he purchased the suit property through buying shares from the company and had been occupying it exclusively until the time the plaintiff encroached on it.
8. The defendant denies the allegation that the suit property was bought by their mother and alleges that the plaintiff had his own shares in the company which he sold.
9. With regard to the clearance certificate issued in the name of the plaintiff and himself, he contended that the same was erroneously issued. The respondent has also argued that the application is time barred.

Directions

10. On 8th June, 2015 the court issued directions to the effect the suit herein be heard by way of *viva voce* evidence. The directions were issued following issuance of directions for conversion of the originating summons into a plaint and the replying affidavit into a statement of defence.

EVIDENCE

The Plaintiff's Case

11. In his testimony before the court, the plaintiff who testified as P.W.1 told the court that the defendant who is his elder brother, was registered as the owner of the suit property with the understanding that he would hold it in trust for their family. According to the plaintiff, the defendant was registered as the proprietor of the suit property because traditionally women were not registered as land owners. The plaintiff told the court that as at the time the defendant was registered as the proprietor of the the family land he was merely 6 years old!
12. According to the plaintiff (P.W.1), the decision to register the defendant as proprietor of the suit property was made by their clan.
13. It is the testimony of the plaintiff that the clan helped their mother get land from the company herein.
14. After the land was bought, his mother and he moved into the suit property (that happened way back in

1979). A year later, the defendant joined them and the property was sub-divided into two equal portions. Thereafter, they continued utilising the suit property in the manner it was sub-divided until 2009 when their mother passed on.

15. Pointing out that they buried their mother on the suit property, the plaintiff explained that the defendant started claiming exclusive ownership of the entire suit property after the death of their mother.

16. Maintaining that the suit property is family land, the plaintiff informed the court that he lives thereon with his grandchildren.

17. In support of his case, the plaintiff produced photographs showing the developments he has effected in the suit property; receipts in respect of payment effected when acquiring the suit property; clearance certificate issued by the company in respect of the suit property; search certificate in respect of the suit property and searches conducted in respect of the suit property.

18. Upon being cross-examined by the defendant, the plaintiff maintained that the suit property is family land, the same having been bought using proceeds from another family land that had been sold.

19. P.W.2, **Josephat Murage Muraya**, corroborated the testimony of the plaintiff concerning involvement of the clan in acquisition of the suit property and its registration in the name of the defendant. In this regard, he informed the court that the family of the parties herein and other clan members decided to sell their parcels of land and relocate to Nyeri. After selling their land in Kirinyaga, the money was given to the parties mother to bank as they waited for land in Burguret to be found. When the land in Burguret was found, the mother of the parties to this suit and P.W.2's father went to the company herein and bought one share (equivalent to 3.75 acres) which was registered in the name of the defendant as earlier on arranged by the clan.

20. P.W.2 corroborated the testimony of the plaintiff to the effect that after balloting of the land in Burguret was done, the plaintiff and his mother took possession of the suit property and began developing it, before the defendant joined them.

21. According to P.W.2, when clearance certificates were being processed to facilitate issuance of title deeds, it was resolved that the clearance certificate be issued in the name of both the plaintiff and the defendant herein because they were the beneficial owners of the land.

22. P.W.2 further corroborated the plaintiff's testimony to the effect that the parties to this suit occupied distinct portions of the suit property.

23. It is noteworthy that the testimony of P.W.2 to the effect that the boundary separating the parties' respective share of the suit property is still there was neither shaken nor controverted by the defendant.

24. P.W.2 further confirmed that trouble only started after the death of the parties' mother and in particular when the respondent started claiming that the entire suit property belongs to him.

The Defendant's Case

25. On his part, the defendant **Macharia Magana**, who testified as D.W.1, maintained that the suit property belongs to him. In this regard, he explained that he purchased it from the company herein. To prove that he is the one who paid for the suit property, he produced the original receipts in respect of the payments he allegedly made as **Dexbt 1, 2 and 3**.

26. The defendant told the court that his mother and himself had also bought land for the plaintiff from the company herein but owing to problems that arose during balloting, some people who had paid for land did not get their respective shares. As a result, it was resolved that the money they had paid be refunded and the available land be resurveyed to enable the remaining shareholders know the size of their land and location. (It is noteworthy that the said averment is not only at variance with the defendant's

statement of defence but is also not supported by any documentary evidence).

27. The defendant admitted that the clearance certificate in respect of the suit property was issued in his name and in the name of the plaintiff but contended that the insertion of the plaintiff in the clearance certificate was done by fraud- plaintiff took advantage of his ageing mother to get himself registered as a co-owner of the suit property. The defendant also contended that the receipt for Kshs.500/- (**Pexbt-5**) issued in the name of the plaintiff was forged. (It is also noteworthy that the alleged fraud or forgery on the part of the plaintiff does not form part of the defendant's statement of defence!)

28. The defendant further admitted that before the death of their mother, the plaintiff and their mother were in occupation of half of the suit property.

29. He claimed that following the demise of their mother, he evicted the plaintiff from a portion of the suit property, and left him with 1 acre only. Explaining that the plaintiff was dissatisfied with the portion he gave him, he explains that he issued him with an eviction notice.

30. With regard to the testimony of P.W.2 to the effect that they sold the land in Kirinyaga, he admitted having sold that parcel of land but denied having used the proceeds therefrom to buy the suit property.

31. On how he got registered as the proprietor of the suit property, he told the court that he used the former Chairman of the company herein, Waruru Kanja, who was his employer, to get the suit property registered in his name.

32. In cross-examination, he admitted that after they purchased the suit property, they took it as a family and that since then, (1979), the plaintiff has been in the suit property.

33. Concerning the allegation that they bought land for the plaintiff from the company herein, he stated that they did so after he sold the land in Kirinyaga.

34. At the close of the defendant's testimony, it was resolved that the secretary of the company herein be called to clarify issues raised in the testimonies of both the plaintiff and the defendant and to produce the register of shareholders to enable the court determine who between the parties was allotted the suit property.

35. Consequently, the secretary of the company herein at the material time, one Samuel Ndungu Muhiu, attended court and informed the court that the mother of the parties to this dispute had been a shareholder of the company since 1978.

36. He informed the court that there were wrangles between officials of the company leading to appointment of a probe committee. He informed the court that because of the wrangles, all the shareholders returned the allotments originally given to them and a new register (the one in use today) was opened.

37. Mr. Muhiu further informed the court that in 1988, the mother of the parties to this suit came to their office, accompanied by the defendant herein and asked him to record both the plaintiff and the defendant as joint owners of the suit property, which he did.

38. According to Mr. Muhiu, the mother of the parties herein complained that she had been giving the defendant money to pay for the land but the defendant was paying in his name yet the land belonged to her.

39. Mr. Muhiu told the court that according to the company's register, the suit property is jointly owned by the parties to this suit. He also informed the court that a clearance certificate was later issued in the name of the two parties for issuance of a title deed in their joint names.

40. Explaining that the register was presented to the Land Registrar for issuance of title to the parties to

this suit, he stated that if a title deed was issued in the name of the defendant alone, then that title is not authentic/must have been obtained irregularly.

41. He produced the register and a certified copy of the page of the register where the suit property appears and the names of the parties herein as **Pexbt-1**.

42. Upon being cross-examined by the defendant, he acknowledged that the receipts held by the defendant concerning payments for the suit property were genuine but maintained that the mother of the parties to this suit came to them and informed them (read the officials of the company herein) that the defendant was paying the money on her behalf.

43. At the close of hearing, counsels for the respective parties filed submissions.

Plaintiff's submissions

44. On behalf of the plaintiff, issues of convergence and divergence in the respective cases of the parties to this suit are flanked and submitted that there is convincing evidence of existence of a trust in favour of the plaintiff. The following reasons are advanced in support of that contention:-

a) The history of acquisition of the land;

It is submitted that the history of the land as per the available evidence indicates existence of trust as pleaded. The defendant is said to have failed to challenge the trail of documents of ownership, which indicate that the suit property was meant to belong to the parties as joint owners.

b) Evidence of registration as a trustee;

In this regard, it is submitted that the trail of documents of ownership preceding issuance of title deed was expectedly meant to issuance of title deed in joint names of the parties. The evidence of P.W.1 to the effect that the list of shareholders was so compiled and the subsequent documents issued in joint names to indicate such joint ownership and to lead to joint registration of proprietorship is said to be in support of the pleaded trust.

c) Evidence of observance of a trust by possession and occupation;

It is submitted that the evidence adduced in this matter shows that the parties invariably possessed and occupied the suit property since its acquisition, over a long period of time. That status was respected and strictly observed until recently when the defendant started claiming sole ownership, and only after their mother's death. It is pointed out that, to date, the parties reside and work on half share of the land respectively. They do not have alternative land. Their mother was buried in the suit property. It is noted that the defendant does not claim that the status on the ground was by design or through license. Save for the defendant's belated lame objections, it is submitted that there is no evidence of any disruption of the joint possession of the land.

d) Evidence of existence of a trust by observance of the relevant customary law

The court is urged to take judicial notice of existence of a custom where family land would normally be registered in the name of the eldest son, in the absence of the father. Existence of a customary trust is said to have been proved through the testimony of P.W.2.

e) Proof of fraudulent registration of the defendant in apparent breach of the fiduciary duty.

In this regard, it is submitted that there is evidence to the effect that the documents that should have been used to effect registration in favour of the parties were in the joint names of the parties. The defendant is accused of having acted in breach of his fiduciary duty by effecting registration of the suit property in his sole name when he should have registered it in their joint names.

45. Based on the decisions in the cases **Mbui v. Mbui (2005) 1 E.A 256; Kanyi v. Muthiora (1984) KLR 712; Gathiba v. Gathiba (2001) 2 E.A 342; Mutsonga v. Nyati (2008) 1 KLR 1048; Mwangi & Another v. Mwangi (2008) 1 KLR 1070; Mbogo & 3 others v. Mbogo (2008) e KLR; Philicery Nduko Mumu v. Nzuku Makau (2002) 2 E.A 251; Njenga Chogera v. Maria wanjira Kimani & 2 Others (2005) e KLR; Lunkuli v. Marko Sabayi (1979) 1 KLR 251; Gatimu Kinguru v. Muya Gathanji (1976)KLR 253;** and the provisions of **Section 28 and 30** of the Registered Land Act, Cap 300 Laws of Kenya (repealed); **Section 25(2) and 28(b)** of the Land Registration Act, 2012 , it is submitted that our law imputes a customary trust over registered land in recognition of evidence of possession and occupation of such land in observance of such customary rights.

46. In the cases cited herein above, the courts are said to have recognised customary trust in circumstances similar to those obtaining in the instant case.

Respondent's submissions

47. On behalf of the respondent it is submitted that the plaintiff neither proved that the defendant holds the suit property in trust for him nor that the defendant obtained the title he holds fraudulently.

Analysis and consideration

48. I have read and considered the pleadings, evidence and the submissions made in respect of the cases of the parties in this case.

49. With regard to the claim that the defendant holds the property in trust for the plaintiffs, that claim should be gauged on the basis of the test enunciated by the Court of Appeal in the case of **Salesio M'itonga v. M'ithara & 3 Others (2015)eKLR** thus:-

“It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki - vs- Gichuki – Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust.....We concur with the following findings by the High Court:-

“Trust must be proved by credible evidence adduced by the person claiming that a trust exists. See Wambugu vs. Kimani supra....”

50. Does the evidence adduced by the plaintiff meet the threshold for proof of existence of a trust relationship between himself and the defendant?

51. In answering this question, it is important to review the evidence adduced in this suit which is to the effect that the suit property was acquired in 1978. According to the testimony of P.W.2, which was neither shaken nor controverted by the defendant, the acquisition of the suit property was an initiative of the clan.

52. The clan and in particular, P.W.2's father, was involved in the acquisition of the land and its registration in the name of the defendant on behalf of his family.

53. It is common ground that following the acquisition of the suit property, it is the plaintiff and his mother who moved into the land first and settled therein. A year later, the defendant joined them and settled in a different portion of the suit property.

54. According to the testimony of P.W.2 which the defendant did not shake or controvert, the parties settled in distinct portions of the suit property and remained in occupation of their distinct portions of the land during the lifetime of their mother.

55. It is also common ground that it is only after their mother passed on that the defendant began claiming ownership of the whole of the suit property.

56. Whereas the evidence available to wit receipts show that it is the defendant who paid for the suit property, the totality of the evidence adduced in this suit shows that the suit property was acquired for use and benefit of both the plaintiff and the defendant.

57. The evidence on record also shows that the title to the suit property was supposed to be issued in the joint names of the plaintiff and the defendant. However, owing to undisclosed circumstances the same was issued to the defendant.

58. Being satisfied that the defendant's registration as the proprietor of the suit property is subject to a trust in favour of the plaintiff to the extent of half share of the suit property I find and hold that the claim herein has merit and allow it as prayed.

Dated, signed and delivered at Nyeri this 11th day of July, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. King'ori for the plaitiff

Mr. Macharia Magana – defendant

Court assistant - Lydia