



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 34 OF 2010

JOSEPH MOSONIK.....1ST PLAINTIFF

TAPLULE MOSONIK.....2ND PLAINTIFF

VERSUS

KIPKEMOI MOSONIKDEFENDANT

JUDGMENT

(Plaintiffs claiming land by way of trust; plaintiffs claiming that they contributed towards purchase of the land; land registered in the name of the defendant; plaintiffs claiming that defendant got registered because they did not have ID cards; defendant denying any trust and asserting that he purchased the land with his own money; no evidence by plaintiffs that they contributed to the land; in any case, the proportions claimed by the plaintiffs not commensurate to what they allege they contributed; plaintiffs independently having purchased land in their own names and being registered thus negating the argument that defendant was registered because they did not have IDs; no evidence of trust other than the mere allegation of it; mere allegation not good enough; plaintiffs' suit dismissed with costs)

This suit was commenced by way of plaint on **11 May 2010**. The 1st plaintiff is the brother of the defendant. They are both sons of the 2nd plaintiff who is their mother. The case of the plaintiffs is that the two plaintiffs and the defendant jointly contributed to the purchase of the **land parcel Kericho/Kaitit/371** (also described hereinafter as **land parcel No. 371**) which land became registered in the sole name of the defendant. In their pleadings, the plaintiffs have averred that the defendant holds the said **land parcel No. 371** in trust from them. It is pleaded that on **29 September 1995**, the defendant subdivided the suit land into three portions known as **Kericho/Kaitit/930**, **931**, and **932** without their consent. In the suit, the plaintiffs have asked for the following prayers :-

*(a) An order for subdivision of the **parcel of land Kericho/Kaitit/371**.*

(b) General Damages.

(c) Costs of this suit and interest thereon.

The defendant filed defence vide which he denied that he holds the suit land in trust for the plaintiffs. He also denied that the suit land was purchased jointly by the three parties. He pleaded that he has now subdivided the **land Kericho/Kaitit/371** into three portions, namely **Kericho/Kaitit/930**, **931**, and **932**. He further pleaded that there had been a previous suit, **Sotik RMCC No. 55 of 1995**, which was heard and decided in favour of the defendant and thus this suit is *res judicata*. He pleaded that the two plaintiffs and himself were each members of Kaitet Ranching Farmers Co-operative Society Limited (hereinafter

Kaitit Society) and that each was allocated land commensurate to his/her financial contribution. He averred that the 1st plaintiff subsequently became registered as owner of the **land parcel Kericho/Kaitit/421** whereas the 2nd plaintiff became registered as proprietor of the **land parcel Kericho/Kaitit/473**.

The two plaintiffs testified and they called one witness. PW- 1 was the first plaintiff. He testified inter alia that their mother could not be registered as proprietor of the suit land as she did not have an identity card (ID). He testified that he contributed Kshs. 1,500/=, their mother Kshs. 2,600/= and the defendant Kshs. 1,900/=, all totaling to Kshs. 6,000/= towards the purchase of the **land parcel No. 371** from Kaitit Society. The land was 21 acres, and in his view, the defendant was only to get 12 acres, himself 2 acres, and their mother 7 acres. He testified that they filed a case in the Land Disputes Tribunal and they obtained orders that the land be subdivided in the said proportion. He testified that their mother lives on the suit land, but this was under threat, as the defendant has commenced selling portions of the land and that six persons have now bought about 9 acres. In cross-examination, PW-1 stated that he lives on a different parcel of land which he purchased from the Society. He testified that the money contributed was given to the defendant and that the share certificate and payment receipts that were issued bore the name of the defendant. He stated that their case before the Sotik Court was dismissed for want of jurisdiction.

PW- 2 was the 2nd plaintiff. She testified that the **land parcel No. 371** belongs to her and that she resides on it. She testified that she gave the land to the defendant with the hope that the defendant would take care of her. She stated that the land was bought through the contribution of several family members, although she later testified that only herself and the 1st plaintiff, contributed towards the purchase of the land. She stated that they trusted that the defendant would hold the land on their behalf. She testified that she wants 7 acres for herself, 2 acres for the 1st plaintiff, and the balance can be held by the defendant. In cross-examination, she inter alia agreed that she has other land in her name which she testified was purchased with her own money. She also conceded that the 1st plaintiff has land in his name, which she stated he contributed alone. She testified that the receipts for the purchase of the land in dispute were misplaced.

PW- 3 was one James Kipkoech Arap Siga. He was a Committee member of Kaitit Society. He was also among elders who initially heard the dispute. He produced the minutes of the land dispute which were however are illegible. He testified that it was resolved that the defendant gets 12 acres, the 1st plaintiff 2 acres, and the 2nd plaintiff 7 acres. In cross-examination, he testified inter alia that the 2nd plaintiff was a member of the Society and that she owns the **land parcel No. 473**. He stated that the 1st plaintiff was never a member of the Society. He stated that the defendant was nominated by the 2nd plaintiff to hold the suit land for the others.

With the above evidence, the plaintiffs closed their case.

The defendant testified and called one witness. He stated that he paid for the land in dispute using his own money. He paid Kshs. 6,000/=. He was issued with receipts. He had four receipts and he explained that the rest are lost due to effluxion of time. Upon payment, he testified that he was issued with a share certificate which he produced. He was then issued with a title deed to the suit land. He stated that he has lived on the land since 1970 to date. He testified that the **land parcel No.371** does not now exist as he has subdivided it into the **land parcels No. 930, 931 and 932**. The **parcel No. 932** has been sold to one Paul Rotich and he has retained ownership of the **parcel numbers 930 and 931**. He produced the Green Cards to demonstrate this. He denied that the two plaintiffs contributed to the purchase of the **land parcel No. 371**.

In cross-examination, the defendant testified that he was employed and later did business and had money. He testified that two of his brothers and his mother live with him in the land under dispute. He stated that he subdivided his land so as to sell one portion to raise money for school fees, and charged one to KCB. He retained one unencumbered, which is where he lives. He stated that in the year 1969 he was employed until 1974 when he left to do business. He stated that he had his own money in 1967 as he started working in the year 1965 at Monieri Estate. He denied that his mother sold cows to raise money to buy the land.

He stated that his mother followed him after he purchased his land as his father was living with the first wife in another area. His mother then built a house on his land and refused to go to her **land parcel No. 473**. He stated that his mother did not have money to buy any land and it is him who gave her money to purchase her land. He denied that he became registered as proprietor on behalf of the plaintiffs because their mother did not have an ID. He was of the view that if she did not have an ID, she would never have been registered as proprietor of her **land parcel No. 473**.

DW- 2 was one John Kipsigei Tone. He is a neighbor to the litigants and also a member of Kaitit Society. He stated inter alia that each of the parties paid to the Society and that disputes arose around the year 2000.

With the above evidence, the defendant closed his case.

I invited counsels to file written submissions and they did so. I have considered these in my judgment.

I must start by saying at the outset that the plaintiffs' case as pleaded is fundamentally flawed. The main prayer sought in the plaint is for subdivision of the **land parcel Kericho/Kaitit/371**. I do not see how this order can be granted since the **land parcel Kericho/Kaitit/371** does not exist as it was subdivided on **29 September 1995** to produce the parcel numbers **Kericho/Kaitit/930, 931 and 932 (parcels Nos. 930, 931 and 932)**. Out of these three subdivisions, the **land parcel No. 932** has already been sold and the proprietor thereof, one Paul Kipkorir Rotich, was never sued in these proceedings. I cannot see how I can proceed to affect the title of Paul Rotich, given that he was not a party to this suit, and I also do not see how I can proceed to affect the titles to the **parcel Numbers 930 and 931** since the subject matter of the suit, as pleaded, is the **land parcel No. 371**, which as I have pointed out earlier does not exist. For this reason alone, the case of the plaintiffs must fail.

But even if the **land parcel No. 371** was intact, I am not of the view that the plaintiffs would have succeeded in their suit. The plaintiffs' case is one based on trust. It is their case that the defendant was registered as proprietor of the **land parcel No. 371** to hold in trust for the two of them. They claim that they contributed towards the purchase of the land and that the 1st plaintiff is entitled to 2 acres and the 2nd plaintiff is entitled to 7 acres of this land. It was claimed that the 1st plaintiff contributed Kshs. 1,500/=, the second plaintiff Kshs. 2,600/= and the defendant Kshs. 1,900/=. Putting aside the fact that there was absolutely no other evidence supporting the allegation that such money was ever handed over to the defendant by the plaintiffs, I am unable to reconcile how, given the shares of alleged contribution, the plaintiffs would want 2 and 7 acres respectively and allow the defendant 12 acres. If indeed this was their share of contribution as claimed, then the second plaintiff clearly would deserve the largest share and not the defendant. The 1st plaintiff, would have contributed a quarter of the purchase price, and therefore entitled to about 5 acres and not 2 acres. The rationale of the plaintiffs asking for 2 and 7 acres respectively was never explained to me, and it appears to be an acreage that was plucked from the air.

It was also claimed that the defendant became registered as proprietor on behalf of the plaintiffs, because the 2nd plaintiff did not have an ID card. Well, if this was the position, then I am again unable to reconcile it with the fact that the 2nd defendant actually got registered as proprietor of the **land parcel Kericho/Kaitit/473** which is acknowledged she purchased independently from the Kaitit Society. I am also at a loss, and it was never explained by the plaintiffs, why, if they indeed had money, they did not simply add to the shares that they purchased independently, so that they could have larger acreages of their own, given that they actually did purchase land directly from the Society.

It was argued that the elders held that the plaintiffs are entitled to the land. That holding does not bind me in any way and I disregard the same entirely.

When a party alleges a trust clear evidence of the same must be tabled. It will require special circumstances for a court to hold that there is a trust on the mere oral allegation that one exists, without there being additional documentary or other surrounding evidence, for example, in the manner in which the parties live, or other explanation or additional facts, to demonstrate that the alleged trust actually exists. If this is not the case, then any person can claim that another holds land in trust for him or her, and

by that sole allegation, without additional supporting evidence, a trust would be held to exist, which to me is a fairly dangerous approach, unless indeed it is clear that special circumstances exist which bring one to no other conclusion other than a trust does actually exist. I have not seen any special circumstances in this case.

From my above discourse, I do not see any merit in the plaintiffs' case. It is hereby dismissed. I have toyed with whether or not I should award the defendant costs of this suit given the relationship that he has with the plaintiffs. In my discretion, and considering all surrounding circumstances, I do award the defendant the costs of this suit.

The plaintiffs' suit is therefore hereby dismissed with costs.

It is so ordered.

Dated, Signed and delivered on this 1st day of July, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT:

Mr. Joshua Mutai instructed by M/s Chelule and Company Advocates for the plaintiffs.

Mr. Caleb Koech holding brief for M/s Tengekyon and Koske Advocates for the defendant.