



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYERI
ELC NO. 584 OF 2014
(Formerly HCCC NO. 86 OF 2003)

JOSEPH MURIITHI NJIRU PLAINTIFF

-VERSUS-

MATHENGE NJERU DEFENDANT

JUDGMENT

Background

1. On **25th September, 2003** the plaintiff, Joseph Muriithi Njeru, who is the younger brother of the defendant, Mathenge Njeru, filed this suit claiming that the defendant holds the parcel of land known as **Mwerua/Mukure/60** (hereinafter referred to as the suit property) in trust of himself and the plaintiff.

2. The plaintiff contends that the suit property initially belonged to his father, Njeru Mumu and was transferred by his said father to the defendant to hold in trust for himself and the plaintiff.

3. Complaining that in blatant breach of his duty as a trustee the defendant has refused, failed and neglected to determine the trust and to transfer his share of the suit property, the plaintiff seeks judgment against the defendant for:-

1. **A determination of the trust in respect of the suit property and transfer of 2.025 hectares thereof to him;**
2. **Costs of the suit;**
3. **Any other relief which this court deems fit and proper to grant.**

4. Vide his statement of defence dated **21st October, 2003** and filed on **22nd October, 2003** the defendant denies the allegation that the suit property was transferred to him by his father to hold in trust for himself and the plaintiff. The defendant contends that he purchased the suit property from the Ambui clan through the purchase of shares that culminated in his being registered as proprietor of the suit property in 1971.

The plaintiff's case

5. When the matter came up for hearing, the plaintiff maintained that the suit property belonged to his father and was transferred to the defendant to hold half share thereof on his behalf. Explaining that when he was born he found the land owned by their father, he stated that they have been in occupation of the suit property from the time he was born. As at the time the property was transferred to the defendant, he was away from home working at Nairobi. He realised the property had been transferred to the defendant when he returned home in 2002.

6. In support of his case, the plaintiff produced his father's certificate of death as Pexbt 1 and the green card in respect of the suit property as Pexbt 2.

7. The plaintiff also availed his cousin, Johnson Kamau (P.W.2), who informed the court that the suit property was purchased by the father to the parties in this suit from their clan in 1959.

8. P.W.2 stated that the property was transferred to the defendant after the parties father grew old to hold in trust for himself and on behalf of his sole surviving brother, the plaintiff herein.

9. P.W.2 informed the court that his father had also bought land from the clan to wit, plot 57. To prove that fact, he produced a green card in respect of the plot his father bought as Pexbt 3.

10. It is P.W.2's testimony that their clan bought the land their fathers held from Gathiori. P.W.2 informed the court that out of the land their clan bought, the plaintiff's father got 10 acres. He produced records to that effect as Pexbt 4.

11. P.W.2 further informed the court that when the plaintiff's father died in 1975, he was buried in the suit property.

12. Upon being cross-examined by counsel for the defendant, P.W.2 maintained that the suit property belonged to the plaintiff's father and that it was transferred to the defendant to hold in trust for himself and the plaintiff.

13. Concerning the contention that the defendant gave his father money to buy the land on his behalf, P.W.2 stated that he was not aware that the defendant gave his father money to buy the land for him. He however, conceded that it is the defendant who has been in occupation of the suit property and that the plaintiff has never lived on the suit property from the time he stopped working.

The defence case

14. The defendant who testified as D.W.1, informed the court that he bought the suit property from Ambui clan for Kshs.3300/- and got it registered in his name in 1971. To prove ownership of the suit property, he produced a copy of the title issued to him as Dexbt 1 and the green card in respect thereof as Dexbt 2. He also relied on the copy of the green card produced by the plaintiff as Pexbt 2.

15. Concerning the plaintiff's contention that the suit property belonged to their father, he stated that their father had no land.

16. With regard to the fact that his father was the registered proprietor of the suit property, he stated that his father's name was included in the title because he was the one who was offered the property. He conceded that the land was transferred to him by his father and that the plaintiff used to live on the suit property when he was young.

17. Concerning the whereabouts of the plaintiff when he was buying the suit property, he informed the court that he did not know where the plaintiff lived or worked.

18. In response to the testimony of P.W.2 to the effect that the property belonged to his father, he

maintained that he gave his father money to buy the land for him. He contended that P.W.2 was the one who took some of the purchase money to the clan.

19. Maintaining that he is the sole owner of the suit property, the defendant vowed that he cannot allow the plaintiff to come to his land.

20. **D.W.2, James Ngari Kibue**, informed the court that it is the plaintiff's father who began paying for the land but after he was unable to meet his obligations, brought in the defendant to continue paying for the suit property. He produced a record of the transactions in respect of the properties bought by the clan and its translated version as Dexbt 4(a) and (b) respectively.

21. According to D.W.2, when the plaintiff father's was unable to continue paying for the suit property, he informed both of his sons but the plaintiff said he had no money.

22. **D.W.3 John Muriuki Muchere**, who is the area assistant chief informed the court that in 2003, the dispute herein was brought to him for determination. He informed the court that after his panel of elders heard the dispute, it resolved that the suit property was bought by the defendant, hence it belonged to him.

23. It is noteworthy that D.W.3 did not produce any document(s) to prove the deliberations by the elders, the verdict arrived at and the reasons for it.

Submissions

24. Despite parties to the suit having been given an opportunity to file and serve their submissions at the close of hearing, at the time of writing this judgment, the defendant had not filed his submissions.

Submissions on behalf of the plaintiff

25. On behalf of the plaintiff, it is submitted that it is not in dispute that the defendant is the plaintiff's elder brother and that Njeru Mumu (deceased) was the father of the parties to the dispute herein. It is contended that from the testimony of P.W.1, it is clear that both the plaintiff and the defendant were raised on the suit property. Based on the document produced as Pexbt 4, reference is made to **Section 9(2)** of the Native Land Tenure Rules of 1956 and **Rule 12** of the said Rules and submitted that since there was no claim filed against Njeru Mumu's ownership or occupation of the suit land, the land belonged to him. **Rule 12** aforesaid provides:-

“After the expiration of 30 days from completion of a record, or on the determination of all objections to a record in accordance with rule 11, whichever shall be later, the record shall be deemed to be a true and competent record of all existing private-right holding in the unit to which the record relates, but no inaccuracy in, or omission of, any particular relating to any lease or licence shall in any way affect the validity of such lease or licence”

26. The testimony of the defendant to the effect that he bought the suit property from Ambui clan at Kshs.3,300/- is said to be at variance with his statement of defence to the effect that he purchased the suit property through purchase of shares which culminated in him being registered as the proprietor in 1971.

27. Arguing that the defence by the defendant does not make sense, counsel for the plaintiff submits that there is no evidence to show how the defendant's shares, if any, were being held.

28. Based on the provisions of **Section 3** of the Law of Contract Act which requires a contract of land to be in writing, it is submitted that the defendant did not tender any sale agreement between himself and his father or the clan.

29. Terming the testimony of D.W.2 hearsay, counsel for the plaintiff submits that D.W.2 talks about meetings he did not attend. He further submits that D.W.2 failed to prove that he was the author of the

records of the documents he produced in court.

30. Terming D.W.3 an incredible witness who failed to produce any document to prove the resolution allegedly arrived at concerning the dispute referred to his office, the plaintiff's advocate urges the court to disregard D.W.3's testimony.

Analysis and determination

31. It is common ground that the plaintiff and the defendant are the sole surviving sons of the Njeru Mumu (deceased); that the plaintiff and the defendant lived on the suit property before the plaintiff went to look for employment and that after he returned home, the plaintiff did not live in the suit property.

32. Although no reason is given why the plaintiff did not go back to the suit property when he returned home, from the evidence on record, it can be inferred that he was prevented from going back to the suit property by the defendant, who was by then, the registered proprietor of the suit property. That inference can be made because there is evidence that after the plaintiff returned home, he went to his brother the defendant and claimed a share of his entitlement to the suit property. The defendant refused to recognise his claim, claiming that he did not hold the suit property or any portion thereof in trust for the plaintiff.

33. After the defendant declined to recognise his claim, the plaintiff referred the matter to the provincial administration for arbitration. Unfortunately, the elders who heard the dispute found in favour of the defendant.

Dissatisfied with the decision of the elders, the plaintiff filed the current suit.

34. It is also not in dispute that the suit property was registered in the name of the plaintiff's father before it was transferred to the defendant, who is the current registered proprietor in respect thereof.

35. According to the testimony of D.W.3, the question as to whether the plaintiff is entitled to a share of the suit property was referred to his office. Upon deliberating on the matter, the panel of elders who heard and considered the dispute resolved that the suit property belonged to the defendant to the exclusion of the plaintiff. The testimony of D.W.3 is corroborated by that of D.W.2 who stated that despite the fact that the suit property was registered in the name of the defendant's father, the defendant's father held it in trust for the defendant as it is the defendant who provided the money used for buying the property.

36. To prove that it is the defendant who paid for the suit property, D.W.2 produced the register of the transactions concerning the property and its translated version as Dexbt 4(a) and (b) respectively. A review of the translated version of the register reveals that:-

1) There were various agreements entered into between the Ambui clan (the sellers of the land from whom the suit property was obtained). For instance, the 1st agreement was entered into on 5th April, 1943. According to the clan's minutes of 8th June, 1950 the plaintiff's father is indicated as one of the persons who got land from the agreement dated 5th April, 1943.

2) A second agreement was entered into on 8th June, 1950 in which the clan members purchased more land. Vide a meeting held on or about 23rd February, 1962 the clan members resolved to share the land in accordance with how much each member had contributed as the land was for the clan. Although there is evidence of participation of the plaintiff's father in the clan meetings, it is not clear what his contribution in acquisition of the 2nd portion of the land was.

3) The minutes in particular, the minutes of 14th January, 1973 make reference to some contribution by the defendant (Shem Mathenge) in acquisition of the second parcel of the land.

4) The letter of 11th November, 1967 also goes to show the defendant's involvement in purchase of the 2nd parcel of land.

37. The issue that arises from the register produced by D-2 is whether the register supports the defendant's contention that his father did not own land. The simple answer to that question is found in the minutes of 8th June, 1950 which are as follows:-

“8th June, 1950

Names of those who got land according to 5th April, 1943 agreement, Chief Habel was present and other leaders. Names and payment.

1. **Kibui S/O Manyiti –Kshs. 100/=;**
2. **Njiri S/O Manyiti-Kshs. 100/=;**
3. **Kinyua S/O Manyiti-Kshs.150/=;**
4. **Muriuki S/O Manyiti-Kshs. 150/=;**
5. **Njeru S/O Mumu-Kshs. 100;**
6. **Kioi S/O Mumu-Kshs.150/=;**
7. **Ndari S/O Githiiko-150/=;**
8. **Kibui S/O Mumu;**
9. **Wamiatu S/O Gicuki 150/=.”**

38. Whereas there is no evidence of the contribution of the plaintiff's father in acquisition of the parcel of land acquired vide the agreement entered into on 8th June, 1950, in view of the express recognition of the fact that he got land by virtue of the earlier agreement, it is not correct to say that the plaintiff's father had no land.

39. It is noteworthy that the defendant does not claim to have bought any land from his father. In the absence of any evidence to the contrary, I find and hold that the plaintiff's father had land.

40. Whereas it is possible that the defendant contributed in the acquisition of the second parcel of the land that was bought by the clan, in the absence of any evidence to show what happened to the land that the father of the parties to this dispute had, it is safe to assume that part of the land held by the defendant is the portion owned by his father before the second agreement.

41. The defendant tried to justify entitlement to the whole of the suit property by claiming that the purchase price of the ten or so acres he holds was Kshs.300/= per acre. Nothing can be further from the truth. According to the register produced by D.W.2, the 2nd agreement pursuant to which the defendant got his alleged entitlement to the suit property if any, distinct from that of his father, was Kshs. 18,000/= plus four heifers. The agreement in respect of the original parcel was between the sellers and the clan members. The original agreement does not indicate the size of the land bought.

42. The beneficiaries of the agreement later on sat and agreed to share the land according to individual contributions. In the absence of any other agreement concerning the suit property, it is not true that the defendant bought the suit property from the clan at Kshs. 300/- per acre. That fact is not supported by the evidence on record.

43. Having found that the plaintiff's father had land, the question that arises is whether the plaintiff has proved that the defendant holds the suit property and/or any portion thereof in trust for him.

44. In determining this question I will be guided by the decision in the case of Njenga Chogera v. Maria

Wanjira Kimani & 2 Others (2005) e KLR, where, faced with an almost similar case scenario, the Court of Appeal held:-

“As regards evidence of customary law trust vis-à- vis the provisions of the Registered Land Act, we can do no more than refer to the decision in MUTHUITA V. MUTHUITA (1982-88) 1 KAR 42 at p. 44 where Potter J.A. said:-

“In GATIMU KINGURU V. MUYA GATHANGI [1976] KLR 253 Madan J (as he then was) held that the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of section 126(1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive. That decision has been followed and in my respectful opinion it is correct.

In view of that misdirection it is perhaps not surprising that the resident magistrate concluded that the evidence supported the defendant’s case. He did not deal with the claim based on adverse possession.

In the High Court the learned judge correctly directed himself as to the functions of a first appellate court and as to the relevant provisions of the Registered Land Act, and having carefully reviewed the evidence, found that the appellant was registered as proprietor of the suit premises as trustee for himself and the three plaintiffs. In my view there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did. With respect I agree with the learned judge.”

The evidence on which the above finding was premised was as follows:-

“The plaintiffs’ case was simple and straightforward. It was their case that the defendant as the first born in his family was registered proprietor of the suit land with the intention that he holds it as a trustee for himself and other members of the family. The suit land had been purchased by the husband of the 1st plaintiff which contention is opposed by the defendant who claimed the land to be his. What emerges from the evidence on record is that all the parties to the suit land had been using and living on this land as family land. The plaintiffs and their witnesses were able to demonstrate that the suit land had been purchased by the husband of the 1st plaintiff and further that the same land was registered in the name of the defendant as a trustee. It is to be noted that the defendant was unable to name the person who sold him this land. On the issue of ownership, we have already reproduced above the findings of the learned Judge of the superior court.”

45. The evidence in the Njenga Chogora case (*supra*) is, in my view, *pari materia* to the evidence adduced in this case. The plaintiffs in that case, based their claim on alleged trust. The plaintiffs’ claimed that the defendant was registered in trust for himself and for them as the eldest son of their husband/father. There was evidence that the suit property was initially family land and that the plaintiffs lived thereon before the property was registered in the name of the defendant. The defendant, who like the defendant in this case, claimed his father had no land, was unable to prove that fact.

46. The evidence adduced in this case shows that the plaintiff’s father had land, in fact, it is the plaintiff’s father who transferred the land to the defendant. There is no evidence that the plaintiff’s father held the land allocated to him pursuant to the agreement of 5th April, 1943 in favour of the defendant.

47. Although there is evidence that the defendant contributed in the acquisition of the land held by his father, there is no proof that his father held the land in trust for him. In my view, the contribution that the defendant made in the acquisition of the suit property does not entitle him to the entire property. The fact that the suit property was originally family land and in the absence of any evidence that the defendant’s father held the suit property in trust for the defendant and cognisant of the fact that the defendant did not plead that his father held the land in trust for him, on the strength of the evidence adduced in this case, I find and hold that the defendant holds a portion of the suit property in trust for the plaintiff.

48. Concerning the plaintiff's contention that he is entitled to half share of the suit property, there being evidence that the defendant contributed to the acquisition of the suit property, I am unable to agree with the plaintiff that he is entitled to half share of the suit property. In my view, the plaintiff is only entitled to half share of the parcel his father was entitled to pursuant to the agreement entered into on 5th May, 1943.

49. Since this court is not privy to the size of the parcel of land the plaintiff's father owned pursuant to that agreement, I direct that, within 14 days of delivery of this judgment, the parties appear before me and address me on what their father's entitlement was pursuant to the agreement of 1943, before I make a determination on the plaintiff's entitlement.

50. Since the documents I have relied on in arriving at the above determination were challenged, this being a family dispute, I make no order as to costs.

Dated, Signed and Delivered at Nyeri this 27th day of October, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. King'ori h/b for Mr. Gacheru for the Defendants

Joseph Mureithi Njeru for the plaintiff

Advocate – absent

Court assistant - Lydia