



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 664 OF 2014 (O.S)

(Formerly Nyeri HCCC NO. 5 OF 2012 (O.S))

MAINA KIAGO PLAINTIFF

-VERSUS-

AMBROSE MOKUA

**CHARLES KIREBETA
DEFENDANTS**

JUDGMENT

Background

1. The plaintiff Maina Kiago, took up the summons dated 16th day of January, 2012 and amended on 24th January, 2012 for determination of the following questions:-
 1. **Whether the registration of the defendants, Ambrose Mokua and Charles Kirebeta, as the proprietors of L.R NOS. Othaya/Gura/865 and 866 is subject of a customary trust in his favour to the extent of I acre**
 2. **If the answer to question (1) above is in the affirmative, whether the said customary trust should be determined and an order made for his registration as the proprietor of the one acre subject of the said customary trust**
 3. **Who should pay the cost of the suit**
2. The application is supported by the affidavit of the plaintiff sworn on **20th January, 2012**. In that affidavit, the plaintiff has deposed that the suit properties (L.R NOS. Othaya/Gura 865 and 866) were originally comprised in L.R No. Othaya/Gura/229 which was registered in the name of the defendants' father Mutua S/O Kirebeta (deceased); that the defendants' father who was his uncle was so registered in trust for his father Kiago S/O Kirebeta (deceased) and the whole family. The plaintiff contends that the defendants' father held the half-share of the original parcel of land hereto in trust for the family of his deceased father (his deceased mother, his siblings and himself).
3. It is the plaintiff's case that in recognition of the said trust relationship, his mother who passed on on 14th February, 2002 occupied their half share of the original parcel of the land, comprising two acres or thereabout.
4. The plaintiff has deposed that they have effected massive developments in the suit land and buried

his deceased mother therein. The plaintiff has further deposed that sometime in 1999, the defendants' father without their knowledge, subdivided the original parcel of land into three portions without regard to their entitlement to half share thereof.

5. Explaining that out of the sub-division his family got 1 acre comprised in L.R NO. Othaya/Gura/867, the plaintiff contends that the defendants still hold one (1) acre in trust for him, being the residue of the portion held by their father in trust for him.

6. Explaining that the defendants' father had respected their possession and use of the said one acre by even allowing him to bury his deceased mother thereon, the plaintiff maintains that he has made up a case for being granted the orders sought.

7. The plaintiff's claim is opposed through the replying affidavit of the 2nd defendant, Charles Kirebeta, sworn on **13th February, 2012**. In that affidavit, the 2nd defendant has, *inter alia*, deposed that contrary to the plaintiff's contention that his father held two acres of the original parcel of land in his favour, his father only held one acre as such. He explains that the said one acre was subject of litigation between his father and the plaintiff's mother in Nyeri SPMCCC No.179 of 1994. The 2nd defendant points out that the dispute between his father and the plaintiff's mother was heard and determined.

8. The 2nd defendant explains that pursuant to the orders granted in Nyeri SPMCCC No.179 of 1994, the plaintiff's mother got the one acre held by the plaintiff and his father got the three (3) acres they hold.

9. Explaining that the parcels of land held by the parties to this suit are as a result of execution of the decree obtained in Nyeri SPMCCC NO. 199 of 1994 (*supra*), the 2nd defendant contends that this suit is *res judicata* that suit.

10. It is the 2nd defendant's case that the plaintiff does not have any claim to the original parcel of land, separate from his mother. In this regard, the 2nd defendant points out that the plaintiff had without success, sought to revive the suit filed by his mother concerning the suit properties herein.

11. With regard to the fact that the plaintiff's mother was buried in the suit properties, the 2nd defendant points out that the parties concerned had agreed that burial of the plaintiff's mother in the suit property would not be taken to mean that she was the owner.

12. Blaming the plaintiff for failing to disclose to the court the litigation history concerning the suit properties, the 2nd defendant contends that there is nothing new that the plaintiff can urge concerning the suit properties that his mother did not urge against their father.

13. In view of the foregoing, the 2nd defendant terms the suit herein misconceived, a non-starter and urges the court to dismiss it with costs to the respondents.

EVIDENCE

The plaintiff's case

14. When the matter came up for hearing, the plaintiff informed the court that the original parcel of land to wit, Othaya/Gura/229 belonged to his father together with the defendant's father in equal shares. The land was subsequently sub-divided into three parcels one of which was registered as Othaya/Gura/867. He produced a certificate of search in respect of the property as Pexbt 1(a) and (b).

15. He stated that the suit land belonged to their grandfather, Kirebeta, since demarcation time.

16. He informed the court that the original parcel was sub-divided by their clan in 1967 and that their fathers were supposed to share the suit land equally. Pointing out that he is the administrator of the

estate of his deceased father (produced grant to prove that fact as Pexbt 2), he informed the court that he sued the defendants in respect of the portion he buried his mother amounting to one acre.

17. He informed the court that the original parcel of land, Othaya/Gura/229 was 4 acres. To prove that fact, he produced a certificate of search as Pexbt 3. He reiterated his contention that his family has used the two acres since 1967. He further informed the court that the defendants' father never disputed his entitlement to the suit land.

18. He further informed the court that he got to know that the defendants were the registered proprietors of the suit properties after they attempted to evict him from the suit property following the death of their father.

19. The plaintiff informed the court that he has developed the parcel he claims by planting coffee bushes and trees thereon. He, however admitted that they had several cases over the suit land.

20. Concerning the burial of his mother in the suit property, he denied having had knowledge of the agreement dated 20th February, 2002.

21. Upon being cross-examined by counsel for the defendants **Mr. Macharia**, the plaintiff stated that he is the owner of Othaya/Gura/867 which he inherited from the defendant's father. He conceded that Othaya/Gura/865 and 866 are owned by Charles Kirebeta and Ambrose Mutua respectively. He also conceded that his mother had filed a case against the defendant's father to wit, Nyeri SPMCC 179/1994 claiming interest by trust.

22. He admitted that his mother wanted the original parcel of land to be divided into two equal portions. He however stated that the claim by his mother was never finalised. He conceded that he unsuccessfully applied to be substituted for his mother in the suit.

23. Despite his admission that his mother was pursuing their alleged entitlement to half share of the original parcel of land, the plaintiff explained that he is pursuing the remainder of their entitlement on his own account.

24. The plaintiff further confirmed the contents of the letter dated 20th February, 2002 to be true and the signatures thereon to be authentic. He stated that he appended his signature on the letter believing that his mother was being buried in her land. Nevertheless, he admitted that the letter was written because the defendants' father did not want his mother to be buried there.

25. He stated that he was aware of the case filed by his mother against the defendants' father but denied having been aware that the court had determined that his mother gets 1 acre and the defendants' father, the balance (3 acres). The foregoing denials notwithstanding, he admitted that the one acre he owns is pursuant to the decree of the court.

The defence case

26. On his part, the first defendant Ambrose Mokuia informed the court that the original parcel of land, Othaya/Gura/229 belonged to their father before it was sub-divided into three portions pursuant to a court order. Pointing out that the plaintiff never appealed against the decision pursuant to which they got the suit property, he produced a decree from Nyeri SPMCCC No.179 of 1974 as Dexbt1. Pointing out that the plaintiff was aware of the decree obtained in Nyeri SPMCC No.179 of 1974, he produced an order obtained in an application in which the plaintiff tried to revive the suit filed by his mother as Dexbt 2. He also produced the application by plaintiff for substitution as Dexbt 3 and the plaintiff's application for letters of administration of his mother's estate as Dexbt 4.

27. Concerning the letter dated 20th February, 2002 he informed the court that it was written because they did not want the plaintiff's mother to be buried in the suit properties. He informed the court that elders prevailed upon them to allow the deceased to be buried as per her wishes. As a result, they

wrote the letter granting permission for burial but confirming that the land did not belong to her.

28. Terming the plaintiff's allegation that he did not know the contents of the letter a lie, the 1st defendant stated that they all understood its contents. He produced the letter as DEXBT 5.

29. On cross examination, the 1st defendant stated that his father had bought a portion of the original parcel of land and received 2 acres from his grandfather. Contending that the plaintiff's father was not allocated any land by their grandfather, the 1st defendant explained that the parcel the plaintiff's mother was cultivating was shown to her by his father. The 1st defendant explained that the plaintiff's mother had sued his father over the portion of the suit land the plaintiff claims.

30. In re-examination, the 1st defendant stated that the plaintiff's mother was allocated land by the court.

Submissions

Submissions on behalf of the plaintiff

31. On behalf of the plaintiff, a brief overview of the evidence adduced by the parties to this suit is given and submitted that it is not in dispute that the original parcel of land was held by the defendants' father subject to a customary trust for the benefit of the family of the plaintiff's father and the family of the defendant's father; that the possession of the original land, since its acquisition, has been in equal shares in observance of the apparent trust and that there is a litigation history.

32. From the pleadings and the evidence adduced by the parties to this suit, two issues are framed for the court's determination;

- a. whether the current suit is res judicata the previous suits and
- b. whether the pleaded trust in favour of the plaintiff has been fully settled?

33. On whether this suit is res judicata the previous suits and in particular Nyeri SPMCCC No.179 of 1994, it is submitted that the current suit is not res judicata that suit because the plaintiff was not a party to that suit; that the plaintiff has a right to claim or put an end to the trust on his own, and that the matter was not conclusively determined in the earlier suit.

Submissions on behalf of the defendants

34. On behalf of the defendants, the following issues are framed for the court's determination:-

- a. whether the matter is res judicata?
- b. Whether there exists a customary trust in respect of the suit properties (LR Nos. Othaya/Gura/865 and 866 in favour of the plaintiff; and
- c. Whether the burial of the plaintiff's mother on the suit land entitled the plaintiff to claim right over the suit land?

35. On whether this suit is res judicata, on behalf of the defendants, reference is made to Nyeri SPMCCC No.179 of 1994 and submitted that the former suit, just like the present one was a claim for trust. It is pointed out that the parties in that suit were the parents of the parties to this suit. Contending that the suit was heard and determined by a court of competent jurisdiction, counsel for the defendants submits that the current suit is clearly res judicata.

36. With regard to the 2nd issue, it is submitted that no trust exists in respect of the suit properties because of the order made in Nyeri PMCCC No.179 of 1994 pursuant to which the suit properties were created. Terming the suit an abuse of the court process, counsel for the defendants submits that the plaintiff is trying to get what his mother failed to get from the defendants' father.

37. Based on the provisions of **Section 6(2)** of the Land Control Act and the case of **David Sironga**

Ole Tukai v. Francis Arap Muge & 2 others (2014) Eklr. it is submitted that the plaintiff's claim that the suit properties are subject of a trust in his favour is unmaintainable because of want of a land control board consent to such a dealing which is, by dint of the provisions of **Section 6(2)** of the Land Control Act, Cap 302 Laws of Kenya a controlled dealing.

38. On whether the burial of the plaintiff's mother entitled the plaintiff to claim a portion of the suit lands, reference is made to the agreement dated 20th February, 2002 and submitted that the contents of the letter makes it clear that burial of the plaintiff's mother on the suit land would not be taken to mean that the land was hers.

Analysis and determination:

39. It is common ground that there existed a suit between the plaintiff's mother and the defendants' father over the original parcel of land to wit plot No. Othaya/Gura/229. That suit culminated in a judgment/decreed to the effect that the plaintiff's mother was entitled to one acre of the suit land and the defendants' father three acres, being the balance of the suit property.

40. The evidence on record shows that pursuant to that decree, the suit property was sub-divided into three parcels. Out of the three parcels, the defendants got three acres comprised in what was their father's entitlement in accordance with the outcome of the dispute between him and the plaintiff's mother. The evidence on record shows that the plaintiff's mother who was not satisfied with the decree issued in Nyeri SPMCC No.179 of 1994 appealed against the decree/order but passed on before the appeal was heard and determined. There is evidence that the plaintiff unsuccessfully applied to be substituted for his mother in this appeal that his mother had filed against the decree/order pursuant to which the defendant's father had been allocated more land than his mother, who claimed that the defendants' father held it to the extend of half share in trust for her.

41. The issue arising from the fact that there existed previous suits over the suit property is whether the current suit is *res judicata* those suits.

42. Under **Section 7** of the Civil Procedure Act, a suit or issue is *res judicata* if the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or in the suit in which such suit has been subsequently raised, and has been heard and finally decided by such courts.

43. The test in determining whether a matter is *res judicata* was summarised in the case of **Benard Mugo Ndegwa -VS- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that: 1) The matter in issue is identical in both suits; 2) the parties in the suit are the same; 3) sameness of the title/claim; 4) concurrence of jurisdiction; and 5) finality of the previous decision.

44. In the current suit, it is admitted that the issue of trust was raised in the Nyeri SPMCCC suit cited herein above but contended that since the plaintiff was not a party to that suit, he has every right to bring the current suit and claim on his own. The reason given for this argument is that the suit brought by his mother was not a representative claim.

45. The foregoing submission raises the issue as to whether the test for *res judicata* postulated in the above mentioned section, presupposes that for the plea of *res judicata* to be established, under the clause "between parties under whom they or any of them claim, litigating under the same title, the suit must of necessity be a representative claim.

46. My answer to this question is negative. All what needs to be proved is that the interest sought to be litigated in the subsequent suit was litigated in the former suit by the litigant's predecessor in claim or entitlement.

47. In the circumstances of this case, the issue of entitlement of the plaintiff's family to half share of the

land held by the defendants' father was subject of litigation between the plaintiff's mother and the the defendants' father. Those parties were not merely litigating their own interest in the suit property but the interest of their families. No wonder, after conclusion of the suit, it is the said family members who were beneficiaries of the decree obtained in the suit.

48. The evidence on record shows that the plaintiff unsuccessfully tried to substitute his mother in the appeal filed by his mother who had passed on.

49. There being no dispute that the issues raised in this suit are similar to those raised in the former suit, the only remaining issue for determination of the question as to whether the current suit is *res judicata* the former one(s) is whether the lower court had jurisdiction to hear the issue raised before it.

50. From the decree obtained in the lower court, it can be discerned that the claim was for declaration that the defendants' father held Othaya/Gura/229 in trust for the plaintiff's mother in equal shares and for determination of the alleged trust, if found to exist.

51. Did the trial Court, which was presided over by a Senior Resident Magistrate, have jurisdiction to hear and determine a claim based on trust.

52. In answering this question I adopt the decision of **Pauline Nyamweya J.** in the case of **Robert Gitau v. Peter Kimani Njera & 2 others (2015) eKLR** where she stated:-**"It is not contested that the dispute in PMCCC No. 10477 of 1994 involved property that was registered under the repealed Registered Land Act, and that the Respondents sought a declaration therein that the said property was held in trust for them and a resultant sub- division of the same in their favour. This was a dispute that was clearly not specifically provided for under section 3(1) of the Land Disputes Tribunals Act to be heard by the said Tribunals, and as it involved title to the suit property it could only be heard either by the High Court or Senior Resident Magistrates Court.This Court for the above reasons in addition finds that the trial magistrate erred in her finding that under section 159 read together with section 126 of the repealed Registered Land Act subordinate courts had no jurisdiction to declare trusts, and that the trial court lacked jurisdiction to determine the issues raised in the application.**

53. The sections of the law referred to in the above cited case makes it clear that the lower courts, subject to the monetary value of the land had jurisdiction to hear and determine claims based on trust, like the instant claim.

54. Since the jurisdiction of the lower court to hear and determine the claim preferred before it by the plaintiff's mother is not in contention, like my brother Wakiaga J., who also was faced with the question as to whether the current suit is *res judicata* the former suit, I find and hold that the current suit is *res judicata* the former one.

55. Concerning the question of *res judicata*, in his ruling delivered on 9th July, 2012 **Wakiaga J.**, stated:-

"The other issue is that of *res judicata*. From the submission by the respondent and the documents in support, I am of the considered opinion that the applicant's claim herein is *res judicata* since the matters in issue herein are matters that are either directly or substantially the same issues which were in the former suits between parties under which the applicant claimed and having been determined by a court of competent jurisdiction."

56. As pointed herein above, the plaintiff has not demonstrated that he has a claim distinct from the claim lodged by his mother against the title held by the defendants' predecessor in claim which ousts the plea of *res judicata* against his case.

57. My view of the plaintiff case is that it is a desperate attempt to revive the appeal lodged by his mother after he was unable to revive it vide the application dated 21st November, 2002, (Dexbt 3).

Such conduct is to say the least an abuse of the court process.

58. Having found the suit to be *res judicata* Nyeri SPMCCC NO. 179 supra, I need not consider the other issues framed for the court's determination as the finding that the matter is *res judicata* suffices to dispose of the matter preliminarily.

59. The upshot of the foregoing is that the plaintiff's suit has no merit and is dismissed with costs to the defendants.

Dated, signed and delivered at Nyeri this 17th day of November, 2015.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the plaintiff (counsel)

Mwangi Kigo for plaintiff

Mr. Macharia for the defendants

Court assistant - Lydia