



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 338 OF 2013

EDWARD KIPKOSGEI CHEMURBII 1ST PLAINTIFF

LYDIA CHEPKEMOI..... 2ND PLAINTIFF

VS

CHARLES K. KOSGEI 1ST DEFENDANT

RICHARD KIPSANG SIGILAI.....2ND DEFENDANT

(Suit by a father against his sons; father wanting orders to have the sons vacate the suit land; the sons making a claim that their father holds the suit land in trust for them as it is ancestral land; no proof that the land is ancestral land and no trust proved; no law providing that all property is held by parents in trust for their children; trust needing to be proved through facts; no proof of trust in this case; defendants not being happy with the manner in which their father has distributed land; no law that compels a proprietor to distribute his/her land in a certain way to his/her children while he/she is still alive; defendants ordered to vacate the suit land unless their father agrees to allow them to occupy it)

JUDGMENT

A. INTRODUCTION AND PLEADINGS

1. This suit was instituted by way of complaint filed on 13 June 2013. In the complaint, it is pleaded that the 1st plaintiff is the registered owner of the land parcel Nandi/Kamobo/4258. The defendants are sons to the 1st plaintiff. It is pleaded that the 2nd plaintiff purchased 0.5 acres of the suit land from the 1st plaintiff, 1st defendant and two other persons namely Daniel Kosgei and Josiah Tanui (who are also sons to the 1st plaintiff). The complaint in the suit is that the 1st defendant has lodged a caution on the suit land without any justifiable reason, which has in turn, prevented the 2nd plaintiff from getting title to the portion that she purchased. There is also a complaint that the 2nd defendant has caused destruction to a banana plantation owned by the 1st plaintiff worth Kshs. 8,000/=. In the suit, the plaintiffs have sought the following orders :-

- (a) Removal of the caution.
- (b) Restraining orders to stop the defendants from ploughing, selling or dealing in the suit land.
- (c) Eviction of the defendants from the suit land.
- (d) Damages of Kshs. 8,000/= against the 2nd defendant.
- (e) Costs of the suit.

(f) Any other justifiable relief.

2. The defendants entered appearance in person and filed a joint statement of defence. In the Defence, it is pleaded that the plaintiff holds the suit land in trust for the defendants and other siblings of the defendants. It is denied that the defendants sold a portion of 0.5 acres to the 2nd plaintiff and the 2nd defendant has also denied having destroyed the banana plantation. They have averred that they have not trespassed on the suit land since it is ancestral land. They have also stated that the caution was lodged to protect the rights and interests of the family.

B. EVIDENCE OF THE PARTIES

(a) Plaintiffs' Evidence

3. PW-1 was the 1st plaintiff. He testified that he is the sole proprietor of the suit land and that the defendants are his sons. He testified that the 2nd plaintiff, Lydia, was introduced to him by the 1st defendant and two other sons of his, namely Daniel and Josiah. Daniel, Josiah and the 1st defendant wanted to sell 0.1 acres each to the 2nd plaintiff which the 1st plaintiff agreed to. He himself sold a portion of 0.2 acres to the 2nd plaintiff, making in total 0.5 acres as the land sold to the 2nd plaintiff. An agreement was drawn which was produced as an exhibit. However, he has been unable to transfer the 0.5 acres to the 2nd plaintiff because of a caution lodged by the 1st defendant. He also testified that the 2nd defendant destroyed his banana plants worth Kshs. 8,000/=. He testified that he wants the caution removed. He also stated that he has made arrangements on how his children are to live on the suit land. He has two wives and he has arranged to have each home have an equal share after giving out the portions that have been sold. He himself wants to retain 2.5 acres for his own use. He stated that apart from the 0.5 acres sold to the 2nd plaintiff, he has also sold 0.6 acres to one arap Songok (not a party to this suit). He testified that if the defendants can agree to that arrangement, he has no problem with them being on the suit land, but if not, then they ought to move out of the suit land. In cross-examination, he testified inter alia that he was under no obligation to involve the defendants when making a decision on how to distribute his land.

4. The 2nd plaintiff on her part testified that she bought 0.5 acres of the suit land. Out of this acreage, she was informed that the 1st defendant donated 0.1 acres, Josiah 0.1 acres, Daniel 0.1 acres, and the 1st plaintiff 0.2 acres. It is the 1st defendant who approached her and asked her to buy the land because he needed school fees and also Josiah's son had a child in hospital and needed money to pay the hospital bill. Daniel on his part wanted to build a house and needed money as well. The three sons of the 1st plaintiff were selling portions that their father (1st plaintiff) would later distribute to them. She paid the money and they went to the Land Control Board only to find that a caution had been lodged by the 1st plaintiff. In cross-examination, she testified that she has paid all the money and was at a loss as to why a caution would be placed by the defendants who themselves had agreed to the transaction.

(b) Evidence of the Defendants

5. The 1st defendant testified that he is 56 years old. He stated that the plaintiff had called the whole family and agreed on how to distribute the land. He stated that a document was drawn, and he produced a document as Defence Exhibit No. 1, which he said is the document in which the 1st plaintiff agreed to distribute land to the defendants in a certain way. He stated that it had been agreed that the 1st plaintiff would give each son and one daughter 1.5 acres each. There are 7 children who were to be given land and the 1st plaintiff was to keep 2 acres for himself. Money was to be donated for sub-division, but they did not have it, and it is the reason that the 1st plaintiff agreed to sell 0.2 acres to the 2nd plaintiff to raise money for sub-division. Of this, they had no problem. He, the 1st defendant, also needed money, and so too his other brothers, Daniel and Josiah. The three brothers therefore agreed to sell their portions of 0.1 acres each to the 2nd plaintiff. An agreement was drawn. He stated that later, the 1st plaintiff changed his mind on the earlier agreed distribution, and it is for that reason that he (the 1st defendant) placed a caution on the land. In cross-examination, DW-1 agreed that the plaintiff never signed the document, D-exhibit No.1, which he said showed the intended distribution by the 1st plaintiff which was agreed to. He did not deny that Lydia, the 2nd plaintiff, had paid the purchase price but complained that she has not paid survey

fees.

6. The 2nd defendant testified as DW-2. He is 41 years old. His evidence was more or less similar to that of DW-1. His complaint again seemed to be that Lydia has not paid survey fees. He denied having destroyed any banana plantation owned by his father. In cross-examination, he stated that he does not agree with the distribution that the 1st plaintiff proposed in his evidence, and insisted, that the arrangement has to be as per D-Exhibit No. 1. He agreed that Lydia has no title because of the caution. He stated that the 1st plaintiff has no right to distribute the land as he wishes.

7. The defendants applied for adjournment to call additional witnesses, which I allowed, but they did not avail any, and neither did they attend court on the day scheduled for further defence hearing. I therefore ordered the defence case closed. No party made any submissions.

C. DECISION

8. It is with the above pleadings and evidence that I need to make a decision in this matter. The case of the 1st plaintiff is simple. He owns the suit land and he has made an arrangement on how his children are to reside on the suit land. He is of the view that he cannot be controlled in how he arranges his children to be on the suit land, and has asked that if his sons cannot agree to his arrangement, then they ought to do the honourable thing, and vacate the land. The position of the defendants on the other hand is that their father must distribute the land according to the wishes of the defendants since they are children of the 1st plaintiff.

9. This case brings out an emerging conflict that is quickly enveloping this country, pitting children (especially sons) against their parents (mostly fathers). The case of the parents invariably is that they own land in their names, and they can do whatever they want with it, since they are the absolute proprietors, or at the very least, their children have to accede to whatever arrangement they have put in place, for the use of the land by the children while they (the parents) are still alive. The children on the other hand, assert that they have equal rights to the land, and go further to attempt to force their parents to distribute the land to them, or to force their parents to have them (the children) use the land according to their (children's) wishes. This conflict has probably been brought about by the scarcity of land given the rising population, coupled with the low levels of education, unemployment, and high poverty levels that have bedeviled this country.

10. What does the law have to say on this conflict ?

11. The starting point has to be the appreciation that the law has given various rights to registered proprietors. The current land regime is that set out in the Land Registration Act, Act No. 3 of 2012, and the Land Act, Act No. 6 of 2012. These two statutes have codified the law that was previously set out in a number of statutes which the Land Registration Act repealed, namely the Land Titles Act (CAP 282), the Registration of Titles Act (CAP 281), the Registered Land Act (CAP 300), The Government Land Act (CAP 280), and the Indian Transfer of Property Act, 1882.

12. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows :-

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

It will be noted that Section 25 does not relieve a proprietor of any duty or obligation to which he is subject to as a trustee.

13. The overriding interests alluded to in Section 25 are set out in Section 28 which provides as follows :-

28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a) spousal rights over matrimonial property;

(b) trusts including customary trusts ;

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(d) natural rights of light, air, water and support;

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law.

14. The defendants in this case have pleaded that their father, the 1st plaintiff, holds the land in trust for them. It will be noted that trusts are among the overriding interests provided for in Section 28 above, and for which a proprietor holds land subject to, as provided in Section 25 above. A trust is essentially a situation in which one person holds property on behalf of, or for the benefit of, another. Trusts are of different types and can be created in a variety of ways (See for example ***Hansbury & Maudsley, Modern Equity, 10 Edition, Chapter 4***). The nature of the trust that the defendants were alluding to was not disclosed by them, either in their statement of defence, nor in evidence. They merely pleaded that the land is ancestral land hence the plaintiff holds it in trust for them and the rest of the family. It is not patently clear from the pleadings whether the defendants were alluding to a customary trust. But assuming that they were, they needed to lead evidence to demonstrate the type of custom that they were relying upon, and if it arose out of customary law, lead evidence of such customary law and how it creates a customary trust.

15. The evidence that was led by the defendants was that the 1st plaintiff had agreed to distribute land in a certain way, which was acceptable to the defendants, but that later the 1st plaintiff changed his mind on how to distribute the said land. It is this change of position that the defendants are not agreeable to and which led to the placement of the caution. There was no evidence led of any customary trust. No evidence was led of any customary law that applies to the parties herein, and which infuses a trust between the

parties. I do not have the necessary evidence to enable me delve into whether a customary trust exists, and if so, the rights given under that custom. If the case of the defendants was one based on a customary trust, then it must fail for want of evidence. Neither was any evidence led to suggest that the land that the 1st plaintiff holds is ancestral land, and I cannot assume that it is, in the absence of evidence.

16. The other question that I need to ask myself is whether there can be said to be in existence a general kind of trust, as between parents and children, which would make parents not deal with any land that they own without first involving their children. As I earlier stated, the parties did not make any submissions and therefore no law was referred to me on this point. On my part, I have not found a specific law that requires parents to consult children when dealing with their property. There could probably be rights under the Children's Act, but the defendants herein are persons aged 56 years and 41 years respectively and cannot benefit from the said statute. I have looked at the Land Registration Act and the Land Act, and I have not seen any provision stating that parents hold land in a general trust for their children. What I have come across is rights of spouses over land which are indeed one of the specified overriding interests in Section 28 (a) of the Land Registration Act. A spouse also needs to be consulted when the other spouse undertakes a disposition of land, a right donated by Section 93 of the Land Registration Act. I have not seen anything in the law to suggest that all the property that parents hold is held in trust for their children. If they do, then such trust must be proved through evidence, and every case must be considered on its merits depending on its own peculiar facts.

17. In the instance of this case, I am afraid that no evidence has been led to suggest that the 1st plaintiff holds the land on behalf of the defendants and that therefore, the defendants must be consulted before the 1st plaintiff deals with the land. Without there being any proven trust, or any other overriding interest in favour of the defendants, how the 1st defendant decides to arrange the affairs of his home must be left to his discretion as absolute proprietor of the suit land. The defendants cannot be heard to complain that their father is not allowing them to use the land as they (the defendants) wish.

18. It was stated by the defendants that they had an agreement with their father, where their father bound himself to distribute the land in a certain way. No such agreement was displayed. What was produced as Defence exhibit 1 was not an agreement. It is merely a complaint signed by the defendants, and three other persons, through which they have vented their frustrations on how the 1st plaintiff is dealing with the suit land. I have not seen anything that binds the 1st plaintiff to distribute land to the defendants in a certain way.

19. A case whose facts are not far from those in this suit is that of ***Marigi v Muriuki & 2 Others (2008) 1 KLR 1073***. This was a suit by sons and grandsons to the appellant, who wanted the appellant to distribute his land in a certain way. The Court of Appeal held that since the appellant as owner of the property was still alive, there was no law upon which he could be compelled to distribute his property. The court of appeal held that his property was not yet available for sub-division and distribution among his wives and children, except if he personally on his own free will, decided to sub-divide and distribute it. He could not be urged, directed or ordered to do it against his own will. The rights of the respondents to the property could only accrue after the death of the proprietor.

20. A not too dissimilar conclusion was also reached in the case of ***Jacinta Wanjiku Kamau v Isaac Kamau Mungai & Another, Court of Appeal at Nairobi, Civil Appeal No. 59 of 2001 (2006) eKLR***. This was a case brought by a wife against her husband in which she pleaded inter alia that the husband could not sell the suit land as it was held in trust for herself and their children. The case was dismissed by the High Court and the court of appeal affirmed this decision.

21. I am guided by the above decisions and I also hold, that barring any clear evidence of a trust, there is no law which compels a proprietor to deal with his land subject to the whims and wishes of his children.

22. The 1st plaintiff has indeed been very gracious to the defendants. He has been very fair to them in my view. He has donated and allowed the defendants a licence to use the suit land while he is still alive. He has even granted them permission to sell some of the portions that he has donated to them. That is how some land was sold to the 2nd plaintiff. Instead of the defendants being happy with the grace accorded to

them by their father, they have instead antagonized him and have tried to arm-twist him to give them more land to use. The registering of the caution is one such act. I see no reason why the caution should remain on the land as it was not placed to protect any sustainable claim over the suit land. I order the same to be removed.

23. The 1st plaintiff also sought orders to have the defendants evicted and restrained from the land if they cannot live on it according to his arrangements. I do not see any reason to deny him this order. As I earlier stated, the 1st plaintiff has discretion on how to arrange his family affairs, including the discretion on how he wants his children to occupy the suit land while he is still alive. If the defendants are not happy with this arrangement, and are not happy to occupy the portion freely donated by their father, then they graciously should move out of the land and let their father have peaceful possession of it. I therefore allow the 1st plaintiff the order of eviction and permanent injunction unless the defendants live on the land as arranged by the 1st plaintiff.

24. The only claim in which I feel there has not been sufficient evidence is the suit against the 2nd defendant for damage to the 1st plaintiff's banana plantation. Apart from merely stating that the 2nd defendant damaged his crop, no other evidence was tabled. In the face of the denial by the 2nd defendant, this claim has not been proved on a balance of probabilities. I cannot therefore order the 2nd defendant to pay the claimed sum of Kshs. 8,000/= as damages.

25. Apart from this latter order, the plaintiffs have succeeded in the suit. The last issue I need to deal with is costs. Costs are in the discretion of the court. I would probably not have given costs to the plaintiffs given their relationship with the defendants. But even in the course of this suit, the plaintiffs went out of their way to make proposals on a settlement, which the defendants spurned. I have no sympathy for the defendants and award costs to the plaintiffs.

26. Before I close, I feel compelled to offer some advice to the defendants, that they should work hard and get land of their own, which they can then deal with as they wish. As to the subject land, they have not demonstrated any right over it.

27. From the foregoing, I make the following final orders :-

(a) . That from the evidence it has not been proved that the 1st plaintiff holds the suit land in trust for the defendants.

(b) . That the caution placed in the register of the suit land be removed forthwith and the Lands Registrar in custody of the register of the land parcel Nandi/Kamobo/4258 do proceed to remove the said caution upon service of this order.

(c) . That subject to the consent of the Land Control Board and any other written law, 0.5 acres of the land parcel Nandi/Kamobo/4258 be transferred to the 2nd plaintiff and she be allowed exclusive use and possession of the same.

(d) . That the defendants do vacate the suit land within 60 days from the date hereof, and be permanently restrained from being on the suit land, unless they are allowed by the 1st plaintiff to be on the said land.

(e) . That if the 1st plaintiff allows the defendants to be on the land, then the defendants can only restrict themselves to the portions that the 1st plaintiff has permitted them to occupy and can only use the land subject to the discretion of the 1st plaintiff.

(f) . The claim for damages for the sum of Kshs. 8,000/= for destruction of a banana plantation is dismissed for want of evidence.

(g) The defendants will bear the costs of this suit.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF SEPTEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Mr. A.T. Kiboi for the plaintiffs.

Defendants acting in person - Absent