



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 62 OF 2012

JINARO MAMO MUGAMBI PLAINTIFF

VERSUS

JOSPHAT KAHURE NDUNG’U DEFENDANT

JUDGMENT

By his plaint filed herein on 26th October, 2009, the plaintiff sought the following orders against the defendant:-

- a. ***A declaration that the defendant holds 4 acres of L.R No. NGARIAMA/LOWER NGARIAMA/1014 in trust for the plaintiff***
- b. ***Transfer of the 4 acres of L.R No. NGARIAMA/LOWER NGARIAMA/1014 to the plaintiff***
- c. ***General damages for breach of trust***
- d. ***Costs of the suit with interest on (a) (b) and (c) above at Court’s rates.***

From the plaintiff’s pleadings, it is his case that on 9th November 2005, he entered into an agreement of sale of land No. NGARIAMA/LOWER NGARIAMA/1014 with one Edward Njagi Muriithi for which the plaintiff paid the vendor a sum of Ksh. 1.2 million by way of exchange with the plaintiff’s Toyota Matatu vehicle No. KAS 814 V leaving a balance of Ksh. 2.1 million which was to be paid upon obtaining consent to transfer. The plaintiff adds that he invited the defendant to pay the remaining balance of Ksh. 2.1 million so that the two hold the 11 acres in the ratio 4:7 which the defendant accepted and gave the plaintiff the said sum so as to clear payment of the purchase price. The plaintiff avers in paragraph 5 of the plaint that the whole of L.R No. NGARIAMA/LOWER NGARIAMA/1014 (hereinafter referred to as the suit land) was transferred to the plaintiff on 23rd November, 2005 and the plaintiff held 7 acres in trust for the defendant although the said trust was never registered since the entire transaction was based on mutual understanding and trust. The defendant then secured a purchaser for the whole land at Ksh. 4,950,000/= and since the purchaser could only transact with the defendant, the plaintiff and defendant agreed to transfer the whole of the suit land to the defendant to pave way for such transfer but soon thereafter, the defendant turned hostile and un-cooperative forcing the plaintiff to lodge a caution on the title and also file Civil Suit No. 77 of 2007 at the High Court in Nyeri seeking transfer of 4 acres to him. It is therefore the plaintiff’s case that the defendant holds 4 acres out of the suit land in trust for him hence this suit.

In his defence, the defendant denied that there is any relationship of trust between him and the plaintiff adding that he purchased the whole of the suit land from the plaintiff which was transferred to him upon payment of Ksh. 2.1 million and the plaintiff’s case is therefore frivolous, vexatious and an afterthought which should be dismissed with costs.

The plaintiff testified and called two witnesses namely DUNCAN OKWARO MUYODI (PW2) and JULIUS THEURI KINGORI (PW3) – both advocates of the High Court of Kenya as witnesses. The defendant has no other witnesses apart from himself.

Both Mr. Kiama and Mr. Muchiri wa Gachoni advocates for the plaintiff and defendant respectively made written submissions at the end of the trial.

I have considered the evidence by both sides together with the exhibits and the submissions by counsels.

The issues which are to be determined by this Court as agreed and framed by the parties are as follows:-

1. ***Was L.R No. NGARIAMA/LOWER NGARIAMA/1014 purchased by the plaintiff and the defendant in the ratio of 4 acres to 7 acres***
2. ***Was the plaintiff registered as proprietor of the said land on 24th November 2005 to hold it in trust for himself and the defendant in the ratio 4:7***
3. ***Was the transfer of the entire suit land from the plaintiff to the defendant shift the trust from the plaintiff to the defendant shift the trust from the plaintiff to the defendant with the defendant holding 4 acres of the suit land in trust***
4. ***for the plaintiff***
5. ***Did the defendant buy out the suit land absolutely from the plaintiff at Ksh. 2.1 million***
6. ***Should the trust, if any, be determined***
7. ***Who should bear the costs of the suit***

It is clear from the certificate of search (Plaintiff's Exhibit 3) that the suit land is registered in the names of the defendant since 2nd February 2006 although the plaintiff registered a caution in his favour on 22nd August, 2007 claiming a purchaser's interest. The suit land was originally registered in the plaintiff's names and a title issued to him on 24th November, 2005. Plaintiff testified that although the whole land was 11 acres, he only bought 4 acres and was given the option of buying the remaining 7 acres and so by an oral agreement, he transferred the whole 11 acres to the defendant. He said he bought the land from one Edward Muriithi, and produced the sale agreement (Plaintiff's Exhibit 1) and that the defendant was to transfer the 4 acres to him. However, the defendant has refused to do so. Looking at the agreements produced herein by the plaintiff in support of his case, they do not seem to support his claim that the defendant holds 4 acres out of the suit land in trust for him. It was for the plaintiff to prove the existence of a trust on the part of the defendant in relation to 4 acres of the suit land. In **MWANGI MBOTHU and OTHERS VS GACHIRA WAITIMU and OTHERS, C.A. CIVIL APPEAL No. 22 of 1984 (NAIROBI)**, the Court of Appeal held as follows:-

“The law never implies, the Court never presumes a trust but in cases of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”

In an attempt to prove the existence of the trust, the plaintiff produced several agreements as follows:-

1. ***Agreement dated 9th November, 2005. This agreement (Exhibit 1) is between the plaintiff and one Edward Njagi Muriithi over the purchase of the suit land. It has nothing to do with the defendant***
2. ***Agreement dated 3rd January, 2006 (Exhibit 4). This is also between the plaintiff and Edward Muriithi over the suit land and is a further agreement to Exhibit 1.***
3. ***Agreement dated 3rd January, 2006 between the defendant and Edward Mureithi – Exhibit 5.***

This agreement relates to the motor vehicle No. KAU 996 C which the defendant was selling to the said Edward Mureithi. It does not relate to the suit land nor mention the plaintiff

4. *Lastly, there is the agreement dated 9th February, 2006 between the plaintiff and Edward Muriithi which simply states that the agreement dated 3rd January, 2006 has now been concluded.*

The above agreements cannot be the basis upon which any trust can even be implied. It is also instructive to note that the Edward Mureithi or Muriithi being referred to in some of these agreements was never called as a witness to shed light on whether in fact there was any relationship between the suit land and the vehicle. The law requires that the plaintiff leads evidence to prove the existence of a trust because whether or not a trust exists is a matter of evidence. Documents ordinarily speak for themselves and it is not the duty of the Court to make a contract for the parties nor can it aid a party who has got himself into a bad deal. The Courts can only interpret an agreement to find out what the intention of the parties was when they signed the same. Looking at these agreements, there is nothing in them to suggest that the defendant was at any time a trustee of the plaintiff over the suit land or any part thereof.

As matters stand now, the defendant is the registered proprietor of the suit land and there is no evidence to suggest that the said registration was obtained through fraudulent means. Indeed, there is no pleadings to that effect and a previous suit in Nyeri being High Court Civil Case No. 77 of 2007 in which a claim of fraud or mis-representation was alleged appears not to have gone far. And on the issue of trust, there is no evidence, direct or otherwise, on which this Court can conclude that the defendant holds 4 acres of the suit land in trust for the plaintiff. That allegation has not been proved as required in law. I would therefore answer all the issues framed for my determination herein in favour of the defendant.

Ultimately therefore, the plaintiff's suit against the defendant is dismissed with costs.

B.N. OLAO

JUDGE

18TH DECEMBER, 2014

18/12/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Ndegwa for Muchiri for Defendant – present

Mr. Wainaina for Kinyua for Plaintiff – present

COURT: judgment delivered this 18th day of December, 2014 in open Court.

Mr. Ndegwa for Mr. Muchiri for Defendant present

Mr. Wainaina for Mr. Kinyua for Plaintiff present.

Right of appeal explained.

B.N. OLAO

JUDGE

18TH DECEMBER, 2014