



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED. J.J.A)

CIVIL APPEAL NO. 88 OF 2016

BETWEEN

TALALEI KIPTENAI.....APPELLANT

VERSUS

TERESA CHEBICHI RUTOO (Administratrix of the

Estate of the ERNEST KIMAIYO).....RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court

at Eldoret, (A. Obwayo, J.) dated 28th December, 2015

in

ELDORET E&LC CASE NO. 515 OF2013)

JUDGMENT OF THE COURT

[1] This is an appeal from the Judgment of the Environment & Land Court (Obwayo, J) in which the respondent's claim of 36 acres from land title **No. Eldoret Municipality/Block 21 (King'ong'o)** (suit land) registered in the name of the appellant was allowed. In addition, that court granted a permanent injunction restraining the appellant from encroaching on or dealing with the 36 acres and decreed that the register in respect of the suit land and the resultant parcels nos. 2382 – 2466 be cancelled.

[2] On 15th November, 2013, the respondent filed a suit as an administratrix of the estate of **Ernest Kimaiyo** (deceased) in which she averred, *inter alia*, that she and her sister **Tecla Cheronno Rutto** and her brother **Philip Kiptoo Maiyo** are the beneficiaries of 28 acres of the suit land measuring 72 acres being the portion legally owned by the deceased; that **Zipporah Tapletgoi (Zipporah)**, the mother of the deceased also owned 20 acres out of the suit land; that after **Zipporah** died in 1991 the appellant fraudulently registered the suit land in his sole name; that the respondent and her siblings have used and occupied the suit land quietly and without interruption for 38 years; that the appellant has threatened to evict the respondents and her siblings from the land; and that the appellant had secretly transferred part of the suit land to third parties.

The respondent gave particulars of fraud thus;

“a) Illegally transferring the suit properties to himself in the full knowledge of the 38 acres thereof belongs to the plaintiff and her siblings.(sic)

b) Unlawfully and illegally transferring portions of the suit land to third parties...

c) Misrepresenting himself as the sole owner of the whole parcel measuring approximately 72 acres while knowing that position to be untrue.

d) Fraudulently acquiring title documents without following the legally laid down procedure.

e) **Failing to heed to plaintiff's sentiments that part of the suit parcel belong to the plaintiff and her siblings.**

f) **Secretly transferring part of the said parcel without consent of the plaintiff and her siblings knowing very well that they are entitled thereto."**

[3] The appellant in his Defence denied the respondent's claim and asserted that he is the sole registered proprietor of the suit land; that neither his deceased brother **Ernest Kimaiyo** nor the appellant contributed any monies towards the purchase of the parcel, that the family land is situated elsewhere and that after the demise of **Ernest Kimaiyo**, he as an act of good faith brought up the respondent and her siblings in his own land.

[4] The respondent gave evidence at the trial and called five witnesses namely **Susan Maiyo, Sammy Kimutai Tenai, Ng'ang'a Njuguna, Ezekiel Kiplagat** and **Phillemon Birech Kibitok**. The appellant also gave evidence and called three witnesses **Kibor Arap Sang, Barnaba Chirchir Mutai** and **James Kirwa Sambu**.

[5] Upon analysing the evidence the trial Judge made findings of fact which we paraphrase as follows:

(i) The respondent's father, (**Ernest Kimaiyo**); mother (**Susan Maiyo**); grandmother (**Zipporah**) moved from Cherunya farm to the suit land sometimes before 1975 where they have lived todate.

(ii) Ernest Kimaiyo also lived on the suit land before he died but could not be buried on the suit land due to the fact that it is situated within municipality.

(iii) None of the parties produced a share certificate.

(iv) The register of farm owners prepared in 1992 and 1993 was prepared without considering the family of **Ernest Kimaiyo** despite the fact that the wife was residing on the parcel of land with her children.

(v) In the absence of share certificates and receipts and considering the fact that the two families resided on the land harmoniously until the appellant obtained title in his name, the logical conclusion is that the suit land was acquired by the families of **Ernest Kimaiyo** and the appellant.

(vi) The registration of the appellant as to absolute proprietor with full knowledge that the respondents' family had an interest in the land was fraudulent and designed to disinherit the family of **Ernest Kimaiyo** of its entitlement.

(vii) The respondent was entitled to one half share as she has proved that there existed an implied trust in the suit land since the appellant was registered as owner as the eldest son of the great family of **Kiptenai Tanui**.

[6] The appellant states in the memorandum of appeal, that the learned Judge erred in fact and in law in holding that the appellant held the land in trust; in holding that the principle of trust had been established; in misdirecting himself that the suit land was family land in the absence of evidence; in failing to consider that no share certificate had been produced by the respondents; in failing to consider that there was no proof of payment by **Ernest Kimaiyo**, and, in failing to consider the weight of evidence adduced by the appellant.

[7] The evidence of **Sammy Kimutai Tenai (Sammy)** as disclosed in his statement and oral evidence, was briefly thus, the appellant; **Ernest Kimaiyo** and himself are sons of **Kiptenai Tanui** who was a proprietor of a parcel of land at Sarura. The said Kiptenai Tanui had two wives – **Zipporah**, first wife and **Anna Cheptanui**, - second wife who is the mother of **Sammy**. **Zipporah** is the mother of the appellant and Ernest Kimaiyo. The whole family was living as squatters at Cherunya farm in Kapcherunya. Thereafter, **Kiptenai Tanui** bought a 20 acre parcel of land at Sarura where he settled Sammy's mother in about 1970. His father, **Ernest Kimaiyo** and the appellant contributed money to buy the suit land and have lived there since 1970.

[8] According to him, the family of **Ernest Kimaiyo** never lived at Sarura land which was transferred to him before his father died. Susan the widow of **Ernest Kimaiyo** and the mother of the appellant stated in her oral evidence that the family was living at Cherunya farm as squatters before **Zipporah** took them to King'ong'o farm and showed her the land which belonged to the family.

[9] The appellant admitted in his evidence that the family was living at Cherunya farm as squatters before moving to the suit land. He admitted, in particular, that his mother **Zipporah**, his brother **Ernest Kimaiyo, Susan** and himself were living at Cherunya farm.

[10] The appellant also admitted that Sarura land was occupied by his father's second wife and that after his father died in 1991 he did not object to Sarura land being registered in the name of Sammy.

[11] The appellant however claimed that he bought the suit land using his own money without any contribution from his father, **Ernest Kimaiyo** and **Susan** but later allowed them to settle in the suit land.

[12] The following evidence was undisputed; that King'ong'o farm on which the suit land is situated was bought by about 62 members of Kapking'ong'o Farmers Society from a white settler through Settlement Land Trustees. The members bought shares from the society and were later allocated land according to the number of shares each member had bought. The land was surveyed in about 1988; land allocated in about 1992 and Title Deeds issued to the members. The appellant was registered as proprietor of the suit land on 9th December, 1992. The register of the members of the society produced at the trial indicates that the appellant was a member of the society. It does not bear the name of the appellant's father, Zipporah, Ernest Kimaiyo or Susan.

[13] We have considered the grounds of appeal, relating to the evidence of the respondent and her witnesses and the submissions of Mr Aseso, learned counsel for the appellant. It is true that the respondent did not produce documentary evidence to prove that Ernest Kimaiyo, his father or Zipporah contributed money to Kapking'ong'o Sacco Society for a purchase of a share in the society. In particular, the respondent did not produce any receipts or share certificate as evidence of payment and membership of the society.

Indeed the respondent relied on what she was told. Susan was told about the contributions by Zipporah. The rest of her witnesses admitted that they did not know how that land was purchased. Zipporah was deceased at the time of the trial. Susan testified that the directors of the society had died except one who was not called as a witness.

Similarly, the appellant did not tender any documents to prove that he contributed money towards the purchase of a share and how much he paid.

However, upon consideration of the evidence the trial Judge believed the evidence of Susan and Sammy Kitenai Tanui, Ernest Kimaiyo and Zipporah that the appellant each contributed money for the purchase of the suit land. It is evident that the matriarch Zipporah was in charge of the land. She is the one who settled Susan, Susan's husband, Ernest Kimaiyo and Susan's children on the land. The appellant admitted that it is Zipporah who caused Kimaiyo and his family to be settled on the disputed land. Zipporah constructed a house for Susan on the land.

Ng'ang'a Njuguna and **Ezekiel Kiplagat** all who are neighbours of the appellant testified that the suit land is a family land. Both testified that they attended a meeting of family members and the directors of the society which was called by Assistant Chief Koech in 1983 at the direction of the District Commissioner. During the meeting, the directors confirmed that **Ernest Kimaiyo** had a share of the land, and the appellant agreed to support Ernest Kimaiyo's children and surrender their share of the land after they had finished school. Susan also attended the meeting. The appellant admitted that he has been supporting the children of **Ernest Kimaiyo**.

There was evidence that other meetings were held in 2013 and 2014. When **Philemon Birech Kibitok**, Assistant Chief arbitrated in a dispute reported to him by the appellant on 14th June, 2013, it emerged that the issue was a long standing family land dispute. In that meeting, the children of **Ernest Kimaiyo** complained that the appellant had refused to surrender to them their father's share of the land.

There was evidence from the respondent that after the death of **Ernest Kimaiyo**, the appellant inherited Susan and begot three children with her. The appellant denied that he inherited Susan and said that all the five children belong to Susan. It is evident however, that Susan had only three children when her husband died. The appellant did not specifically deny siring the three children with Susan. This evidence shows that the family was very close until the land dispute arose.

[14] By section 119 of the Evidence Act, a court may presume the existence of any fact which it thinks likely to have happened, having regard, *inter alia*, to human conduct. Having regard to the totality of the evidence including how the members of the family were living at Cherunya farm, their movement to King'ong'o farm, and their settlement thereon; the fact that the appellant all along supported the children of **Ernest Kimaiyo**, the long and peaceful occupation of the land by Ernest Kimaiyo's family; the fact that appellant offered to surrender five (5) acres to the family of **Ernest Kimaiyo** and the long outstanding land dispute since about 1983, the learned judge was correct in finding that the disputed land was acquired by the families of **Ernest Kimaiyo** and the appellant respectively.

[15] The learned judge made a finding that there existed an implied trust as the appellant was registered as an owner as the eldest son of the great family and that the family of Ernest Kimaiyo was entitled to one half of the share of the land.

A trust results to a person who contributes the purchase price to the extent of contribution. By allocating half share of the land to the family of Ernest Kimaiyo and half share to the appellant, the learned judge presumed that each family contributed equally to the purchase of the land. The evidence of the appellant was that he paid Kshs.3,000/= and was allocated 50 acres; that in addition he bought more land from Arap Rotich and was supposed to be allocated 100 acres but was allocated 72 acres. His witness **Kibor Arap Sang** supported his evidence that he bought 22 acres from Arap Rotich.

According to the evidence of **Barnaba Chirchir Mutai** who testified on behalf of the appellant, every member bought one share of 50 acres each. This witness was a member of the society. He further testified that the appellant bought one share of 50 acres and later bought land from Rotich.

The minutes of the meeting of the society dated 12th January, 1992, produced at the trial, show that some members had bought land from the original members. The respondent's claim in the plaint was for 28 acres being the share of her father, Ernest Kimaiyo. She also claimed an additional 10 acres being half share of the 20 acres belonging to Zipporah. Both the respondent and Susan stated in their oral evidence that the share of Ernest Kimaiyo was 28 acres.

There was no evidence that the land is sub-divided on the ground although Susan testified that everybody uses 8 acres.

In the absence of any evidence or finding by the learned judge that Zipporah paid for 20 acres and in view of the uncontroverted evidence that the appellant bought a share from Arap Rotich, the finding that the appellant held half share of the suit land in trust for the respondent was erroneous. We find that although the judge was correct in invoking the doctrine of implied/resulting trust in the circumstances of the case the learned judge should have held that the appellant held only 28 acres being the share of **Ernest Kimaiyo** in trust for the respondent and her siblings. We so hold. Furthermore the allocation of 28 acres and not 36 acres to the family of Ernest Kimaiyo is justified by the fact that the appellant has for many years, catered for the maintenance and education of the children of Ernest Kimaiyo.

[16] No issue has been raised either by the appellant or the respondent about the ownership of sub-divisions Nos. 2382 – 2466 resulting from subdivision of the suit land.

[17] The trial judge did not give costs of the suit on the ground that the dispute was a family dispute. Similarly, and for the same reason, we do not find it appropriate to award costs.

[18] For the foregoing reason the appeal is dismissed save for the finding that the suit land should be shared equally. Accordingly, that part of the judgment declaring that the appellant holds half share (36 acres) of the suit land in trust for the respondent and her siblings is set aside and substituted with a declaration that the appellant holds twenty eight acres (28) in original land title No. Eldoret Municipality Block 21 (King'ong'o) and the resultant sub-divisions Nos 2382-2466 in trust for the respondent and her siblings.

There shall be no order as to costs.

DATED and delivered at Eldoret this 7th day of March, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR