



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. E4 OF 2020

PAUL WAIGANJO MWANGI.....APPELLANT

-VERSUS-

MAINGI KAROCHA.....RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable M. N. Munyendo, SRM, delivered on 5th November, 2020 in Othaya MELC Case No. 21 of 2019.

2. By his Complaint dated 5th August, 2019 as filed in the subordinate court on the same day, Paul Waiganjo Mwangi (*the Appellant herein*) had sought Judgment against Maingi Karocha (*the Respondent*) for orders framed as follows:

(a) *An order compelling the (Respondent) to co-operate with the (Appellant) by filing the transfer instrument with the Lands Office necessary for the transfer of title of the parcel of land known as Mahiga/Kamoko/1409;*

(b) *A permanent injunction against the (Respondent) by himself, his agents, representatives, employees, servants and/or any other persons claiming through him from interfering with the (Appellant) quiet enjoyment of the parcel of land known as Mahiga/Kamoko/1409;*

(c) *General damages;*

(d) *An order as to costs of the suit;*

(e) *Any other relief that this Honourable Court will deem fit and just to grant.*

3. Having heard the dispute and in her said Judgment delivered on 5th November, 2020, the Learned Trial Magistrate partly allowed the suit and ordered that the Appellant and one Johnson Waititu Mwangi be jointly registered as the proprietors of the said LR No. Mahiga/Kamoko/1409. The court further directed the Respondent to co-operate with the two by filing and executing the necessary documents and attending the Land Control Board.

4. Aggrieved by the said decision, the Appellant moved to this court urging that the Judgment be set aside and that he be granted orders he had sought in the Magistrates court. In his Memorandum of Appeal dated 27th May, 2021, the Appellants lists some four (4) grounds of appeal and states in the main that:

1. *The Learned Trial Magistrate erred in law and in fact in delivering a Judgment that was against the weight of Judgement (sic).*

2. *The Learned Trial Magistrate erred in law and in fact in failing to note that the Respondent had transferred land parcel number Mahiga/Kamoko/1409 as a gift to the Appellant in the Land Board Meeting that was held on 13th October, 2010.*

3. *The Learned Trial Magistrate erred in law and in fact in failing to note that during the Board meeting the issue of the Respondent holding the land in trust for both his brother and the Appellant did not arise as his brother Johnson Waititu Mwangi had his own 1.62 Ha or 4 Acres bought from their mother's savings. The Appellant was to remain with Mahiga/Kamoko/1409 which was 0.14 Ha or 0.3 Acres which was too small to be utilized by both of them; and*

4. *The Learned Trial Magistrate erred in law and in fact in failing to note that the Respondent was economical with the truth when*

he stated that he could not trace the Appellant's brother during the Board meeting. Failure of the brother to appear at the land Board meeting was because he knew that the portion of land was to be transferred to the Appellant by the Respondent.

5. As the first appellate Court, this Court's role is to subject the whole evidence to a fresh and exhaustive scrutiny and to make my own conclusions about it bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. As was stated in **Selle & Another -vs- Associated Motor Boat Company Limited & Others (1968) EA 123:**

“... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to evaluate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally ...”

6. Taking those principles into account, this Court must then turn its attention to the facts and evidence that was placed before the Learned Trial Magistrate in the course of the trial. As noted hereinabove, the Appellant as the Plaintiff in the lower court had sought an order compelling the Respondent as the Defendant in that case to co-operate with him by filing necessary documents to enable the transfer of the parcel of land known as Mahiga/Kamoko/1409 to the Appellant.

7. In addition, the Appellant sought an order of a permanent injunction to restrain the Respondent, his agents and/or servants from interfering with the Appellant's quiet enjoyment of the said property. The Appellant further sought to be awarded general damages and costs of the suit.

8. The basis for those prayers was the Appellant's contention that the suit land originally belonged to one Mwangi Githinji and that the same was a sub-division of Mahiga/Kamoko/409. Despite the sub-division and the resulting parcel being issued to the Appellant on 13th October 2010, the Respondent had declined to facilitate the transfer by filing the necessary documents at the Lands Office.

9. In his statement of Defence dated and filed on 23rd September, 2019, the Respondent denied that the original parcel belonged to Mwangi Githinji as stated by the Appellant. Instead the Respondent

asserted that both the original parcel No. Mahiga/Kamoko/409 and the resulting sub-division were registered in his own name. In addition, the Respondent asserted that one Johnson Waititu Mwangi who is said to be brother of the Appellant was also entitled to a portion of the suit property since both were the sons of the Respondent's sister one Gladys Wamucii Mwangi (*now deceased*).

10. The Respondent further asserted that he has refused to avail the documents of transfer since the Appellant had refused to include the name of his brother as a beneficiary before the Land Control Board and that if the Appellant agrees to the inclusion of his brother Johnson Waititu Mwangi as a beneficiary, he would have no objection to the transfer.

11. From the material placed before me, the dispute between the parties appears to have been fairly straightforward. The Appellant wants the Respondent who is his uncle to facilitate the transfer of the suit property solely to his name. On his part, the Respondent does not himself lay any claim to the land. It is however his case that he has been holding the suit property in trust for the Appellant and his brother Johnson Waititu Mwangi. It is the Respondent's contention that the Appellant wants to disinherit his brother and hence his refusal to have the land transferred solely in the name of the Appellant.

12. A review of the material evidence placed before the trial Court reveals that the suit property – LR No. Mahiga/Kamoko/1409 is a sub-division of LR No. Mahiga/Kamoko/409. The original parcel of land was on 2nd December, 1957 registered in the name of Muhota Rukirage who was the father to the Respondent and a grandfather to the Appellant. When the said Muhota Rukirage passed away, LR No. Mahiga/Kamoko/409 was registered in the name of the Respondent who told the Court that he held the same in trust for himself and his unmarried sister Gladys Wamucii Mwangi.

13. As fate would have it, the said Gladys Wamucii Mwangi passed away on 15th February, 2002 leaving behind two sons –Johnson Waititu Mwangi and the Appellant herein. Apparently Johnson who is the eldest son left their home and went to work elsewhere. In October, 2009 in Johnson's absence, the Respondent sought to have the said LR No. Mahiga/Kamoko/409 sub-divided. The sub-division yielded LR No. Mahiga/Kamoko/1408 which is now owned by the Respondent and the suit property – LR No. Mahiga/Kamoko/1409 which the Appellant now claims.

14. According to the Respondent, prior to the sub-division, they had agreed with the Appellant that the suit property be transferred to the Appellant who would hold a half share of the land in trust for his brother Johnson whose whereabouts were then unknown. It is the Respondent's case that he later learnt after hearing from other people that the Appellant had vowed not to transfer the half-share to his brother and hence his refusal to transfer the suit property which is presently in his name to the Appellant.

15. The Respondent's fears were indeed confirmed when the Appellant filed this suit. According to the Appellant, his elder brother has no share in the suit property for two reasons. Firstly, it was the Appellant's case that they had agreed with his brother that he would take all the savings that their late mother had left from her business. According to the Appellant, the brother Johnson indeed took the savings and bought land in Ngarua. Secondly, the Appellant told the Court they had agreed with his brother that he would take the balance of the contributions made for their mother's funeral and that he would use the same to develop the land he had bought in Ngarua.

16. As the trial Court rightly found however, there was no evidence of any such agreements having been entered into by the two brothers. It was in fact telling that the Appellant did not even indicate how much savings their mother left behind and the amount of contributions made

at her funeral which could enable his brother Johnson to acquire and develop the said piece of land he is said to have acquired in Ngarua.

17. While it was true that the brother had acquired LR No. Sipili/Donyoloip Block 1/4435 (*Laikipia*), the said brother testified in Court as DW2 and indicated that he acquired the piece of land in 1983 long before their mother passed away. The Respondent and other witnesses denied the existence of any such agreements alluded to by the Appellant and it was incumbent upon the Appellant to produce evidence in support of his contention.

18. It was otherwise clear to me that the suit property was ancestral land to which both the Appellant and his brother were entitled to inherit. The Respondent being the good uncle had played his role in ensuring that the sister's children had their fair share of inheritance and the suit filed against him was totally misconceived, unnecessary and a clear act of ingratitude on the Appellant's part.

19. The upshot is that I did not find any conceivable reason to disturb the Learned Trial Magistrate's findings. This Appeal is accordingly dismissed with costs to the Respondent.

Judgment dated, signed and delivered in open court at Nyeri this 27th day of January, 2022.

In the presence of:

Mr. Paul Waiganjo Mwangi – Applicant present in person

Mr. Maingi Karocha – the Respondent present in person

Court assistant - Mugambi

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J. O. Olola

JUDGE