



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 465 OF 2014

(Formerly Nyeri HCC NO. 47 of 2011)

STEPHEN WAHOME MUCHIRI.....PLAINTIFF

-VERSUS-

IREGI GICHOHI alias NGACHA MACHARIA.....DEFENDANT

JUDGMENT

Introduction

1. The plaintiff herein, Stephen Wahome Muchiri, brought the suit herein seeking judgment against the defendant, Iregi Gichohi alia Ngacha Macharia, for a declaration that the defendant holds the parcel of land known as Konyu/Gachuku/817 ("**the suit property**") in trust for the family of Hunja Macharia alias Muchiri Macharia (deceased). The plaintiff also wants the said trust, if established to be terminated and the defendant ordered to transfer the suit property to him as the administrator of the estate of the deceased.
2. It is the plaintiff's case, that the suit property was purchased by the deceased (his father) through the defendant (his uncle).
3. The plaintiff alleges that the defendant fraudulently got himself registered as the proprietor of the suit property. In this regard, he claims that the defendant took advantage of the deceased who was ailing and illiterate to transfer to himself the suit property as opposed to the deceased.
4. The plaintiff told the court that the defendant had been engaged by the deceased to assist in transferring the suit property to him. Instead of transferring the suit property to the deceased, the defendant transferred to the deceased the family land to wit, Konyu Gachuku/835, as opposed to the suit property.
5. The plaintiff informed the court that the family of the deceased took possession and began utilising the suit property immediately after it was bought (early 1960).
6. According to the plaintiff, the defendant only began claiming ownership of the suit property in 2008 (long after their father had passed on).
7. Through his statement of defence and counter-claim, the defendant denies all the allegations levelled against him and contends that he acquired the suit property for his own use and not as an agent or trustee for his brother (the deceased person herein).

8. He admits that the family of the deceased has been in use and occupation of the suit property since it was bought but explains that he is the one who allowed them to take possession and use the suit property because they had nowhere to settle (build).

9. Maintaining that he purchased the land not as an agent or trustee of the deceased, he contends that the licence he had given the deceased and his family to occupy and use the land has expired.

10. The defendant urges the court to dismiss the plaintiff's claim against him and order that the plaintiff and his family be evicted from the suit property. He also prays that he be awarded the costs of the suit and the Counter-claim.

EVIDENCE

The plaintiff's case

11. When the matter came up for hearing, the Plaintiff (P.W.1) told the court that the suit property was bought by his father through the defendant for Kshs. 1220/-. To prove their entitlement to the suit property the plaintiff led evidence which shows that:-

a) after the property was bought they took possession and began utilising it. For instance,

(i) They settled therein in 1968 and planted Macadamia and coffee trees;

(ii) They built permanent and semi permanent houses in the suit property without objection from the defendant;

(iii) They have buried a number of their relatives on the suit property without any objection from the defendant;

b) The defendant never lived in the suit property but in a parcel of land given by their aunt until he bought his own parcel of land in 1980's;

c) that the defendant has never effected any development in the suit property;

12. The plaintiff maintained that the defendant took advantage of their father to transfer the suit property to his name as opposed to that of his father.

13. In support of his claim, the plaintiff produced the following documents:-certificate of search in respect of the suit property, agreement and the translated version in respect thereof, a receipt for land consolidation as **Pexbt 1, 2(a), 2(b) and 3** respectively.

14. Upon being cross examined by counsel for the defendant, the plaintiff, admitted that he was not there when the documents he relied on were made. He stated that his testimony is pegged on what his father told him.

15. As to why the agreement was not signed by the parties thereto, he explained that the agreement was not signed because the parties thereto were illiterate.

16. Concerning reference to parcel number 274 as opposed to 817, he maintained that the documents relate to the suit property and stated that it is the defendant who can explain the appearance of number 274 in the documents he relied on because he was the maker.

17. Cleophas Mwangi Karanja (P.W.2) told the court that the suit property belonged to Mbichi Kimondo. He further told the court that Mbichi Kimondo asked his mother to get him a buyer for the land because he was not utilising it. Following the request by Mbichi Kimondo, they identified the deceased as the possible buyer of the land. Thereafter, the seller sold the property the plaintiff's father for Kshs.1220/-.

18. Like P.W.1, he informed the court that after buying the property, the deceased person herein and his family took possession and began utilising it.

19. Although not aware whether the defendant is the one who bought the suit property, he was categorical that the defendant never lived in it or utilised it.

20. Concerning the registration of the suit property, he recalled that they were sent to look for the seller with a view of going to the land's office to transfer the land to the plaintiff's father.

21. He confirms having gone to the land's office with the seller and the defendant but explains that because only the seller and the defendant met the land officials, he does not know what happened.

22. According to P.W.2, it is the plaintiff's family that has been in use and occupation of the suit property; the defendant interfered with the plaintiff's possession and occupation of the suit property just recently (a year before he gave his testimony in court).

23. Waithika Gitimu, P.W.3, corroborated P.W.2's testimony to the effect that neither the seller nor the defendant lived in or utilised the suit property. In addition to confirming that the developments in the suit property were effected by the plaintiff's sons, she told the court that she is the one who assisted the plaintiff's father set boundaries in the suit property.

24. She was, however, not aware of how the plaintiff's father acquired interest in the suit property and the role played by defendant in acquisition of the property.

The defendant's case

25. The defendant herein, John Iregi Gichohi, who testified as D.W.1, maintained that the suit property belongs to him. He told the court that he bought it from Mbichi Waigwa in 1960 for Kshs.10,000/-. He produced the agreement allegedly entered between him and the seller as **Dexbt- 1(a)**; the translation in respect thereof as **Dexbt 1(b)**. In 1980 he acquired a title in respect. He produced a search certificate in respect of the title issued to him as **Dexbt 2**.

26. He explained that he invited the plaintiff's father to the land after he was given an eviction notice by his friend (where he had earlier built). They agreed that the plaintiff's father brings his family to the suit property but they would leave once the children were grown up.

27. He stated that they have family land, which is registered in the name of the plaintiff's father, but explained that it is difficult to build thereon because of the terrain.

28. With regard to the contention that he had no ability to buy the land at the time, he stated that he was working as a tout and for that reason was able to pay for the land in instalments.

30. With regard to the contention that the documents he relied on appeared to have been manufactured (appeared new) he denied having manufactured the document and stated that he keeps his documents very well.

31. As to why he did not settle in the suit property yet he was housed by his aunt, he stated that he did not settle in the land because it was not easy to access the same by car (he had a car). His aunt's place was ideal.

32. He admitted that the plaintiff's father settled in the suit property in 1969 and began developing it (planting macademia and coffee trees) and several of the plaintiff's relatives are buried in the suit property but maintained that all those activities were carried out with his permission/consent.

33. Concerning the alleged improprieties in transfer of the suit property to himself, he stated that they went to Karatina Land Control Board but they were not given any documents (they were told to go and

wait for the title to be prepared by the lands office).

Submissions

34. On behalf of the plaintiff, a brief summary of the cases of the respective parties to this dispute is given and submitted that the evidence adduced in this case plus the conduct of the parties to the disputes, leaves one without any doubt that the property belongs to the plaintiff's father.

35. In his submissions, the defendant contends that the plaintiff has failed to prove his case on a balance of probabilities.

Analysis and determination:

36. From the pleadings filed in this suit, the evidence and the submissions filed in support thereof, the sole issue for determination is whether the defendant holds the title to the suit property in trust for the plaintiff and his family members.

37. Trust relationship being a question of fact to be proved by way of evidence, the question to answer is whether the plaintiff has discharged the burden placed on him of proving that the defendant holds the title in respect of the suit property in trust for him and his father's family. In this regard see the case of **Salesio M'itonga v. M'ithara & 3 Others (2015)e KLR** where the Court of Appeal stated:-

“It is trite law that trust is a question of fact and has to be proved by evidence. In *Gichuki -vs- Gichuki – Civil Appeal No. 21 of 1981*, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust... In this case, the appellant filed suit claiming existence of a trust therefore, the burden of proof lay with him to prove the existence of the same... We concur with the following findings by the High Court:-

“Trust must be proved by credible evidence adduced by the person claiming that a trust exists. Mere utilization of the land is not proof of the existence of a trust.”

38. Has the plaintiff discharged the burden imposed on him of proving that the registration of the defendant as the proprietor of the suit property is subject of a trust in favour of his father's family? With regard to this question, having carefully considered the cases advanced by the parties to this dispute, I find the following facts to be common ground or uncontroverted:-

1. that the suit property was acquired sometime in early 1960;
2. that after the property was acquired, it is the plaintiff's father and his family who took possession and began utilising it;
3. that the plaintiff's father and his family have effected massive developments in the suit property, including erecting permanent and semi permanent structures thereon.
4. that the plaintiff's family has buried several of their relatives in the suit property;
5. that when the suit property was bought, the defendant had no land of his own; he was being housed by his aunt.
6. That the developments referred to herein above were effected without any objection from the defendant.
7. That the defendant started claiming ownership of the suit property long after the plaintiff's father passed on.

39. Although the plaintiff was not there when the agreement for purchase of the suit property was made,

through P.W.2, he led evidence to show that the property was to be sold to his father.

40. P.W.2 also led evidence to the effect that they went to the land's office with a view of getting the land transferred to the plaintiff's father but was unable to say what happened at the land office.

41. The defendant on his part, explained that he is the one who bought the suit property and gave it to his brother because he had no land to settle on. He also stated that all the developments effected in the suit property, including the burial of the plaintiff's relatives was done with his permission or consent. He however, produced no document or called any witness to vouch for his allegation that he is the one who bought the suit property or allowed the plaintiff's to stay in the suit property.

42. Upon considering the totality of the evidence adduced in this case, including the conduct of the parties to this dispute, I find the conduct of the defendant to be incompatible with the conduct of an owner of property. In my view, there is no way the defendant would continue being housed by his aunt if he had land to donate to his brother. If all what he did was to give a place to the plaintiff's family to settle or use, I am of the considered view that he would have been the one controlling the developments being effected thereon.

43. In view of the foregoing, I am inclined to believe the plaintiff's evidence to the effect that the suit property was bought by his father through the defendant and that the defendant in breach of his fiduciary duty as a trustee registered the land in his name as opposed to the plaintiff's father. Consequently, I find the plaintiff claim to be merited and allow it as prayed.

Dated, signed and delivered at Nyeri this 27th day of July, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kibuka Wachira for the plaintiff

N/A for the defendant

Court assistant - Lydia