



REPUBLIC OF KENYA.

IN THE ENVIRONMENT & LAND COURT AT KITALE.

LAND CASE NO. 10 OF 2012.

STEPHEN THUO GATONYA)

NJUGUNA GATONYE WANYUMBA) ::::::::::::::::::::::: PLAINTIFFS.

VERSUS

JOSHUA GATONYE :::::::::::::::::::::::DEFENDANT.

J U D G M E N T.

INTRODUCTION.

1. The plaintiffs and the defendant are all brothers. The first plaintiff is the eldest followed by the second plaintiff. The defendant is the youngest of the three. They are all sons of the late Wanjiru Gatonye Wanyumba (deceased) who died on 8/11/2011. The deceased was the original registered owner of LR. No. Trans Nzoia/Cherangani/558 (suit land) which was later transferred into the name of the defendant.
2. The plaintiffs filed this case against the defendant seeking for a declaration that the defendant is holding the land in trust for them the same having been registered in the defendant's name fraudulently.

PLAINTIFF'S CASE.

3. The plaintiffs testified that the deceased was the registered owner of LR. No. Trans Nzoia/Cherangani/558 which was 4 ½ acres. In 1999 the deceased called all her three sons and showed each of them where they were to have their 1 ½ acres each. In the year 2000, the defendant wrote to each of the plaintiffs and asked them to stick to the portions given to them by the deceased. The defendant asked the plaintiffs to desist from calling him a grabber. He also told them that he was willing to get out of a joint account which he held with the deceased if this will help the plaintiffs to desist from maligning his name.
4. In 2007 after the post election violence broke out, the deceased was moved to Nyandarua where she stayed with one of her daughters. The defendant later took her from Nyandarua to his house at Banana in Nairobi. This is where the deceased died of old age aged 92 years. Before the deceased died, the defendant had transferred the suit land into his name. This was done three months prior to the death of the deceased. The defendant transferred the suit land into his name based on a special power of attorney dated 29/4/2010 and registered on 30/6/2011.
5. The plaintiffs testified that the defendant caused them to be arrested in January, 2011 and arraigned in court and charged with trespass to the suit land. The plaintiffs contend that the transfer of the suit land into the defendant's name was done while the criminal case was pending. The plaintiffs were subsequently acquitted of the criminal charges. The plaintiffs contend that the deceased was senile as at the time she allegedly donated power of attorney to the defendant.

DEFENDANT'S CASE.

6. The defendant testified that he is the registered owner of the suit land based on a power of attorney given to him by the deceased. He testified that he did not commit any fraud in the course of registration of the land to himself. He also denied that he is holding the land in trust for his brothers the plaintiffs herein. He denied that the deceased was senile as at the time she donated power of attorney to him.

ANALYSIS OF EVIDENCE AND THE LAW.

7. There is no contention that the suit land was initially registered in the name of the deceased. There is also no contention that the suit land is now registered in the defendant's name. The issues for determination are whether the registration of the suit land in the name of the defendant was properly made and whether the defendant is holding the suit land for the benefit of the plaintiffs.
8. From the evidence on record, it is clear that there is bad blood between the plaintiffs on the one part and the defendant on the other. PW2 Njuguna Gatonye Wanyumba produced a letter dated 9/1/2000 [Exhibit 6] addressed to him and signed by the defendant. This letter shows that there was bad blood between the defendant and his two brothers. In the said letter, the defendant asked the plaintiffs to stick to the portions as pointed out by the deceased. Though the defendant denied authoring this letter, I find that he is the one who authored it. This letter corroborates the plaintiffs' evidence that the deceased had informally subdivided her land amongst the three. The first plaintiff was to take the lower part of the land. The second plaintiff was to take the middle part and the defendant was to take the upper part where the homestead was.
9. There is evidence that the defendant changed his mind and started scheming on how to have the entire land registered in his name. There was a valid power of attorney donated to the first plaintiff in respect of the suit land. This power of attorney was given on 13/6/2007 but was registered on 5/3/2010. The defendant was aware of the existence of this Power of attorney but he went ahead to get another power of attorney from the deceased on 29/6/2010. The registration of this power of attorney was made the following day that is 30/6/2010. The power of attorney given to the first plaintiff had not been revoked. There was no evidence adduced to show if the power of attorney given to the first plaintiff was revoked.
10. I have gone through the judgment in criminal case No. 70 of 2011 against the two plaintiffs in this case. The complainant was the defendant in this case. This judgment is not dated and it is therefore difficult to tell when it was pronounced. However be that as it may, the trial magistrate has observed that the power of attorney donated to the first plaintiff was revoked on 18/2/2011. If this be the case, then the revocation must have been done at the behest of the defendant who wanted to pave way for registration of the land into his name before the deceased died. No two powers of attorney can exist side by side in respect of same property. This shows that the deceased was not in control of her mental faculties. She is said to have been 92 years old as at the time of death. It is very doubtful that she was okay in June, 2010 when she is said to have given the Power of attorney to the defendant. The defendant is said to have died at age of 92 of old age. The defendant transferred the land into his name three months prior to the death of the deceased.
11. The defendant caused the plaintiffs to be arrested in January, 2011 charged with trespass which occurred on 25/12/2010. The trial magistrate rightly found that there was no trespass as at that time because the first plaintiff had a valid Power of attorney. The revocation may have been engineered by the defendant after the collapse of the criminal case which the court rightly observed was an abuse of the court process.
12. The question of trust is a matter of evidence. The plaintiffs have managed to show that the suit land indeed belongs to both of them the defendant inclusive. The registration of the land in the defendant's name was intended to disinherit the plaintiffs. I find that the plaintiffs have proved their case against the defendant on a balance of probabilities. I find that the defendant is holding the suit land in trust for the plaintiffs.

DETERMINATION.

13. For the reasons given hereinabove, I declare that the defendant is holding title to LR. No. Trans

Nzoia/Cherangani/558 on his own behalf and in trust of the plaintiffs. The trust is hereby terminated. The title shall be cancelled and individual titles issued in the names of the plaintiffs and the defendant in equal shares. The defendant shall pay the costs of this suit to the plaintiffs.

[Dated, signed and delivered at Kitale on this 19th day of January, 2015.]

E. OBAGA.

JUDGE.

Court:- Judgment delivered in open court at 9.37 a.m. in the absence of parties who were aware of today's date.

Court Clerk:- Kassachoon.

E. OBAGA.

JUDGE.

19/1/2015.