



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT

E.L.C. NO.29 OF 2013

MUKUNDI WAIRI.....PLAINTIFF

VERSUS

DORCAS WANJIKU.....DEFENDANT

J U D G M E N T

The plaintiff is registered as owner of an estate in fee simple of all that piece of land situated at Nyeri and registered as L.R. No.6292/28 and the original number was 6392/5/4. The defendant who was married to the plaintiff's late brother is occupying the parcel of land from which the plaintiff wants her to vacate. The plaintiff has a family and claims that he cannot have peaceful and quiet enjoyment of his own land by reason of the defendants forceful occupation of the land. The defendant claim that the plaintiff has alternative land and shall not be rendered landless by her moving out of the suit property herein.

The defendant denied the averments in the plaint and states that the suit land belonged to his father in Law who has been fraudulently cheated to transfer the plot to the plaintiff thus denying the defendant her husband's share. The defendant claim to have lived in the suit land with her five children for over 20 years until the death of her husband in 2003 when the plaintiff started chasing her away. She has extensively developed the suit land and has built a home hence has no alternative land to shift to and that her late husband was buried on the land.

When the matter came for hearing the plaintiff testified that he is the registered owner of L.R. No.6392/28. He has the original certificate that was registered on 6/7/2012 by his father and transferred on 15/6/2012.

The plaintiff testified that they are five siblings two girls and three boys. The girls are married and the brothers do not live on the suit land. They have land in Gatarakwa that they were given as gifts by their father. The defendant's husband was also given a piece of land.

He denied the allegation that the defendant has extensively built the land and states that the structure she lives in was built by their father. On cross-examination by the defendant, the plaintiff maintained that he land was transferred to him by his late father and that the defendant was given alternative land.

The defendant who works at Good Shepherd Academy stated that she began working in the year 2004 and got married to Charles Maina Wairi in 1993 and was shown where she lives within the suit land as her home and was never given an alternative land. They lived peacefully until her husband died. The

money collected by people when her husband died was put in an account. When her first born daughter did her exams, she went to her mother in law and asked for money but she was dismissed by the mother in law who said that Maina had left them a problem. She has suffered financially without any assistance from the family and that they sold the Ruiru plot and constructed the Burguret plot only for two causes of stone but the rest is wooden.

The plaintiff filed submission whose **gravamen** is that he is the registered proprietor of the property. The property was transferred to him by his father and holds title to the property. His father is alive and of sound mind and made a conscious decision to transfer the suit property to the plaintiff, his son. The plaintiff's father who is the defendant's father in law granted the defendant an alternative piece of land being Gakawa/Githima Block 1/Burguret/1944 and built a house for her and her children.

The defendant in a nutshell submitted that his matter was subject to a dispute before a chief and his deputy who decided that she should be granted her husband's share. She submits that her children aged 17, 18 and 21 years would suffer irreparably as their right will be violated if they will be evicted by their father in law. She works at Good Shepherd Academy and therefore she is likely to suffer if she is forced to settle at Burguret.

I have considered the evidence on record pleadings and submission of both the plaintiff and defendant and do find that the plaintiff and the defendant's husband were brothers before the demise of the latter. Their father is still alive. On the 18/6/2012 Mr. George Wairi Wachira executed a transfer to Mukundi Wairi, the plaintiff herein in respect of L.R. No.6392/28 where he was registered as proprietor for an estate in fee simple of all that piece of land situate at Nyeri and registered as L.R NO 6392/28 Originally 6392/5/4 in consideration of the natural love and affection.

The transfer was executed by the transferor George Wairi Wachira and the transferee Mukundi Wairi in the presence of Adman Khan advocate. Mr. Adman H. Khan certified that he two persons appeared before him on the 18/6/2012 and the said two persons were known to him and produced their identity cards and acknowledged the signatures on the transfer to be theirs and freely and voluntarily executed the transfer and understood the contents of the transfer. He certified that the coloured passport size photographs were a true likeness of the two persons and that the national identity card, P.I.N numbers corresponded to those produced.

Prior to this transfer the wife of the transferee known as Phoebe Wairimu Wairi signed an instrument of spousal consent for transfer on the 15/6/2012 before K.M Wachira an advocate of the High Court of Kenya.

The history of the parcel of land is that the same was registered in the name of Clarence Henry Quentin Mc Connell of Kiganjo in Kenya pursuant to a transfer registered as I.R.5285/14 being land reference No.6392/28 (original number having been 6392/5/4).

A transfer was made to George Wairi Wachira on the 17/6/1970 and charged to Kenya Commercial Bank Ltd. The same was disclosed on 24/5/1982 and then later transferred to Mukundi Wairi on the 6/7/2012 as a gift. This transaction was done after the repeal of the Registration of Titles Act.

Section 23 of the Registration of Titles Act provided that the certificate of title was to be held as conclusive evidence of proprietorship. The person named therein was the absolute and indefeasible owner of the property except on the ground of fraud or misrepresentation to which he is proved to be a party.

With the repeal of the Registration of Titles Act, the rights, and liabilities and remedies of the registered owner remain in place though exercisable and enforceable in accordance with the repealed Act.

The defendant has not demonstrated through evidence that the plaintiff acquired the land from his father through fraud.

This court finds that the certificate of title held by the plaintiff's father was conclusive evidence that he was the proprietor of the parcel of land hence had the power and right to transfer the same to the plaintiff.

The plaintiffs father has shown the willingness to transfer another parcel of land namely Gakawa/Githima Block 1/Burguret/1944 to the defendant. The defendant does not want anything to do with this parcel of land because of the economic weight she bears and the fact that she has college going children. This court finds that it can not interfere with the decision of the plaintiffs father to gift his children. However, the rights of the plaintiff and the rights of the family of his deceased brother as current users of the disputed parcel must be balanced and therefore I order that the defendant vacates the plaintiffs land upon property number Gakawa/Githima block 1/Burguret/1944 being transferred to her in life interest and the defendant be given time to prepare for her taking possession of the said parcel of land. In any event the defendant to be given upto the 30/1/2015 to vacate the parcel of land. There will be no orders as to costs as this is a family dispute. Orders accordingly.

Dated, signed and delivered at Nyeri this 28th day of March 2014.

A. OMBWAYO

JUDGE