



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC NO. 148 OF 2015 (OS)
IN THE MATTER OF LR NO. NYERI/WATUKA/734
AND
IN THE MATTER OF DETERMINATION OF TRUST

AND

IN THE MATTER OF THE LATE MARGARET WANGECHI

BETWEEN

SIMON KIAMA NDIANGUI.....PLAINTIFF

-VERSUS-

KAMAMIA NDIANGUI KAMAMIA.....DEFENDANT

JUDGMENT

BACKGROUND

1. By the Originating Summons dated 18th May, 2015 as filed herein on 19th May 2015, Simon Kiama Ndiangui (*hereinafter referred to as “the Plaintiff”*) prays for a determination of the following questions as against his brother Kamamia Ndiangui Kamamia (*hereinafter referred to as “the Defendant”*):

(a) (*Whether*) the Defendant (is) registered as proprietor of (the parcel of) land number Nyeri/Watuka/734 measuring approximately 98 acres in trust for himself and the Plaintiff;

(b) *If the (answer to the) above question is in the affirmative, (whether) the Plaintiff herein is entitled to 54 acres of the said land Nyeri/Watuka/734;*

(c) *If the (answer to the) above question is in the affirmative, (whether) the Honourable Court should determine the trust and order the Defendant to sign all documents transferring 54 acres out of the suit land to the Plaintiff and if he defaults, whether the Deputy Registrar of this Court should be directed to sign the said documents of transfer; and*

(d) (*Whether*) the Defendant should be ordered to pay the costs of this suit.

2. The basis of those prayers can be discerned from the Plaintiff's Supporting Affidavit to the Originating Summons. It is the Plaintiff's case that the suit property was originally the property of their mother Margaret Wangechi who passed away in 1988. The Plaintiff asserts that their said mother acquired the property from the Settlement Fund Trustees (SFT) and later had it registered in the name of the Defendant as her eldest son in trust for the family. As the only other child of their mother, the Plaintiff contends that he is a beneficial owner of the property and hence the orders sought.

3. But in his Replying Affidavit sworn and filed herein on 15th June, 2015 in response to the originating Summons, the Defendant avers that he solely acquired the suit property from SFT having paid an initial deposit of Kshs.161/- and taken a loan of Kshs.9,000/- from the SFT which he settled through a check-off system. It is the Defendant's case that since his mother was homeless, he invited her and his younger brother (*the Plaintiff*) to come and live with him on the land. The Defendant thus denies that his mother bought the property and/or contributed thereto or had the same registered in his name in trust for the Plaintiff.

THE PLAINTIFF'S CASE

4. This matter proceeded by way of *viva voce* evidence. At the trial, the Plaintiff called four witnesses who testified in support of his case.

5. PW1 – Simon Kiama Ndiangui is the Plaintiff herein. He told the Court the Defendant is his elder brother and that they are both the sons of the late Margaret Wangechi who passed away in August, 1988. PW1 testified that her late mother purchased the land from the Settlement Fund Trustees (SFT) and that she gave the mandate of operating the loan account with the SFT to the Defendant as the eldest son.

6. PW1 further told the Court that their mother consented to having the suit land registered in the name of the Defendant during her lifetime on the premise that the Defendant would hold it in trust for her family. When their mother passed away, the Plaintiff and the Defendant were left behind as the only heirs to the estate.

7. PW1 further told the Court that after their mother's demise, the Defendant wanted to sell some 5 acres of the land to an outsider to enable him pay school fees for his children. PW1 objected to the transaction and opted to buy the 5 acres. They signed a sale agreement to that effect.

8. PW1 told the Court that notwithstanding the registration of the Defendant as a trustee for himself, the Defendant now claims that the entire parcel of land belongs to himself and has despite various requests refused to terminate the trust and transfer the Plaintiff's share to himself.

9. On cross-examination, PW1 told the Court he was around 20 years old in 1964 and that before the purchase of the suit land, he used to live with his mother in the village while his brother (*the Defendant*) lived on the suit property in Gatarakwa. PW1 testified further that the Defendant was working in Bellevue for the white man who initially owned the land. PW1 further told the Court it was their late mother who first paid the deposit of Kshs.161/- towards the purchase of the land.

10. PW1 conceded however that he did not have any documentary evidence of any such payment and/or the fact that the land was registered in the name of the Defendant to hold in trust for himself. It was PW1's testimony that the payment to SFT was done out of the proceeds of the suit land and that even though their mother died in 1988, he had not taken out letters of administration for her estate.

11. PW2 – Simon Kiama Nduhiu is a cousin of the Plaintiff. He told the Court he was born in 1956 and that for as long as he could recall the parties in the dispute have always lived on the suit property from around 1965. PW2 further told the Court he always believed the land belonged to the mother of the Plaintiff and the Defendant. The said mother is buried on a portion of the suit land.

12. On cross-examination, PW2 told the Court he was 8 years old in 1964. All the parties lived on the land. Their mother who was PW2's aunt would say that the land belonged to the sons. PW2 conceded

that he did not know why the land was registered in the Defendant's name but he came to hear when the matter went before the Land Disputes Tribunal, that the Defendant was so-registered by virtue of being the eldest son.

13. PW3 – Mathenge Theuri Gitachu is a farmer and a neighbor of the disputants in Gatarakwa. He told the Court the parties herein had always occupied the suit land together with their mother until when she died and was buried therein. PW3 told the Court the land was registered in the name of the Defendant and that he had been a witness when the Plaintiff purchased 5 acres from him. PW3 was a witness in the Tribunal case and he later heard that the Tribunal had decreed that the parties share the land.

14. On cross-examination, PW3 told the Court he settled on his parcel of land number 735 in 1964. He was not residing in the area prior to that and had not known the parties herein before then. He further told the Court he did not know who the rightful owner of the land is though he was aware the land is registered in the name of the Defendant.

15. PW4 – Jedidah Wangui Wanjohi hails from Kinyinya Village and is a first cousin to the parties herein. PW4 told the Court she had not known the mother to the parties. She however told the Court her own mother had told her that the mother to the parties had informed her that the land belonged to both the parties.

16. On cross examination, PW4 testified that she was 55 years old and that she first visited the suit property during the burial of the mother to the parties in dispute. Their father and PW4's mother were born of the same father. Other than what PW4 had been told by her mother she did not know anything else about the suit property.

THE DEFENCE CASE

17. On his part, the Defendant called 3 witnesses in support of his case.

18. DW1 – Kamamia Ndiangui Kamamia is the Defendant himself and a farmer at Embaringo Village in Gatarakwa location. DW1 told the Court he purchased the suit property by first paying a deposit of Kshs.161/- to the SFT. He was then given a loan of Kshs.9,000/- which he paid using the proceeds from the sale of Pyrethrum and milk from the farm. He was issued with receipts by the SFT.

19. DW1 testified that prior to the allocation of the land, he was an employee of a white settler at the Bellevue Farm where he lived as a squatter. Just before independence in 1963, they were identified and interviewed for allocation of land under the Scheme. DW1 told the Court he balloted and was allocated parcel number Nyeri/Watuka/734. He built his home on the land in 1964.

20. DW1 further told the Court that after the allocation he agreed to host his mother and younger brother who were then homeless in Kihuyo Village. The Plaintiff herein was then a pupil at Mweiga Primary School and DW1 transferred him to Gatarakwa Primary School. He was later employed as a teacher.

21. DW1 testified that after the Plaintiff got married, he requested the Defendant to allow him put a small temporary house on the land for his family until when he would be able to purchase his own land. Later in 1989, the Plaintiff requested the Defendant to sell him a portion of land. DW1 agreed and sold to him 5 acres after they executed an agreement which was witnessed by other people. Their mother had passed away the previous year.

22. DW1 further told the Court that in the year 2010, he sold 2 acres of his land to one John Gichunju Ithathu. When the Plaintiff heard about the sale, he went to Nyeri and placed a caution on the land after which he filed a case at the Land Tribunal in Mweiga. DW1 told the Court his mother had no interest in the land and that he was issued with a title therefore on 9th June, 2003.

23. On cross-examination, DW1 told the Court he lived in Bellevue while his mother and the Plaintiff lived in Kiguyo Village. Kiguyo was the home of DW1's mother. DW1 told the Court he was born in a

placed called Kiguru and that his father worked in many white settlers farms before DW1 ended up in Bellevue.

24. DW1 testified that after being allocated the land, he took possession, planted pyrethrum and kept cattle. He denied that his mother contributed towards the acquisition of the land.

25. DW2 – John Kieni Gachonde is a neighbor of the Defendant. He told the Court they were all living in Bellevue estate, before independence in a White Settler's farm. Having worked for over 4 years, they were allocated land by the SFT on the same date with the Defendant. Each one of them then settled in their respective portions and began developing them. Each was given Kshs.9,000/- by the SFT which sum they repaid over a period of time.

26. DW 2 testified that as at the time of allocation, the Defendant's family did not reside on the land. They came to live with him later.

27. On cross-examination, DW2 told the Court his parcel of land measuring 84 acres is adjacent to that of the Defendant and that he knew the mother to the parties. DW2 testified that the mother to the parties was disabled and that she would have had no way of obtaining money from SFT.

28. DW3 – Geoffrey Kahiga Muraya is a resident of Gatarakwa. He told the Court he has known the parties in the dispute since the 1960s when he was an employee in a White Settler's farm. In 1963, the white man's land was taken over by the SFT and the employees were allocated the same after balloting process.

29. DW 3 testified that the Defendant and himself were allocated land after which they were required to pay Kshs.161/- as deposit. The SFT also gave them 3 cows. The Defendant's mother and the Plaintiff later joined the Defendant on the land. DW3 who was the Chairman of the area's Co-operative Society told the Court they would deduct 25% of the proceeds from Pyrethrum and pay off the members' loans.

30. DW 3 told the Court that the Defendant was one of their members and he was not aware that his mother participated in any way towards the purchase of the suit land.

31. On cross-examination, DW3 told the Court they were about 34 of them who balloted. A family member could not ballot for an allottee. The SFT then gave them 30 years to repay although he was unaware how long the Defendant took to repay the loan.

DETERMINATION

32. I have taken a careful look at the pleadings filed by both parties, the testimonies of their witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions filed herein by the Learned Advocates for the Defendant. I was unable to find any submissions filed by the Plaintiff.

33. From the pleadings and evidence placed before the Court, the sole issue for consideration is whether or not the suit property is registered in the name of the Defendant in trust for himself and his brother, the Plaintiff herein. Since the Plaintiff claim is based on trust, the law placed the onus upon him to prove the existence of such trust.

34. Otherwise and as was stated by the Court the Appeal in **Mbothu & Others -vs- Waitimu & 11 Others (1980) KLR 171:**

“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

35. In the matter before me, there was no dispute that the Plaintiff and the Defendant were the only children of Margaret Wangechi who is said to have passed away sometimes in August, 1988. It is the Plaintiff's case that the subject matter of the dispute, a parcel of land known as Nyeri/Watuka/734 measuring some 98 acres, was originally owned by their late mother who had bought the same from the Settlement Fund Trustees (SFT).

36. The Plaintiff testified that their mother paid the initial payment for the purchase of the property being Kshs.161/- and that the balance of the purchase price was paid from the proceeds generated within the land. Testifying at the trial herein, the Plaintiff told the Court that their mother had consented during her lifetime that the property be registered in the name of the Defendant as her eldest son to hold the same in trust for the family.

37. The Plaintiff did not however explain why their mother chose to register the expansive property in the name of Defendant when she could have easily registered the same in her own name. Neither did he produce any evidence of the initial payment of Kshs.161/- said to have been made by their mother towards the purchase of the property. All that the Plaintiff produced was a copy of the title registered in his brother's name, a certificate of Official Search confirming the registration and a copy of the proceedings and award made in his favour by the Kieni West Division Land Disputes Tribunal on 3rd February, 2011.

38. There was no dispute that the award arising from the proceedings of the said Land Disputes Tribunal were quashed by the High Court at Nyeri in Judicial Review Case No. 25 of 2011; Kamamia Ndiangui Kamamia -vs- Kieni West land Dispute Tribunal & 2 Others, on 16th May, 2013 after the Court determined that the Tribunal lacked jurisdiction to deal with the dispute.

39. In his own testimony before the Court, the Plaintiff conceded that he did not have any documents to show that his mother paid for the land and/or that the land was registered in the Defendant's name to hold in trust for himself.

40. On the other hand, the Defendant told the Court that prior to the allocation of the land, he was an employee of a white settler at the Bellevue Farm where he lived as a squatter. Around the time of independence in 1963, the Settlement Fund Trustees (SFT) took over the farm which was then allocated by way of ballot to the employees. The Defendant told the Court he was allocated the suit property after the ballot.

41. The Defendant further testified that he paid the required deposit of Kshs.161/- and that he was then granted a loan of Kshs.9,000/- by the SFT to be repaid in 30 years. After the repayment he was issued with a title deed on 9th June, 2003.

42. It was further the Defendant's testimony that his mother used to live at the time at her parent's place in Kiguyo village with the Plaintiff. Sometime in 1964 after acquiring the land, he invited his mother and younger brother who were homeless to come and live with him on the land. He later on gave his brother a small portion of the land to put up a house after the brother got married.

43. In support of his case, the Defendant called two of his neighbours with whom they worked at the Settler's farm. The two corroborated the Defendant's testimony as to how they balloted for their respective portions of land and how they paid for the same through deductions made from the proceeds generated by the farm. In that respect, the Defendant availed in Court a bundle of documents being deposit slips of payments made by himself to the SFT from the years 1965 up to 1977.

44. A perusal of the copy of the titles produced in Court by the Plaintiff together with the Certificate of Search does not indicate anywhere that the suit property is held in trust for the Plaintiff. That ought to have been clearly indicated on the register if that was the case. Otherwise, the Plaintiff was required to establish the existence of such a trust by way of evidence. From the material placed before me, there was absolutely no evidence upon which this Court can make a finding that the Defendant holds the suit land in trust for the Plaintiff.

45. In the premises, it was clear to me that the Plaintiff's claim has no basis and all the questions posed in his Originating Summons are hereby answered in the negative. Other than the five (5) acres of land the Plaintiff bought from the Defendants on 19th February, 1989, the Plaintiff has no further claim on the suit property.

46. Accordingly, the Originating Summons dated 18th May, 2015 as filed herein on 19th May, 2015 is dismissed with costs to the Defendant.

Judgment dated, signed and delivered in open Court at Nyeri this 17th day of March, 2022.

In the presence of:

No appearance for the Plaintiffs

No appearance for the Defendants

Court assistant - Kendi

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J. O. Olola

JUDGE