



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 27 OF 2013

LAZARUS ANDANYI

CHRISTOPHER ANDANYI

RICHARD ANDANYI

JOHN ANDANYI

ISAAC ANDANYI:.....:PLAINTIFFS

VERSUS

DAVID ANDANYI BERI:.....:DEFENDANT

J U D G E M E N T

INTRODUCTION

1. The first to fourth plaintiffs are sons of the defendant from the defendant's first wife. The fifth defendant is son of the defendant from the defendant's second wife. The defendant is the father of all the five plaintiffs.

2. The plaintiffs brought this suit against the defendant claiming the following reliefs;-

(a) Specific performance of the agreement of 9/3/2009.

(b) An injunction restraining the defendant from selling, transferring or in any way disposing off the remaining portion of the land parcel formerly known as Kwanza/Namanjalala Block 2/Kimaran/309.

(c) Costs of the suit.

(d) Any other or further relief (s) as this Honourable court may deem fit to grant.

3. The defendant who was duly served with summons to enter appearance and file defence neither entered appearance nor filed defence. The hearing therefore proceeded by way of formal proof.

PLAINTIFFS CASE

4. The Plaintiffs testified through PW1 Lazarus Shioso Andanyi the first plaintiff herein who testified that the defendant who is their father had two wives. The first to 4th plaintiffs are from the first wife Elimina Lihavi. The second wife is Mary Makokha who is the mother of the fifth plaintiff. PW1 testified that LR NO Kwanza/Namanjalala Block 2/Kimaran/309 (suit land) is a sub-division of LR NO. Kwanza/Namanjalala Block 2/Kimaran/25.

5. PW1 testified that LR NO. Kwanza/Namanjala Block 2/25 was in the name of the defendant. He stated that he had conducted a search in respect of that Plot which he produced as exhibit 1. He however stated that he was unable to carry out the search in respect of the suit land because the land registry staff refused to give him a search despite having paid for it. PW2 went on to state that they have been having a dispute with their father over the land. They took their dispute to the area chief who arbitrated over the dispute. It was agreed that the defendant subdivides his land which is 14.4 acres amongst his two wives. It was agreed that the first house was to get six acres and the second house 6 acres. Two acres were to be held by the defendant during his lifetime. Upon the demise of the defendant each house was to take one acre each which was held by the defendant. The remaining land was to be reserved for roads.

6. PW1 testified that his father did not honour the agreement which he had signed. He instead went ahead to sell the land which was meant to be given to the second house as well as the two acres he was to hold during his lifetime. The defendant then re-located to Big Tree area where he bought land where he is staying with his second wife.

7. PW2 Isaac Luyundi Andanyi the 5th plaintiff herein reiterated what PW1 had stated except that he testified that in their house, they are two sons whereas PW1 stated that the 5th plaintiff is the only son of the second house. PW2 stated that he does not know the acreage of the land his father bought at Bit Tree area where he is residing with his mother.

ANALYSIS OF EVIDENCE

8. I have gone through the evidence adduced vis-a-vis the prayers of the plaintiffs. Whereas PW1 produced what he called a search in respect of LR NO. Kwanza/Namanjalala Block 2/Kimaran/25, a look at what was produced shows that it is not an official search. This is a mere form which shows the plot No. and acreage as 4.775 hectares. It does not show who is the owner of the land and is not even signed by the Land Registrar.

9. The agreement which was signed before the chief and which was produced as exhibit 2 shows that Plot No. 25 is 14.4 acres. Exhibit 1 which the plaintiffs called an official search shows that plot No. 25 is 4.775 hectares which translates to about slightly over 11 acres. It is therefore not clear on what basis the plaintiffs claim that their father's land is 14.4 acres.

10. If the plaintiffs are claiming that the suit land is a sub-division of LR NO. Kwanza/Namanjalala Block 2/Kimaran/25, then they would not have expected to be given a search on that title because the same must have been closed upon sub-division. What the plaintiffs should have produced was a green card and a search in respect of the sub-divisions to show that the suit land is a sub-division of plot No. 25 and that the other sub-division had been sold as they allege. The green card would have shown the history of the land including the subsequent sub-divisions.

11. In the circumstances, can it be said that the plaintiffs have proved their case as required? The answer is in the negative. The plaintiffs have failed to show that their father's land was 14.4 acres and that he has sold six acres meant for the second house as well as the two acres which he was to hold during his life time. There was a prayer in the submissions that the court orders that the 5th plaintiff is entitled to the plot which his father bought at Bit Tree area. There was no such prayer in the plaint and even if it were there, there was no evidence adduced to show that the defendant bought any such plot as alleged. There was no evidence at all adduced that the defendant had sold 8 acres as alleged by the plaintiffs.

DECISION

12. The plaintiffs should have at least produced searches in respect of the alleged sub-divisions and transfer if any of part of the original plot. This was not done. I find that the plaintiffs have failed to prove their case against the defendant on a balance of probabilities. The same is hereby dismissed with no order as to costs.

Dated, signed and delivered at Kitale on this 16th day of September, 2014.

E. OBAGA

JUDGE

COURT: Judgement delivered at 10.41 a.m in the absence of Plaintiff's advocates who were aware of today's date. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

16/9/2014