



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 314 of 2004

HANNAH MUTHONI NJOROGE.....1ST PLAINTIFF

EDWARD NJUNGE2ND PLAINTIFF

VERSUS

SALOME WANJIRU NJOROGE..... DEFENDANT

JUDGMENT

This suit is brought before this court vide an Amended Plaint dated 3rd July 2006 in which the Plaintiff prays for the following reliefs:

1. That a mandatory injunction do issue restraining the Defendant, her agents, servants and/or employees from interfering with the Plaintiffs' stay, use, occupation and/or possession of the parcel of land known as **KARAI/GIKAMBURA/982 (herein the "Suit Land")**
2. A declaration that the suit land belongs to the Plaintiffs by virtue of being the genuine and true heirs and that they have a legitimate right to be in occupation thereon.
3. An Order for the cancellation of the registration of **SIMON NJOROGE GITHAIGA** (Deceased) as the proprietor of the Suit Land and/or any other subsequent dealings and/or registrations
4. An order that the Plaintiffs herein be registered as proprietors of the Suit Land
5. Costs of this suit

The plaintiffs are siblings, both children of the late Peris Wanjiku Githaiga. They have sued the defendant who is the wife of their late Uncle Simon Njoroge Githaiga. Peris Wanjiku Githaiga and Simon Njoroge Githaiga were siblings, children of the late Hannah Nyakairu. The plaintiffs claim is that the suit land belongs to them, having been born and bred there all their lives. The 2nd Plaintiff passed away leaving the 1st plaintiff to pursue this case. The plaintiff's homestead is on the suit land.

In their amended plaint, the plaintiffs stated that at August 1977, the suit land belonged to their grandmother, Hannah Nyakairu. However, upon her demise in 1989, the defendant's husband, the late Simon Njoroge Githaiga through fraud unlawfully had the suit land transferred to himself without the

knowledge or consent of the plaintiffs. They listed the following particulars of fraud on the part of Simon Njoroge Githaiga:

1. Representing himself as a genuine heir and dependant of Hannah Nyakairu in **Succession Cause No. 464 of 1987** (Nairobi) which he was not;
2. Causing the transfer of the suit land unto himself
3. Disinheriting the true and genuine heirs and dependants of the said Hannah Nyakairu

The plaintiffs contend that the suit land belonged to them as it was left to them by their grandmother Hannah Nyakairu through their mother Peris Wanjiku Githaiga. They also contend that they have built their homes on the suit land and developed the land extensively as they have known the suit land as their home throughout their lives and they have nowhere else to go. In fact, in 1990, they filed Kiambu **Civil Case No. 124 of 1990** against Simon Njoroge Githaiga and a Prohibitory Order was issued in that case and was registered against the title of the suit land.

The plaintiffs further state in their plaint that upon the demise of the said Simon Njoroge Githaiga, the defendant, Salome Wanjiru Njoroge, his wife, took out letters of administration vide **Kiambu SPMC succession Cause No. 85 of 2001** and cited the suit land as constituting the deceased's estate, had the grant therefore confirmed and proceeded to share out the suit land to herself and her 6 children, oblivious of the pendency of **Kiambu PMCC No. 124 of 1990** and the prohibitory order issued therein.

The plaintiffs further stated that despite demand for reparation and notice of intention to sue being served upon the defendant, she refused, neglected and or ignored to make good the plaintiff's claim.

The Defendant did not file any defence. She was, however, represented in court by counsel during the hearing of this case.

The plaintiff's case involved two witnesses namely the plaintiff herself and Mr. Joel Paul Gatundu. The plaintiff produced in evidence the original Certificate of Freehold Title in respect of parcel of land known as **Karai/Gikambura/656** which she testified was the larger piece of land out of which the Suit Land was excised. The said title document was in the name of Peris Wanjiku 'B'. She also produced in evidence the Green Card indicating that the said parcel of land known as **Karai/Gikambura/656** was the larger portion of land which was subdivided and yielded the Suit Land in the name of Hannah Nyakairu. It was the plaintiff's testimony that she is the one who lives on the Suit Land and not the Defendant, whom, she stated has her own piece of land separate from the Suit Land. She further testified that the Suit Land is where they buried her grandfather, grandmother (Hannah Nyakairu) and her brother (2nd Plaintiff). She testified that her grandmother, Hannah Nyakairu had 3 daughters and one son. One of Hannah Nyakairu's daughters was her mother, Peris Wanjiku Githaiga and her son was Simon Njoroge Githaiga. As stated earlier, it was her testimony that Simon Njoroge Githaiga fraudulently inherited the Suit Land from the estate of his mother, thereby excluding his sister and her offspring, who are the plaintiffs in this case. She further testified that the defendant and her six children became the registered proprietors of the Suit Land through a succession cause in respect of the estate of her late husband, Simon Njoroge Githaiga.

The testimony of Mr. Joel Paul Gatundu (PW2) was that he was a neighbor of the plaintiffs and had known her since 1958. He testified that he knew the mother of the Plaintiffs, Peris Wanjiku Githaiga, who was deceased. He testified that the said Peris Wanjiku Githaiga had 4 children, the plaintiffs and two others. He testified that Simon Njoroge Githaiga was the plaintiff's uncle.

It was his testimony that Hannah Muthoni Njoroge, the 1st plaintiff herein, had lived on the Suit Land since 1958.

Analysis

The applicable law in this case is the Law of Succession Act, owing to the fact that the Defendant's title

to the Suit Land arose from the transmission of her deceased husband's estate. Her deceased husband also obtained title to the Suit Land by way of transmission of his mother's estate. Any question regarding the distribution of the Suit Land therefore boils down to the administration of the estate firstly of Hannah Nyakairu and subsequently of the estate of Simon Njoroge Githaiga. The claim made by the plaintiffs therefore falls within the ambit of a succession cause rather than the suit that they have filed. In both instances cited earlier, Letters of Administration were granted by the Court and the estates of the mentioned deceased persons were distributed with the sanction of the court. If the plaintiffs had an issue with the way the Suit Land was distributed, they should have made their claims in those succession causes. Noteworthy is Section 76 of the Law of Succession Act which provides as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) That the proceedings to obtain the grant were defective in substance;

(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;”

This court finds that this is the procedure the plaintiff should have pursued instead of making a naked claim to the Suit Land as she has done in this case.

Conclusion

Having said that, this Court hereby dismisses the suit. No order as to costs.

SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH 2013.

MARY M. GITUMBI

JUDGE