



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 278 of 1995

KAMAU GITHAЕ.....
.....PLAINTIFF

VERSUS

LEAH WACHEKE NGANGA

(Sued in her capacity as the administrator of the estate of EZEKIEL NGANGA

KANUNWA-DECEASED).....
.....DEFENDANT

JUDGMENT

The plaintiff, Kamau Githae, filed suit against the defendant, Ezekiel Nganga Kanunwa seeking various reliefs from this court. He averred that he was the registered owner of all that parcel of land known as *Nakuru/Menengai/18* (hereinafter referred to as the suit land) which measures approximately 85 acres which he acquired in 1962. He averred that the defendant, a landless person, had resided on part of the suit land by invitation. However, in April, 1995 the plaintiff gave notice to the defendant to vacate the suit land. The defendant had however refused to vacate from the suit land thus necessitating the plaintiff to file the present suit. He therefore sought declaratory orders of this court to declare him as the sole owner of the suit land. He further prayed for perpetual injunction to be issued to restrain the defendant from trespassing, cultivating, sub-dividing or in any manner whatsoever interfering with the plaintiff's possession and quiet enjoyment of the suit land. He finally sought an order of the court to have the defendant evicted from the suit land and further the costs of the suit.

When the defendant was served with summons to enter appearance together with a copy of the plaint, he filed a defence denying the averments made by the plaintiff in his plaint. He conceded that the plaintiff was the registered owner of the suit land but averred that the plaintiff had had himself fraudulently registered as the owner of the suit land. He deponed that he was a co-owner of the suit land having jointly purchased the same with the plaintiff. He therefore prayed for the plaintiff's suit to be dismissed with costs and his counterclaim where he is claiming to be entitled to an undisclosed portion of the suit land be allowed. He averred that the suit had been adjudicated upon by a court and determined in his favour in Land Case No.9 of 1984. He averred that he had acquired title to a portion of the suit land by adverse possession and or prescription. He also prayed to be awarded costs of the counterclaim.

The plaintiff filed a reply to the defence filed by the defendant. He joined issues with the defendant. He filed a defence to the counterclaim. He denied that the defendant was entitled to a portion of the suit land as claimed the counterclaim. He further denied that a suit had been filed in court which determined

the issues in dispute between the plaintiff and the defendant. He put the defendant to strict proof thereof. The suit was then listed for hearing but due to one reason or the other the hearing did not take off. The defendant, Ezekiel Nganga Kanunwa (*hereinafter referred to as the deceased*) died on the 19th of October, 1996 before the suit could be heard. The widow of the deceased, Leah Wacheke Nganga was however substituted as the defendant in the place of the deceased once it was established that she was the administrator of the estate of the deceased.

During the hearing of the case, the plaintiff called one witness, himself. He testified that he was the registered owner of the suit land. He produced the title in respect of the suit land which was issued to him on the 23rd of January, 1981 as *Plaintiff's exhibit No.1*. He testified that he had joined a partnership of ten people who had formed the partnership to purchase parcels of land, one of which is the suit land. He testified that the deceased was one of the original ten members but was unable to pay the sum of Ksh.4,248/= which was required as 10% deposit. The deceased invited the plaintiff to pay the said amount on consideration that he would get part of the land. The plaintiff testified that he paid the said amount and duly took occupation of the suit land. It was his testimony that the deceased and members of his family resided on a portion of the suit land.

The plaintiff testified that he paid the loan which was advanced to him by the Settlement Fund Trustees to purchase the suit land. In total, he paid the sum Ksh.116,271/30. He produced original copies of the statements of accounts issued by the Settlement Fund Trustees (SFT) which confirmed that he had settled the said loan advanced to him as *Plaintiff's exhibit No. 2(a)*. He testified that the deceased only paid the sum of Ksh.1,050/= to the Settlement Fund Trustees. Apart from the said amount of Ksh.1,050/=, the deceased had not paid any other amount in respect of the suit land. He further testified that sometime in 1984, the deceased referred a dispute in respect of the suit land for arbitration before the District Officer (D.O), Bahati. At the time, the deceased was claiming that he was entitled to a half portion of the suit land. After hearing the testimony of the plaintiff and the deceased, the D.O awarded the deceased 28 acres out of the suit land. The plaintiff was not satisfied with the decision arrived by the D.O. He testified that at the time the deceased referred the dispute to be arbitrated upon by the D.O., Bahati, he (*the deceased*) was occupying a portion of the suit land measuring 16 acres or thereabout.

The Plaintiff testified that in his view the deceased and his family were not entitled to even a single acre from the suit land because they had contributed nothing, other than Ksh.1,050/=, to the purchase of the suit land. He denied that the deceased had settled a portion of loan advanced in respect of the suit land when he made milk deliveries to the Kenya Co-operative Creameries Ltd (*K.C.C. Ltd*). He further denied the suggestion put to him by the defendant that he had agreed for the suit land to be subdivided in accordance with the decision which was arrived at by the D.O, Bahati. He further testified that the defendant and her family had sold several portions of land to various persons without his authority. He reiterated that he was entitled to the entire suit land measuring 85 acres or thereabout. He testified that once he had completed paying the loan due to the Settlement Fund Trustees, he was issued with a discharge of charge which he used to obtain the title in respect of the suit land. He was however prepared, on humanitarian grounds, to give to the defendant and her family a portion of the suit land measuring four (4) acres only. He urged the court to allow the prayers sought in his plaint.

The defendant called two witnesses to testify on her behalf. The defendant testified as DW1. She testified that the deceased and the plaintiff were partners when the suit property was purchased. After the deposit was paid, the plaintiff and the deceased resided on the suit land. They first moved into the suit land in 1962 when the suit land was purchased. She testified that the deceased contributed to the initial deposit which was paid when the suit land was purchased. She further testified that the loan due to the SFT was paid jointly by the plaintiff and the deceased. It was her testimony that the deceased paid his portion of the loan to the SFT by making milk deliveries to KCC Ltd. She conceded that she did not have any documents to prove that the deceased indeed made milk deliveries to the KCC Ltd and used the proceeds therefrom to settle the loan that was due to the Settlement Fund Trustees.

The defendant testified that the reason why there were no receipts indicating that the deceased had paid the portion of the loan due to the Settlement Fund Trustees was because the account at the Settlement Fund Trustees was in the name of the plaintiff. She testified that all the records in respect of the

payments made were therefore kept by the plaintiff. She testified that the deceased paid a portion of the loan due to the Settlement Fund Trustees when a portion of 4 acres was sold jointly by the plaintiff and the deceased to the PCEA Church.

She reiterated that because of the contribution made by the deceased towards the purchase of the suit land, the estate of the deceased was entitled to 26 acres out of the suit land. She reiterated that the family of the deceased had been residing on the said suit land since 1962. She conceded that the deceased and herself had sold a portion of the suit land to various persons measuring a total of 17 acres. She testified that she was aware that the dispute between the plaintiff and the deceased had once been referred for arbitration before the D.O, Bahati division. She reiterated that the family of the deceased was entitled to a portion of the suit property measuring 16 acres.

DW2 Christopher Njogu Nganga, the son of the deceased and DW1 reinforced the testimony which had been presented before court by his mother, DW1. He testified that as a young boy in the 60's he recalled that they used to cultivate and occupy 58 acres out of the total acreage comprised of the suit land. Although he did not produce any documentary evidence, he reiterated that the deceased paid part of the loan that was due to the Settlement Fund Trustees when he made milk deliveries to the KCC Ltd. He further testified that the deceased further paid the loan due to the Settlement Fund Trustees by selling a portion of land, jointly with the plaintiff, measuring 4 acres to the PCEA church. He reiterated the testimony of his mother DW1 by stating that the family of the deceased was entitled to 28 acres (*and not 26 acres according to DW1*). He testified that the deceased and the defendant had sold a total of 18¾ acres. They had therefore been left with a portion of land measuring 9¼ acres. He urged the court to dismiss the plaintiff's suit and enter judgment in their favour as prayed in the counterclaim.

After the close of both the plaintiff and the defendant's case, the parties to this suit agreed by consent to file written closing submissions. Both the plaintiff and the defendant filed the said written submissions. After carefully reading the pleadings filed, and considering the evidence adduced by the parties to this suit, including the written submissions filed, the issues for determination by this court are as hereunder:-

- (i) *How did the plaintiff and the deceased come to occupy the suit land in 1962?*
- (ii) *What was the agreement between the plaintiff and the deceased, in respect of the suit land?*
- (iii) *Who, as between the plaintiff and the deceased, paid the initial 10% deposit for the purchase of the suit land?*
- (iv) *Who, as between the plaintiff and the deceased paid the loan that was due in respect of the suit land to the Settlement Fund Trustees?*
- (v) *And finally, what is the entitlement of the plaintiff and the family of the deceased in terms of the existing acreage of the suit land?*

In answer to the above questions, this court shall determine the matters in dispute in this case. On issue (i), I have considered the testimony of the plaintiff and the defendant. My evaluation of the evidence adduced is that the deceased was an original member of the partnership of ten members who had joined together to purchase ten portions of land, one of which is the suit land. From the evidence adduced, it is clear that the deceased was unable to raise the 10% of the purchase consideration that was required to be paid as a deposit for the purchase of the suit land. The deceased invited the plaintiff to join the partnership on consideration that he would pay the deposit that was then required. The plaintiff paid the deposit of Ksh.4,248/=. I believed the testimony of the plaintiff when he stated that the deceased paid nothing towards the initial 10% deposit of the purchase consideration.

It is however clear from my analysis of the evidence adduced that the plaintiff and the deceased reached some understanding on how the balance of the purchase consideration which had been advanced to them for the purchase of the suit land by the SFT was to be repaid. However, it is apparent that the deceased

renege on his part of the deal. Apart from paying a paltry sum of Ksh.1,050/=, the deceased paid nothing. The balance of the loan due to the SFT was paid by the defendant. He produced receipts in evidence which showed that he had paid the entire loan amount of Ksh.116,271/30. However the plaintiff conceded that he had sold a portion of the suit land measuring four (4) acres to offset the loan due in respect of the suit land to the Settlement Fund Trustees. The said four (4) acres was sold to the PCEA Church for a purchase consideration of Ksh.52,000/=.

According to the evidence adduced by the plaintiff, upon completion of the payment of the loan that was due to the SFT, he was issued with a discharge of charge. He went to the Land Registry, Nakuru and was issued with the title in respect of the suit land in his name. This was in 1981. It is when the plaintiff was issued with the title in respect of the suit land that the harmonious relationship that then existed between him and the deceased ended. It is apparent that the plaintiff sought to have the deceased and his family evicted from the suit land. The dispute was referred to the District Officer, Bahati who heard and determined the dispute by apportioning a portion of land measuring 28 acres to the deceased and his family. The plaintiff was not happy with the decision of the D.O. Bahati.

Although the defendant averred in her defence and counterclaim that she had the dispute between the plaintiff and the deceased had been resolved when Land Case No.9 of 1984 was filed in court, no evidence of the existence of such a suit was placed before this court. In my opinion, the decision of the D.O. Bahati was never adopted as a judgment of the court. The arbitration process by the D.O. Bahati was therefore inconclusive.

Having carefully evaluated the evidence adduced by the plaintiff and the defendant, I do hold that there existed an agreement between the plaintiff and the deceased whereby it was agreed that the suit land would be sub-divided once the loan due to the Settlement Fund Trustees was paid in full. As stated earlier in this judgment, the deceased renege on his part of the agreement and left the burden of the repayment of the loan to the plaintiff. I did not believe the testimony by the defendant and her son that the deceased had offset part of the loan due to the Settlement Fund trustee by paying the same from the milk proceeds that he received from KCC Ltd. It is improbable that the deceased could have paid the loan to the Settlement Fund Trustees and failed to keep the receipts.

I am however prepared to consider that the sale of a portion of the four (4) acres comprising part of the suit land by the plaintiff to offset the loan due to the Settlement Fund Trustees was a joint contribution of the plaintiff and the deceased. In that regard, since the purchase consideration of the said four (4) acres was Ksh.52,000/=, I will apportion equally the said amount to the plaintiff and the deceased as their contribution to the offsetting of the loan then due to the Settlement Fund Trustees. In that respect therefore, this court holds that the deceased contributed the sum of Ksh.27,050/= as the purchase consideration of the suit land. This sum is comprised of the sum of Ksh.26,000/= (*half of the purchase consideration of Ksh.52,000/= for the sale of the four (4) acres to the PCEA Church*) and his initial payment of Ksh.1,050/=.

As regard the plaintiff his contribution for the purchase of the suit land is Ksh.116,271/30 (*less Ksh.26,000/= paid on behalf of the deceased*) which is equivalent to Ksh.90,271/= plus Ksh.4,248/= which he paid as the initial 10% deposit for the purchase consideration. As stated earlier in this judgment, there is no evidence that the deceased made any contribution towards the initial 10% deposit for the purchase consideration. The plaintiff's contribution in respect of the purchase consideration of the suit land is therefore Ksh.94,519/30.

The total acreage of the suit land as per the title produced as *Plaintiff's exhibit No.1* is 33.14 hectares (*which translates to 82.85 acres*). The deceased is therefore entitled to 18.43 acres calculated as hereunder;

27,050/= (*being the contribution of the deceased*) x 82.85 acres
towards the purchase of the suit land)

121,569/30 (*being the purchase consideration of the suit land*)

= 18.43 acres.

The entitlement of Plaintiff shall be 64.41 acres calculated as hereunder;

94,519/30 (*being the contribution of the* x 82.85 acres

Plaintiff towards the purchase

Consideration of the suit land)

121,569/30 (*Being the purchase consideration*

Of the suit land)

= 64.41 acres

I therefore enter judgment in this suit as hereunder;

(i) It is hereby declared that the suit land known as *Nakuru/Menengai/18* is jointly owned by the plaintiff and the defendant (*as the administratrix of the estate of the deceased – Ezekiel Nganga Kanunwa*) in the following portions:-

(a) Kamau Githae – 64.41 acres.

(b) Leah Wacheka Nganga – 18.43 acres.

(ii) The plaintiff is hereby ordered to surrender the title in respect of the suit land to enable the suit land to be surveyed, demarcated and sub-divided in accordance with this judgment. The costs of surveying and subdividing the suit land shall be borne by the plaintiff and the defendant on a pro-rata basis to their respective acreages.

(iii) The defendant and the members of her family (*including purchasers of the portion of the suit land who occupy the suit land after the same was sold to them by the deceased and the defendant and who claim title from the defendant*) shall vacate the portion of land that is more than 18.43 acres within sixty (60) days of the date that the sub-division shall be completed in accordance with para (ii) of the judgment.

(iv) If the P.C.E.A church has not been issued with the title in respect of their four (4) acre portion of land, then two acres each shall be deducted from the entitlement of the plaintiff and the defendant making their respective shareholding to be 62.41 acres and 16.43 acres respectively. If the said portion has been transferred, then the judgment of this court in (i) shall apply.

(v) Since neither the plaintiff nor the defendant were successful in this suit, there shall be no orders as to costs.

(vi) Either party shall be at liberty to apply to give effect to the judgment of this court.

DATED at NAKURU this 8th day of November, 2006

L. KIMARU

JUDGE