



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2986 OF 1995

EDWARD MUTHONI NDIGUITHA.....PLAINTIFF

VERSUS

EDWARD MWANGI NGURE.....DEFENDANT

JUDGMENT

Plaintiff seeks the following relief's against defendant; namely:

- (a) Defendant be declared a trespasser on LR NO. Loitokitok/Olkaria/296
- (b) An order of eviction against defendant
- (c) A permanent injunction to restrained defendant from trespassing on the suit land.
- (d) Mesne profits at the rate of Kshs 2000 per year from 1.9.95 or
- (e) Any other further relief

The following facts emerge from the pleadings, documents and evidence

- (i) Land title No. Loitoktok/Olkeria/296 was registered in the name of Ndigoitha Kibi also known as Joseph Ndigoitha Wakibi who died on 19.11.89. (ii) Deceased left a widow Maria Njeri Ndigoitha and three daughters Serah Muthoni Ndigoitha (plaintiff): Esther Wanjiku Kangethe and Mary Wanja Ndungu
- (iii) The Agreement for sale of land dated 23.2.91 shows that Maria Njeri Ndigoitha sold the suit land to Edward Mwangi (defendant) for shs 120,000 and that Edward Mwangi has paid shs 110,000 to Maria Njeri Ndigoitha. That Agreement shows that the sale was subject to vendor obtaining letters of administration and consent of the Land Control Board. Plaintiff however avers in the plaint that it is one Wakibi Ndiguitha (her deceased brother) who sold the land to defendant who took possession in about 1989.
- (iv) Defendant took possession of the suit land on 15.2.91 according to his evidence. Defendant agreed that the vendor did not obtain grant of letters of administration or consent of the Land Control Board
- (v) The record of High Court Probate and Administration cause No. 907/94 shows that Serah

Muthoni Ndigoitha and Esther Wanjiku Kangethe obtained a Grant of letters of administrate to the estate of Joseph Ndigoitha Wakibe on 21.9.94. That Grant was confirmed on 3.3.95 and the suit property registered in the name of Serah Muthoni Ndigoitha on 11.12.95 The certificate of confirmation of the Grant was revoked and the suit Land was given to Serah Muthoni Ndigoitha, Maria Njeri Ndigoitha, Esther Wanjiku Kangethe and Mary Wanja Ndungu as tenant in common in equal shares. Indeed Serah Muthoni Ndigoitha, (plaintiff), testified that the beneficiaries of the land are herself, Esther Wanjiku, Mary Wanja and her mother who are all entitled to the suit land in equal shares.

It is conceded in the plaint that defendant is in possession of the land in pursuance of an agreement for sale by which the suit land was sold to the defendant allegedly by one Wakibi Ndigoitha.

There is no dispute that the agreement for sale was not completed.

Indeed, the vendor Maria Ndigoitha did not obtain a grant of letters of administration or consent of the Land control Board. The defendant does not in the present proceedings seek specific performance of the Agreement.

As paragraph 3 of the plaint shows, plaintiff brought this suit on the basis that the land in dispute was registered in her name as a personal representative and that she was later on 8.3.95 registered as sole proprietor of the suit land subject to the life interest of Esther Wanjiku Kangethe But the Grant (Ex3) was not solely given to plaintiff alone. It was given to her and one Esther Wanjiku Kangethe on 21.9.94 The Grant was confirmed on 3.3.95 According to the confirmed Grant the land in dispute was to be registered in the name of Serah Muthoni Ndigoitha (plaintiff) but Maria Njeri Ndigoitha was entitled to a life interest.

But as I have shown above, the confirmed Grant was revoked on 11.12.95 The Grant was confirmed a fresh and four persons were named as beneficiaries of the suit land as tenants in common in equal shares.

It is true that plaintiff was the sole registered owner of the suit land subject to the life interest of Maria Njeri Ndigoitha by 2.11.95 when the suit was filed .

But plaintiff ceased to be the sole proprietor of the land on 11.12.95 when it was ordered that suit land be registered in the name of four persons as tenants in common in equal shares. Plaintiff did not subsequently amend the plaint to join the other three Co – proprietors in common as coplaintiffs. One important characteristic of a proprietorship in common is that each proprietor is entitled to undivided share in the whole. In my view, as the share of the plaintiff in the whole land has not been severed by partition, she cannot competently bring a suit to recover land alone. A suit to recover land from defendant has to be filed by the four proprietors or by one with the authority of others. No authority, like power of Attorney, is pleaded in the plaint and to that extent the suit is incompetent.

So, regardless of the merits of the suit, I strike it out as incompetent with costs.

E. M. Githinji

JUDGE

13.2.2003

Miss Mwaura present

Mr. Kamonde present

Miss Mwaura

I apply for certified copy of the judgment

E. M. Githinji

JUDGE

Order: To issue

E. M. Githinji

JUDGE