



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 71 OF 2017

(FORMERLY NAIROBI ELC 360 OF 2010)

MBURU KIHARA..... PLAINTIFF

VERSUS

MBUGUA MUNGAI KIARIE.....DEFENDANT

JUDGMENT

Background

1. Plaintiff and defendant are the registered owners of parcel no. Githunguri/Ikinu/527. Plaintiff allegedly sold a portion of this land to defendant many years ago as from 1966. The only dispute herein is the acreage being claimed by both parties. Plaintiff avers that the land was 4.5 acres and that he sold to defendant a total of 2 acres. Defendant on the other hand is claiming entitlement of 3 acres.

Litigation history

2. In 1999, defendant apparently lodged a dispute before the land dispute tribunal which case was allegedly dismissed. Thereafter, defendant lodged an appeal before the provincial tribunal where again the case was dismissed. Defendant then filed another appeal before the high court in case no. 287/06 which quashed the decisions of the land tribunal and provincial appeals committee on account of lack of jurisdiction.

3. Plaintiff then filed the present case (NBI ELC 360 of 2010) on 27.7.2010. Defendant too filed his own suit at Githunguri SPM's case no. 91/2010 on 9.9.2010. The two suits appear to have been consolidated on 28.11.2013. Thus whereas it may appear as if the dispute is about 8 years old (taking into account that the two suits were filed in year 2010), the truth of the matter is that the legal dispute is clocking 20 years in the litigation arena as the land dispute tribunal case was lodged in 1999!. The court also noted that the two litigants herein are very old men.

The record

4. The records relied on by the parties are as follows; Plaintiff relied on the plaint dated 10.6.2010, the list of statements of witnesses filed on 18.1.2018, the list of documents filed on 18.1.2018 and another list filed on 25.10.2018. For defence, they relied on the statement of defence filed on 25.8.2016, the list of witness statements filed on 2.8.2018 and list of documents filed on same date of 2.8.2018.

5. It is on court's record that interlocutory judgment was entered on 13.6.2014. It is not clear whether, the same was set aside. I have however considered the claims of both parties on their merits as both sides were fully represented on the date of hearing and no one raised this issue.

Plaintiff's case

6. Plaintiff's case is that parcel of land L.R No. Githunguri/Ikinu/527 measures 4.5 acres. On 17.8.1966, he sold 1.75 acres to defendant and the two obtained consent from land control board. On 3.10.1971, plaintiff sold a further 0.25 acres to defendant making the total of acreage sold to defendant at 2 acres. Thereafter when plaintiff desired to excise the two acres to give defendant his share defendant started claiming for more land. In 1999, defendant filed the land dispute tribunal case no. LDT 16/20/25 of 1999 where he was claiming 2.95 acres.

7. Defendant lost the case and he lodged the appeal no. 123/2000 at the provincial tribunal. He lost. He went to High court vide H.C appeal no. 287/2000 where the tribunal awards were quashed on the basis of lack of jurisdiction.

8. PW 1, Mburu Kihara avers that the suit land was actually family land which he got through demarcation. He therefore desires to get his share so as to share it with his brothers. In order to facilitate this process a meeting was apparently convened on 25.4.1993 in presence of elders. PW 2 avers he was present. It was then agreed that defendant would get his two acres whereas plaintiff would share the rest of the

land with his two brothers.

9. In support of his case, plaintiff produced as exhibits the 12 items in his list filed on 18.1.2018 as P Exhibits 1-12 and the two items in his further list filed on 25.10.2018 as P. Exhibit 13 and 14 respectively.

Defence case

10. DW 1 Mbugua Mungai Kiarie testified that around 1967, he purchased 2.75 acres of land out of parcel No. 527 from Kahara Njeru. Then he purchased 0.25 acres from Mburu Kihara hence making a total claim of 3 acres. He admits that there were proceedings before the land dispute tribunal, the provincial appeals committee and the High Court.

11. DW 2 one David Ndirangu Kihara relied on his statement filed on 3.11.2018 (the year is not clear) as his evidence. He stated that plaintiff had sold to defendant 0.25 acres while one Njeru Kahara had sold 2.75 acres out of the same land to make a total sum of 3 acres for defendant.

12. In support of his claim defendant produced exhibits in his list of documents dated 2.8.2018 item a-c as Defence exhibits 1-3 respectively.

Determination

13. I have considered all the evidence adduced herein the pleadings and the submissions (I did not see any submissions from defendant).

14. I find that the main issue for determination is whether defendant is entitled to 2 or 3 acres and whether plaintiff is entitled to 2.5 acres or thereabout.

15. I find that plaintiff and his witness have given a consistent account of how defendant came to be entitled to a portion of land registration no. 527. In 1966 plaintiff transferred 1.75 acres out of the suit land to defendant. That transfer is clearly captured in the document produced as P-Exhibit 9. This document is evidently very old, it is torn and is held together by cello tape! Still it captures crucial details, that the land Githunguri/Ikinu/527 is 4.5 acres. It also indicates that at a consideration of shs.4437 a share of 1.75 acres was transferred to Mbugua Mungai. The balance of 2.85 acres is for Mburu Kihara (plaintiff).

16. That transfer must have been actualized in form of registration as is captured in the green card produced as P Exhibit 8 This green card indicates that on 6.4.95, the two parties were registered as owners of the suit parcel under Cap 300 Laws of Kenya with defendant owning 1.75 acres and plaintiff getting 2.85 acres. Again these are the particulars captured in the certificate of title as is evident from the search certificate availed as P exhibit 7 (the search is dated 22.4.2014).

17. The aforementioned registrable and registered instruments clearly depict a relationship of proprietors in common as between the two litigants. **Section 101 (1)** of the **Registered Land Act (Repealed)** provided that;

“An instrument made in favour of two or more persons, and the registration giving effect to it, shall show-

(a) whether those persons are joint proprietors or proprietors in common; and

(b) where they are proprietors in common, the share of each proprietor”.

18. While being cross examined defendant stated as follows;

“I am not refuting the agreement of 1.75 acres. I remember the agreement of 0.25 acres. I don't have documents where I got 0.9 acres”.

19. This piece of evidence is in line with the contents of paragraph 4 and 5 of defendant's statement of defence where he acknowledges that he purchased 1.75 acres and was later added 0.25. The only problem appears to be his mathematics, since 1.75 acres plus 0.25 acres do not add up to 3 acres as alleged by defendant. They add up to 2 acres.

20. The applicable law in the partitioning of land held in common was to be found under **section 104 of the repealed Registered Land Act** while it is now available under section 94 of the Land Registration Act. This Act defines co-tenancy at **Section 91(1)** as follows;

“In this Act, co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common”.

21. **Section 94(1)** of the said Act provides for partitioning of land held in common in the following words;

“Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provision of this Act and of any other written law applying to or requiring consent to a subdivision of land and of any covenants or conditions in a certificate of land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.”

22. The parties did not take advantage of this law in order to have severance of their respective interests in the land, all because defendant wanted more land than what was due to him. Consequently, for the last 53 years (since 1966), the two litigants have remained in an unholy, unpleasant alliance, spending their prime years shuttling from one court to another. It is time to sever this relationship.

23. All in all I find that plaintiff has proved his claim on a balance of probability.

Final orders

(1) The land Githunguri/Ikinu/527 – is to be subdivided and separately registered for the defendant Mbugua Mungai Kiarie to get 2 acres while the plaintiff Mburu Kihara is to get 2.5 acres.

(2) The County Land Registrar and the County Surveyor, Kiambu are directed to ensure compliance with point number 1 herein.

(3) A permanent injunction is hereby issued restraining defendant by himself, his servants and or agents from interfering with plaintiff's enjoyment and possession in plaintiff's portion of the land.

(4) The Deputy Registrar of this court is hereby authorized to sign all the requisite documents to facilitate the implementation of this judgment.

(5) The consent of land control board is hereby dispensed with in the implementation of this judgment.

(6) Each party to bear their own costs of the suit.

Dated, signed and delivered at Thika this 2nd day of May, 2019.

MBUGUA LUCY

JUDGE

2/5/2019

In the presence of

Court Assistant: Diana

M/s Mwaura H/B for Mr. Mwariri for Plaintiff

Mr. Mbiu Kamau for Defendant: Present

Plaintiff: Present