



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 460 OF 2017

PETER KIMANGA MURITU - PLAINTIFF

VS

ELIZAPHAN MWANGI MURITU - 1ST DEFENDANT

JAMES MAINA MURITU - 2ND DEFENDANT

JUDGMENT

1. The Plaintiff and the Defendants are blood brothers. The Plaintiff sued the Defendants seeking orders for eviction against the Defendants from the LOC. 8/Matharite/1757(suit land) and costs of the suit.

2. The Plaintiff avers that he is the registered owner of the suit land and in or about the month of May 2017 the Defendants occupied the suit land without any colour of right by erecting structures and tilling the land thereon without the Plaintiffs knowledge and consent.

3. The Defendants in their joint defence denied the Plaintiff's claim and denied any encroachment/occupation of the suit land. They also denied erecting any structures or carrying out any family activities on the suit land.

Plaintiff's case.

4. The Plaintiff avers that he is the registered owner of the suit land measuring 0.728 Ha. That he acquired the title from his mother Mary Waithira Muritu as a gift. That the Defendants invaded the suit land in May 2017 and erected structures and tilled the suit land without his knowledge and consent. That despite demand to them to vacate through his lawyers on record then Bwonwonga & Co. Advocates the Defendants have persisted in their trespass thus depriving him of his enjoyment of the suit land. He enclosed a copy of title dated 11/11/13 to support ownership of the land.

5. At the trial, he testified that the Defendants have been allocated Loc.8/Matharite/1756 and 1758 respectively by their mother which is pending payment of the registration expenses to be met by the Defendants. That they do not have titles yet. That he has planted tea on the suit land which the Defendants are trespassing and picking without his consent.

6. On Cross-examination by the Defendants he stated that the suit land was a subdivision of Loc.8/Matharite/482 which upon subdivision gave birth to Loc.8/Matharite/1756,1757,1758. That Loc.8/Matharite/1756 was further subdivided into Loc.8/Matharite/1877 and 1878. That save for Loc.8/Matharite/1757 (Suit land) the rest are still registered in the name of their mother.

7. He contended that he accepted the suit land from his mother as a gift and did not collude with her or the surveyor to get more land on the ground than what is indicated in the title. He stated that he does not live on the suit land. On re-examination he confirmed that though the structure (cow shed) was demolished the Defendants are still picking tea on his land (suit land).

Defence case

8. The Defendants testified and informed the Court that the suit land is part of Loc.8/Matharite/482 which belonged to their grandfather Muiru Gachuma who died in 1978. That he owned two parcels Loc.8/Matharite/482 and 383. That Loc.8/Matharite/482 became registered in the name of their mother Mary Waithira Muritu fraudulently upon the demise of their grandfather. That their mother later carried out subdivisions on Loc.8/Matharite/482 without their knowledge creating 3 parcels: LR No. Loc.8/Matharite/1756, 1757 & 1758. The Defendants further stated that they occupy Loc.8/Matharite/1756 & 1758 respectively while the Plaintiff occupies Loc.8/Matharite/1757.

9. It is their case that the suit land is bigger on the ground by 0.6 Acres than it is on the title. That Loc.8/Matharite/482 was 5.2 Acres but after subdivision it became 4.8 acres. That their mother and the Plaintiff have refused to have the variance on the suit land and title rectified.

10. Further that their mother has subdivided Loc.8/Matharite/1756 belonging to the 1st Defendants into Loc.8/Matharite/1877 & 1878 each measuring 0.9 acres and is intending to transfer Loc.8/Matharite/1878 to the Plaintiff. That despite the dispute being heard by the Deputy County Commissioner Murang'a who advised the parties to have the suit land rectified to reflect the correct measurement on the title and the land on the ground, the Plaintiffs and their mother have not been cooperative.

11. The Defendants denied any encroachment or picking tea on the suit land and insisted that they are each working on their respective parcels. That though they occupy the respective parcels they have not become registered as owners as the titles are still in the name of their mother. The 2nd Defendant confirmed that the structure (cow shed) was removed and transferred to Loc.8/Matharite/1758. They denied trespassing or interfering with the peaceful possession and enjoyment of the Plaintiff's land.

12. It is their evidence that the original land Loc.8/Matharite/482 land should be resurveyed and a grant of letters of representation to the estate of their grandfather obtained. That their mother and the Plaintiff have colluded to give the Plaintiff a bigger portion of the land i.e Loc.8/Matharite/1757 (in which is alleged to contain higher acreage by 0.6 acres) as well as Loc.8/Matharite/1878 measuring 0.9 acres.

13. Parties elected to file written submissions which I have reviewed. The submissions reiterate the parties' pleadings and I do not wish to duplicate. I will however refer to them in the determination.

14. Having considered the pleadings of the parties, the evidence adduced on trial, written submissions and the applicable law, the issue for determination remains; whether the Plaintiff is the registered owner of the suit land; whether the Defendants have trespassed on to the suit land; whether the Plaintiff should be granted the prayer of eviction; who pays the cost of the suit.

15. It is commonly acknowledged that the suit land is a subdivision of Loc.8/Matharite/482 which belonged to the parties' grandfather and which became registered in the name of the mother upon the demise of her father. It is also not in doubt that the parties are brothers and the dispute involves family land which is currently partly under the control of their mother Mary Waitheha Muritu.

16. It is on record that the Plaintiff is the registered owner of the suit land as evidenced by the copy of the title registered on 11/11/13. The parties however did not present a copy of the green card to support the historical background of the title. The same is however not disputed by the parties.

17. Section 26 states as follows;

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

Going by copy of title the Court has no doubt that prima facie the Plaintiff is the registered owner. Though the Defendants have not controverted the ownership of the title by the Plaintiff, they have raised allegations in their defence to the effect that the land was fraudulently registered in the name of their mother contrary to section 45 of the Law of Succession Act; that no Succession proceedings have been filed in respect to their grandfathers estate; that the Plaintiffs title is tainted with illegality having been obtained through fraud and collusion between the Plaintiff and their mother; that their mother subdivided and allocated the land to her sons inequitably by giving the Plaintiff more land i.e. suit land has 0.6 acres more on the ground and she intends to give him in addition Loc.8/Matharite/1878 measuring 0.9 acres; that though they have been allocated Loc.8/Matharite/1756 & 1758 to occupy the titles are yet to be transferred in their names; that the title of the suit land should be rectified to measure 0.728 Ha. on the ground.

18. Going by section 26 of Land Registration Act it is clear that a title of a proprietor can only be challenged on grounds of fraud, misrepresentation to which the person is proved to be a party or where the title has been acquired illegally unprocedurally or through a corrupt scheme. The Defendants did not present any evidence in the contrary to challenge the title of the Plaintiff. The Court finds that in the absence of any evidence to the contrary the Plaintiff is the duly registered owner of Loc.8/Matharite/1757.

19. There is an issue of survey of parcels which is adverted by both parties to resolve the dispute between the parties. No evidence was tendered on record to show that both parties have submitted the dispute to a registered surveyor so that the issue of whether or not the Plaintiff's land is bigger than the measurement on the title can be ascertained. The parties are best advised by their legal advisors to pursue the right channel to determine the issue. The Plaintiff in Paragraph 7 & 8 of his Replying Affidavit is not averse to the survey being carried out. The Defendants too have alluded to their desire to have the land verified by a surveyor in their pleadings. The case is marred by palpable suspicion amongst family members pitting the Defendants on one side and the Plaintiff and their mother on the other hand. The Court will determine the case before it which is whether or not trespass has been proved.

20. As to whether the Defendants have trespassed on to the land, it is the Plaintiffs case that the Defendants have removed the cowshed structure on his land but the 1st Defendant is still picking the tea on his land. The 1st Defendant has denied this allegation. It is on record that the Defendants occupy Loc.8/Matharite/1756 & 1758 respectively. The 2nd Defendant lives in Kiambu and not on his said parcel of land. Neither the Plaintiff lives on the suit land. It is the 1st Defendant that lives on Loc.8/Matharite/1756. It is trite law that he who asserts must prove. The Plaintiff has neither provided evidence to support the claim of trespass on the land, in particular the Defendants allegation that they are picking tea. He did not present any pictures, maps or status report on the ground to show the trespass or any encroachment for that matter. The Court is unable to find that there is trespass on to the Plaintiff's Land.

21. As to whether the Court should grant the orders of eviction, the answer is in the negative. No grounds have been proved to warrant the issuance of such orders.

22. The upshot is that the Plaintiff's claim fails and is hereby dismissed.

23. Parties being family, each party to bear their own costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 3RD DAY OF MAY, 2018.

J G KEMEI

JUDGE