



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 51 OF 2017

RAURENJIA NGURU NJIRI.....1ST PLAINTIFF

JAMES MURITHI NJERU.....2ND PLAINTIFF

VERSUS

JANE TERRY WANJIRU MBOGO.....DEFENDANT

JUDGEMENT

1. By a plaint dated 8th March 2017 and filed on 9th March 2017 the 1st and 2nd Plaintiffs sought the following reliefs against the Defendant;
 - a. *An order that the Defendant removes the restriction placed against land parcel No. Ngandori/Ngovio/5424 and or in the alternative the County Land Registrar, Embu be ordered to vacate the said restriction to facilitate the registration of the transfer documents in favour of the 2nd Plaintiff.*
 - b. *A permanent injunction restraining the Defendant from interfering with land parcel No. Ngandori/Ngovio/5424 in any way.*
 - c. *Costs of this suit.*
 - d. *Interest on (b) above at court rates.*
 - e. *Any other relief that this honourable court may deem just to grant.*
2. The 1st Plaintiff pleaded in the said plaint that she was the sole registered proprietor of the **Title No. Ngandori/Ngovio/5424** (hereinafter known as the suit property) which she had since sold to the 2nd Plaintiff. It was further pleaded that the Defendant had trespassed thereon and wrongfully caused a restriction to be entered against the suit property.
3. The Defendant entered an appearance and filed a written statement of defence on 28th March 2017. She denied that the 1st Plaintiff was the sole registered proprietor of the suit property. Instead, she pleaded that the suit property belonged to her late husband, Muchira Mwendano, who had inherited it from his father, Riro Mwendano.
4. It was the Defendant's case that she was at first married to the 1st Plaintiff's son known as Justus Nyaga (hereinafter called Nyaga). They were blessed with 3 children and were gifted **Title No. Ngandori/Ngoviu/5425** (hereinafter called parcel No. 5425) by the said Riro Mwendano (hereinafter called Mwendano). It was her case further that upon the demise of Nyaga she got married to another son of the 1st Plaintiff known as Muchira Mwendano (hereinafter called Muchira). They were blessed with 3 children and were gifted the suit property by the said Mwendano.
5. The Defendant denied having trespassed upon the suit property and stated that she had been cultivating and utilizing the suit property since 2001. It was her case that the 1st Plaintiff was trying to fraudulently dispose of the suit property without her knowledge and consent.
6. Due to the peculiar nature of the dispute and obtaining circumstances, this court decided to hear and determine the suit on a priority basis even though it was filed only recently. At the trial hereof, the Plaintiffs called three (3) witnesses whereas the Defendant called two (2).
7. The first one to testify was the 1st Plaintiff who testified as PW 1. She testified that the Defendant was her daughter-in-law who was married to her late son, Nyaga. She stated that she was the registered proprietor of the suit property having acquired it from her husband, Mwendano. It was her evidence that the suit property was being used by her son Muchira during his lifetime and that upon his demise, her husband (Mwendano) gave it to her absolutely.

8. The Plaintiff testified further that the Defendant had her own land parcel No. 5425 which belonged to her late husband Nyaga and wondered why she was utilizing the suit property which did not belong to her.

9. The 1st Plaintiff confirmed having sold the suit property to the 2nd Plaintiff but stated that she could not transfer it because the Defendant had caused a restriction to be entered against the title. She, therefore, wanted the restriction to be removed and for the prayers sought in the plaint to be granted.

10. The 1st Plaintiff denied the Defendant's contention that she was ever married to her other son called Muchira (aka Mucira). She stated that they only paid dowry for Nyaga and not Muchira. During cross-examination by the Defendant, she denied that any goat was ever bought for the purpose of sealing a marriage between Muchira and the Defendant. So far as she was concerned, her son Muchira died as an unmarried man.

11. The 2nd witness to testify was the 2nd Plaintiff who testified as PW 2. He stated that he bought the suit property from the 1st Plaintiff sometime in 2017 after conducting a search on its ownership at the Lands Office. He stated that he was shown the suit property and noted that nobody was residing thereon. The consent of the relevant Land Control Board was obtained but the suit property could not be transferred to him because of a restriction which had been placed at the instance of the Defendant.

12. The 3rd Plaintiff's witness was Edita Marigu Njiru who testified as PW 3. She testified that the 1st Plaintiff was her mother and that the Defendant was the wife of her late brother Nyaga who died in 2001. She testified that the Defendant had her own parcel of land (i.e. No 5425) which belonged to her late husband. She denied that the Defendant was also married by her late brother Muchira. She also stated that during his lifetime the late Muchira had leased out the suit property and rented a house elsewhere.

13. The Defendant was the first to testify on her own behalf as DW 1. She stated that sometime in 1993 she was married by the 1st Plaintiff's son known as Nyaga with whom she had 3 daughters. When the said Nyaga died in 2001, she was married by another son of the 1st Plaintiff known as Muchira with whom she had 3 children. Her second husband died around 2015.

14. It was her testimony that in order to formalize her second marriage, the late Muchira and the 1st Plaintiff visited her parents' home during the lifetime of Muchira. The details of what transpired during the visit were not, however, disclosed.

15. It was the Defendant's case that her father-in-law, Mwendano, had during the lifetime of his two sons, informally sub-divided his land and shown them their respective portions. Nyaga was shown parcel No. 5425 whereas Muchira was shown the suit property. She further stated that later on a surveyor was engaged to undertake the sub-division and she was asked to pay Kshs 5000/- for each of the titles.

16. It was her case that she only got a title deed for Nyaga's parcel No. 5425 but not the one meant for Muchira. She later on discovered that the 1st Plaintiff had obtained title to the suit property. It was her contention that at the time the Land Control Board gave consent for transfer of the suit property to the 2nd Plaintiff she was not aware of its correct parcel number because the surveyor had misled her on the parcel number.

17. The 2nd Defendant's witness was Stephen Mbogo Mwaniki who testified as DW 2. He stated that he was a Senior Assistant Chief of the area where the suit property is located. He told the court that he knew the family members of Mwendano including his late sons, Nyaga and Muchira. It was his evidence that the Defendant and the late Muchira lived in one house as husband and wife and even had children together.

18. It was his further evidence that he was aware of the land dispute. He was also aware that Mwendano had given all his sons a portion of land. He testified that Mwendano was not mentally stable due to his age and illness. He stated that when he summoned the concerned parties over the land dispute, the 1st Plaintiff did not turn up hence he referred the dispute to the office of the Chief. He also confirmed that at the time of Muchira's death, the suit property was being utilized by a lessee.

19. The hearing was concluded on 26th February 2018 and the parties were directed to file and exchange written submissions within 60 days. The record shows that the Defendant filed her submissions on 29th March 2018 whereas the Plaintiffs filed theirs on 8th May 2018.

20. The court has considered the pleadings herein, the evidence of the parties and the documents relied upon in the suit. The court is of the view that the following four (4) issues arise for determination;

- a. Whether the suit property rightfully belongs to the 1st Plaintiff or the Defendant.
- b. Whether the 1st Plaintiff fraudulently acquired the suit property.
- c. Whether the Plaintiffs are entitled to the reliefs sought in the plaint.
- d. Who shall bear the costs of the suit.

21. The Plaintiff in this suit devoted some evidence in a bid to demonstrate that there was no marriage between the Defendant and the late Muchira whereas the Defendant made every effort to demonstrate the existence of such marriage. The court must make it clear from the outset that this is not a succession court and there are no succession proceedings before it. The previous proprietor of the suit property, Mwendano, was still alive at the time the suit was heard even though in bad health.

22. In the circumstances, it is not necessary at all for the court to make a determination on the existence or otherwise of the alleged marriage between the Defendant and the late Muchira. The transfer of the suit property from Mwendwa to the 1st Plaintiff was done *inter vivos* during the lifetime of the two parties. As with all such transactions, a proprietor of a parcel of land is entitled to charge, lease, transfer or otherwise deal with his land as he pleases. There is no legal obligation on the part of a parent to give a portion of his land to any of his adult children, whether married or unmarried. If he chooses to do so, that would be out of his own volition and love for his children but not out of any legal obligation. See **Esiroyo Vs Esiroyo & Another [1973] EA 388**.

23. The court has carefully considered the evidence on record regarding the suit property. There is no doubt that it was derived from **Title No. Ngandori/Ngovio/606** (hereinafter called parcel No. 606) which belonged to Mwendano. There is no doubt that he intended to give his sons a portion of his said land upon sub-division. The court accepts that he actually showed them some portions on the ground even before a surveyor was engaged to undertake a formal subdivision. They took possession and started utilizing those portions.

24. The evidence on record shows that the process of sub-division and issuance of individual titles had not been completed by the time Muchira died in 2015 or thereabouts. When the titles were eventually issued, the Defendant was issued with a title for parcel No. 5425 which had been gifted to Nyaga but the title for the suit property was issued to the 1st Plaintiff who is the wife of Mwendano. So how did that come to be? The 1st Plaintiff testified that upon the death of Muchira, her husband (Mwendano) decided to give the suit property to her.

25. In her evidence in chief, the Defendant informed the court that when she inquired from the surveyor why she was getting one instead of two parcels, the surveyor informed her that the family had decided that she should be given only one parcel. In my opinion, the family could only authoritatively make such a decision with the blessings or approval of Mwendano who was the registered proprietor of the original parcel of land. As indicated earlier, the registered proprietor was under no legal obligation to gift a portion of his land to his adult children. There was also nothing to prevent him from changing his mind upon the demise of his son and gift the same parcel to his own wife.

26. There was no evidence on record to show that Riro Mwendano did not gift the suit property to his wife. He does not appear to have complained that his wife had grabbed the suit property or that his wishes had been subverted. He was the person best placed to shed more light on the matter but, unfortunately, he could not testify due to his medical condition.

27. The court has examined the land registers (green cards) tendered in this suit. The green cards show that the suit property was a sub-division of parcel No. 606. The sub-division was undertaken or registered at around 2015 whereupon Mwendano was registered as proprietor before transferring it to the 1st Plaintiff. There is no evidence of the suit property having been registered in the name of Muchira at any prior moment.

28. The above analysis leads the court to the inevitable conclusion that the 1st Defendant is the rightful owner of the suit property having acquired it from her husband who was the registered proprietor thereof at the material time. The intended transfer of the suit proper to late Muchira did not materialize during his lifetime. So, neither the Defendant nor the personal representative of the estate of the late Muchira can legitimately claim the suit property.

29. The 2nd issue for determination is whether or not the 1st Plaintiff acquired the suit property fraudulently. As indicated before, the 1st Plaintiff acquired the suit property from her husband who is still alive. There was no evidence of any fraud on the part of the 1st Plaintiff in its acquisition. The 1st Plaintiff conceded in her evidence that her late son Muchira had been given the suit property by his father Mwendano. Mr Mwendano then decided to gift her the suit property upon the death of Muchira. There was no evidence that Mwendano has ever complained of any fraud against his wife, the 1st Plaintiff herein.

30. The 3rd issue is whether the Plaintiffs are entitled to the reliefs sought in the plaint. It follows that if the 1st Plaintiff is the rightful owner of the suit property and the property was not obtained through fraudulent means, then she is entitled to all the rights of a registered proprietor. The relevant provisions of **section 24 (a) of the Land Registration Act** provide that;

“(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

The court, therefore, finds and holds that the Plaintiffs are entitled to the reliefs sought in the plaint.

31. The 4th and final issue relates to costs of the suit. Under **section 27 of the Civil Procedure Act (Cap 21)**, costs of the suit are at the discretion of the court subject to the proviso that costs shall follow the event unless, for good reason, the court directs otherwise. The court has considered the circumstances of this suit. The 1st Plaintiff and the Defendant are members of the same family. It was not necessary for the 2nd Plaintiff to join the suit since the 1st Plaintiff had the legal capacity to ventilate her case without the assistance of the 2nd Plaintiff. The appropriate order on costs shall be for each party to bear own costs.

32. The upshot of the foregoing is that the court finds that the Plaintiffs have proved their case on a balance of probabilities as required by the law. The court, therefore, enters judgement in their favour as prayed in the plaint. Each party shall bear its own costs. The court further directs that the Defendant shall have the right to harvest any food crops she may have planted in current season upon maturity. For the avoidance of doubt, the latter order does not apply to cash crops on the suit property.

33. It is so ordered.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 5th day of JULY, 2018.

In the presence of Mr Siro holding brief for Ms Fatuma for the Plaintiffs and the Defendant in person.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

05.07.18