



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 330 OF 2017

RICO KINYARIRO KARIUKI.....PLAINTIFF

VERSUS

RENATE WOLFF.....DEFENDANT

RENE NJUGUNA KARIUKI.....INTERESTED PARTY

JUDGMENT

Introduction

1. The dispute in this suit relates to Land Reference Number 12661/61 comprised in Title Number I.R 72109 situated in Karen and measuring about 0.404 hectares. It involves son and mother. Rico Kinyariro Kariuki (the **plaintiff**) and Rene Njuguna Kariuki (the **interested party**) are biological sons of Renate Wolf (the **defendant**), sired by one John Kariuki Kinyariro. The plaintiff and the interested party reside in Kenya while the defendant resides in Germany.

2. In or about 1994, while on a visit to Kenya, the defendant bought the suit property. On 15/1/1997, the suit property was registered in the name of the defendant and a title issued under the Registration Titles Act, Cap 281 (now repealed). The property is still registered in the name of the defendant to date.

3. On 19/4/2000, the defendant, while in Germany, swore an affidavit in which she made the following sworn depositions:

a) That Rico Kinyariro ID No 7981466 and Rene Njuguna ID No 10550405 both of Post Office Box 76360 Nairobi in the Republic of Kenya are my sons.

b) That the Land Title Number IR 72108 in Nairobi Kenya is mine.

c) That I have authorized both my sons (Rico and Rene) to share the same said land equally.

d) That I have allowed Rico and Rene to cultivate and develop the shared portion of the same said land in accordance to their wishes.

e) That in case of my death each son (Rico and Rene) will inherit his same said share of the land from me.

f) That what is stated herein is true to the best of my knowledge and belief.

4. In 2016, the defendant came to Kenya and informed the plaintiff and the interested party that she had decided to sell the suit property. Aggrieved by the defendant's decision, the plaintiff brought this suit seeking the following orders:

a) A declaration be issued to declare the plaintiff is the beneficial owner of a half portion of the parcel of land known as Land Reference Number 12661/61 (IR 72109).

b) A permanent injunction be issued to restrain the defendant whether by herself and/or through her servant and/or agents or any person howsoever from interfering with the plaintiff's quiet possession, use and enjoyment of that property known as Land Reference Number 12661/61 (I.R. 72109) or otherwise dealing with the property in any manner howsoever to the detriment of the plaintiff.

c) A permanent injunction be issued to restrain the defendant whether by herself or through her servants and/or agents or any person howsoever from dealing in any manner whatsoever with the suit property known as Land Reference Number 12661/61 (I.R. 72109), and the developments thereon and in particular not to sell or dispose or alienate the same in any manner

whatsoever.

d) In the alternative to prayers (a) (b) and (c) above, this honourable court directs that the plaintiff is given the first right of purchase of the suit property at a valuable consideration less the cost of improvements and developments that he has incurred thereon.

e) Costs of the suit.

The Plaintiff's Case

5. The plaintiff's case is that the defendant purchased the suit property during a visit to Kenya in or about 1993 as a gift *inter vivos* to the plaintiff and the interested party, to be equally shared between the two siblings, for their use, enjoyment and eventual inheritance upon the defendant's demise. She then left for Germany soon after the purchase and subsequently swore an affidavit on 19/4/2000 confirming that she had given her full consent and authority to her sons (the plaintiff and the interested party) to share the parcel equally and to cultivate and develop the property in accordance with their wishes. Having full trust in her mother's bequest and without any fear of being disposed of the property, he developed the property using his life savings. Over the years, he has been paying annual rates and doing everything necessary to preserve and tend the property. Consequently, the plaintiff contends that he is the beneficial owner of ½ of the suit property and the defendant has no right to dispossess him the ½ which she gave him.

Defendant's Case

6. The defendant contests the plaintiff's claim of beneficial ownership of ½

portion of the suit property. She contends that on 19/4/2000 when she swore the affidavit, she was ill. Secondly, she contends that she indicated in the said affidavit that in case of her death each of her two sons would have one half of the acre. She has since recovered and on 10/11/2016 she duly revoked her earlier wish. She adds that the plaintiff and the interested party were to benefit from the suit property in equal shares in the unlikely event of her death and not earlier.

7. The defendant further contends that the plaintiff has fenced off the entire property and erected one gate which he has locked with the intention of grabbing the entire suit property to the exclusion of other family members. The defendant also contests the value of the plaintiff's developments on the suit property. Lastly, the defendant contends that the Constitution of Kenya guarantees her right to peaceful enjoyment of the property which is registered in her name.

Interested Party's Case

8. Although no plea was made against the interested party, he filed a statement of defence in which he took the same position as that taken by his mother, the defendant.

Plaintiff's Evidence

9. At the hearing, the plaintiff testified as PW1 and called one witness. He adopted his witness statement dated 17/5/2017 as his sworn evidence in chief. He testified that the defendant is the registered proprietor of the suit property and he (the plaintiff) is the beneficial owner of a half portion of the suit property. He stated that he has developed the suit property and resides on it with his wife and children. He further stated that the interested party is the beneficial owner of the other half portion of the suit property.

10. The plaintiff further testified that the defendant purchased the suit property in or about 1993 as a gift *inter vivos* to him and the interested party. Upon purchase, the defendant left for Germany. Later, the defendant swore a duly commissioned affidavit on 19/4/2000 confirming that she had given full consent and authority to him and the interested party to share the parcel equally and to cultivate and develop their respective portions as they wished. He added that he put up developments and made improvements worthy Kshs 30,000,000 to the property. He further testified that he has been paying annual rates in respect of the suit property. He attributed his strained relationship with the defendant to the fact that he separated with the defendant when he was only 6 years when his father moved with him to Kenya leaving the defendant in Germany and since then they have had very minimal contact with the defendant who is his biological mother. Lastly, he testified that he moved to court after he received a letter dated 25/11/2016 from the Land Registrar indicating that the defendant had applied for the removal of the caveat he had lodged against the Title. He produced the following ten exhibits: (i) certificate of title; (ii) defendant's affidavit sworn on 19/4/2000; (iii) land rates invoices and receipts; (iv) defendant's email dated 15/4/2016; (v) caveat application; (vi) letter dated 27/11/2016; (vii) letter dated 7th December; (viii) letter dated 25th November; (ix) valuation report dated 27/6/2017 and (x) photographs of the suit property.

11. PW2 – Solomon Muthee Wachira, testified that he learnt that the defendant who lived in Germany wanted to purchase part of his

property for her to two sons who were living in Kenya. The defendant subsequently came to Kenya, inspected the property and proceeded to conclude the purchase of the suit property from him. Thereafter, the defendant left for Germany. PW2 testified that he still resides on the portion which he retained after hiving off the suit property. He further testified that since the sale, he only knows the plaintiff as the person in charge of the suit property. He added that before the plaintiff moved into the suit property, suspicious intruders had been visiting the property, prompting the plaintiff to erect a perimeter wall on the property.

Defendant's Evidence

12. The defendant testified as DW3 and called one witness. She adopted her written statement as her sworn evidence in chief. She testified that she bought the suit property with the intention of living in it as a pensioner in Kenya during the months of winter in Europe. She did not speak to the plaintiff prior to buying the property. In the year 2000, she had health problems and swore an affidavit to indicate that in case of her death, the suit property would pass to her two sons, Rico and Rene. Whenever she visited Kenya, the plaintiff never gave her a chance to see the suit property. Due to lack of co-operation from the plaintiff, she decided to sell the suit property in 2008. This did not however happen because two deaths occurred in her family in Germany. Subsequently, in 2014, she resolved to effect a formal transfer of the suit property to her two sons, Rico and Rene, and proceeded to prepare a formal transfer. The plaintiff declined to execute the formal transfer. She then decided to sell the suit property.

13. The defendant further testified that the plaintiff wants the entire suit property to himself and he has settled on it without her permission. She added that she needs to sell the suit property and use the sale proceeds to fend for herself in retirement. She added that she is prepared to compensate the plaintiff for his developments on the suit property which she estimated at Kshs 3,522,000. She produced the following six exhibits contained her bundle: (i) certificate of title plus removal of caveat; (ii) valuation report dated 7/9/2017; (iii) defendant's statement; (iv) interested party's statement; (v) John Kariuki Kinyariro's statement; and (vi) photographs of the suit property.

14. DW1 – John Kariuki Kinyariro adopted his witness statement dated 13/9/2017 as his evidence in chief. He testified that he is the biological father of the plaintiff and the interested party. He added that the plaintiff lived in his house in Buruburu until 2012 when he moved to the suit property. He further testified that the plaintiff was trying to grab the defendant's property using the affidavit of 19/4/2000. He added that the defendant revoked her desires in 2016.

Interested Party's Evidence

15. The interested party testified as DW2. His evidence was a replica of the evidence of the defendant.

Plaintiff's Submissions

16. Counsel for the plaintiff filed written submissions dated 19/2/2018 in which he addressed the court on the following issues: (i) whether the defendant gifted the suit property to the plaintiff and the interested party; (ii) whether or not the gift crystallized; (iii) whether the plaintiff relied on the defendant's affidavit of 19/4/2000 to settle into the suit property; (iv) whether the plaintiff has any other legitimate interest in the suit property; (v) whether the plaintiff holds a beneficial interest in a half portion of the suit property; and (vi) whether the plaintiff is entitled to the prayers sought.

17. Counsel submitted that the reason why the plaintiff took possession of the suit property is that the same was gifted to him and to his siblings by the defendant as a token of her love for her two sons whom she had separated with in 1973. He added that the affidavit sworn by the defendant on 14/9/2000 had not been challenged in any way. Counsel argued that the gift took effect immediately and there was no evidence of intention to have the gift revert back to the donor or take effect only upon the death of the donor. Counsel argued that the defendant had tendered evidence to the effect that the processing of the transfer was ongoing when the parties' relationship turned sour.

18. It was further submitted that, based on the defendant's sworn deposition, the plaintiff had settled on the suit property and has been in possession of the property all along. It was contended that the plaintiff had a legitimate expectation that it was safe for him to make investments on the property.

19. Counsel further submitted that even if the gift were to fail, the plaintiff has acquired a legitimate equitable interest in the property based on the doctrines of proprietary estoppel, adverse possession and legitimate expectation.

Submissions by the Defendant and the Interested Party

20. Counsel for the defendant and the interested party filed joint written submissions dated 27/2/2018. She contended that the affidavit of 19/4/2000 did not authorize the plaintiff to move into the suit property or construct on it. She added that the purported gift did not crystallize. Counsel argued that in his plea to the court, the plaintiff lays claim to the entire parcel of land, an indication that the plaintiff is bent on grabbing the entire piece of land. She contended that the plaintiff has no legal entitlement to either half or whole of the suit property. Counsel further submitted that at most, the plaintiff has a monetary claim on account of the developments he had undertaken on the suit property. He urged the court to award the plaintiff damages of Kshs 3,522,000.

Determination

21. I have considered the parties' respective pleadings, evidence, submissions and authorities. I have also considered the relevant law and jurisprudential principles. Three key issues fall for determination in this suit. The first issue is whether the gift contemplated by the defendant in her sworn affidavit of 19/4/2000 crystallized. The second issue is whether the plaintiff has acquired beneficial ownership of one half of the suit property under the doctrine of proprietary estoppel, adverse possession and legitimate expectation. The third issue is whether the plaintiff is entitled to any of the reliefs sought in the plaint. I will deal with the three issues in the order in which they have been framed.

22. The suit property was registered in the name of the defendant on 15/1/1997. On 12/5/2016, the plaintiff placed a caveat against the title, claiming a beneficial interest in the title. The title was registered under the Registration of Titles Act. Prior to the enactment of the Land Registration Act and the Land Act, the substantive statutory framework governing the title was the Transfer of Property Act of 1882. Both the Registration of Titles Act and the Transfer of Property Act of 1882 have been repealed.

23. Section 122 and 123 of the Transfer of Property Act 1882 had the following legal framework on gifting of land.

“122 “Gift” is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

123 For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.....”

24. The Land Registration Act 2012 contains the following broad regulatory framework on disposition and dealings affecting land.

36 (1) A lease, charge or interest in land shall not be disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with this Act or any other law, shall not extinguish, transfer, vary or affect any right or interest in that land, or in the land, lease or charge.

2. Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract.....”

25. The above framework was lifted from Section 38(1) of the Registered Land Act (now repealed).

26. Section 43(1) and (2) of the Land Registration Act contains the following framework on instruments of disposition of interest in land:

1. Every instrument effecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.”

2. No instrument effecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.

27. I have carefully evaluated the evidence placed before the court by the parties. It is common ground that the defendant swore the affidavit of 19/4/2000. There is however no evidence of satisfaction of the mandatory requirements of either the repealed Transfer of Property Act 1882 or the Land Registration Act 2012 in so far as they relate to the disposition of an interest in land through gifting. Section 122 of the repealed Transfer of Property Act 1882 required that acceptance of the gift be in writing. Under Section 123 of the repealed Act, the instrument conferring the gift had to be registered. Sections 36 and 43 of the Land Registration Act contain similar mandatory formal requirements on disposition of land.

28. Looking at the evidence presented to the court, it is clear that the mandatory formal requirements relating to gifting of land or disposition of an interest in land were not met. There is no evidence of formal acceptance of the gift. Secondly, disposition instruments were never signed and registered. Consequently, it is the finding of the court that the gift contemplated in the affidavit of 19/4/2000 failed to satisfy the mandatory formal requirements for gifting of land hence the gift did not crystallize.

29. The second issue is whether the plaintiff has acquired a beneficial interest in one half of the suit property. The plaintiff contended that he has acquired beneficial ownership interest in the suit property under the doctrines of proprietary estoppel, adverse possession and legitimate expectation.

30. Section 7 of the Land Act itemizes the following modes of acquisition of title to land

(a) allocation; land adjudication process;

(c) compulsory acquisition

(d) prescription

(e) settlement programs;

(f) transmission

(g) transfers;

(h) long term leases exceeding twenty one years created out of private land ; or any other manner prescribed in an Act of Parliament.

31. DW 1 testified that the plaintiff is his biological son. He further testified that the plaintiff lived in his house in Buruburu up to the year 2012 when he relocated to the suit property. To assert prescriptive rights of ownership such as adverse possession, certain essential features must be proved. One such feature is exclusive adverse possession for a period of twelve years without the consent or sanction of the registered proprietor. In the present suit, the plaintiff moved into the suit property in 2012 and has all through contended that his entry into the suit property was pursuant to an act of gifting by his biological mother. He cannot therefore be said to be an adverse possessor.

32. Secondly, the framework for an order of adverse possession is provided under Section 38 of the Limitation of Actions Act. A party seeking an order of adverse possession is required to take out an originating summons. The plaintiff did not exercise that option. The claim of prescriptive rights came up at the stage of submissions. It was not pleaded in the plaint.

33. It is therefore the finding of this court that the plaintiff has not led evidence to demonstrate that he has acquired prescriptive title to ½ of the suit property under Section 7 of the Land Act.

34. Lastly, besides the declaratory and injunctive orders sought by the plaintiff, he sought to be granted the first option to purchase the suit property less the cost of improvements and developments done on the suit property. In my view, the improvements such as erection of a perimeter wall were made with the implied permission of the defendant who intended to gift the property to her two sons. She says she has changed her mind partly because the plaintiff is intent on grabbing the entire parcel of land. She now wants to sell the property. Having found that the gift did not crystalize, I hold the view that the defendant is entitled to sell the suit property. It would however be inequitable to disregard the improvements done to the property and the outgoings paid by the plaintiff to preserve the property. There is however no common ground on the value of the improvements. Both the plaintiff and the defendant produced valuation reports. The plaintiff's valuation report was prepared by M/s Kenval Realtors (EA) Limited. They valued the cost of the improvements (items 2 to 13) at Kshs 10,594,394.50.

35. On her part, the defendant produced a valuation report by M/s Gathumbi Associates in which the improvements on the suit property were assessed at Ksh 3,522,000. Doing the best that the court would do when confronted with sharply contrasting figures such as the above figures, I would assess the fair estimate of costs of the developments at an average of the two figures. This translates to Kshs, 7,058,197.25

(Kenya shillings seven million fifty eight thousand one hundred ninety seven, twenty five cents).

36. Consequently, the court does grant the plaintiff the option to purchase the property at the current market value to be determined by a registered valuer appointed by the defendant. The sum of Kshs 7,058,197.25 is to be netted against the market value determined by the defendant's valuer.

Disposal Orders

37. In light of the foregoing, the court makes the following disposal orders:

a) Prayers (a), (b) and (c) of the plaint are declined.

b) Should the defendant actualize her desire to sell the suit property, the first offer shall be given to the plaintiff to purchase the property at the market value to be solely determined by the defendant's valuer. The consideration to be paid by the plaintiff shall be less the sum of Kshs 7,058,197.25 which is the assessed fair value of the plaintiff's developments on the suit property.

c) In the event that the contemplated sale does not take place or sale to the plaintiff fails for whatever reason, the defendant shall deposit in court the above sum of Kshs 7,058,197.25 and shall thereafter be at liberty to proceed to deal with the suit property in any manner she desires. The plaintiff shall be at liberty to apply for release of the deposited money to himself.

d) In light of the nature of the orders herein, each party shall bear own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF OCTOBER 2018

B M EBOSO

JUDGE

In the presence of:-

Mr Gikonyo Advocate for the plaintiff

Mrs Rashid Advocate for the Defendant

June Nafula - Court Clerk