



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 253 OF 2013

(Formerly Nyeri HCC No. 142 of 2009)

WACHIRA WAMBUGUPLAINTIFF

VERSUS

SAMUEL KARENJU1ST DEFENDANT

STANLEY THIONG'O WACHIRA2nd DEFENDANT

JUDGMENT

1. The plaintiff who is the registered proprietor of the parcels of land known as **LR No.Chinga/Gathera S.226** and **Chinga/Gathera S.337** (the suit properties) granted license to the defendants (who are his sons) to use and occupy **Chinga/Gathera S.226**.

2. The plaintiff blames the defendants for having unlawfully encroached onto **Chinga/Gathera S.337** and for interfering with his proprietary rights over the suit properties.

3. Explaining that as a result of the unlawful activities of the defendants on the suit properties he has suffered and continues to suffer loss and damage as well as mental and psychological torture, the plaintiff prays for judgment against the defendants jointly and severally for: -

(a) Permanent injunction to restrain the defendants from entering, remaining or in any other manner interfering with his use and enjoyment of the suit properties;

(b) General damages and exemplary damages

(c) Costs of the suit.

4. Vide their statements of defence dated **20th February 2014**, the defendants denied the allegations leveled against them and averred that the plaintiff bequeathed and directed them to the portions of the suit properties they use and occupy; that they have extensively developed the portions they occupy-have built their homes and planted tea bushes therein.

5. The defendants blame their step-mother for the woes they are facing and explain that they have legitimate expectation to earn a livelihood from the suit property having lived therein with the permission and knowledge of their father who is the plaintiff in this matter.

6. When the matter came up for hearing, the plaintiff informed the court that he sued the defendants because “they have inherited his parcels of land (the suit properties) while he is still alive”. He informed the court that he has built on parcel No. 226 which he inherited from his father but he had purchased plot No. 337.

7. The plaintiff maintained that the defendants have forcefully taken his land and refused to vacate despite having asked them to do so.

8. The court heard that the plaintiff has shown the defendants where to cultivate and that the plaintiff and defendants have severally tried to resolve the dispute herein with family members and before the area chief without success.

9. The court further heard that the defendants have built in parcel No. 226 and that the plaintiff has no objection to that as he has shown them where to build and cultivate.

10. The plaintiff's problem is that the defendants have encroached on other parcels, abused and even beaten him up.
11. For the foregoing reasons, the plaintiff urged the court to order the defendants to agree to take what he will give them but not the parcels they have encroached on. He also urged the court to order the defendants to vacate the parcels they have encroached on.
12. In cross examination, the plaintiff acknowledged that he has other parcels of land other than the suit properties and that he has a plot at Gachicha where he resides with his current wife.
13. The plaintiff also acknowledged that parcel No.226 was inherited from his father and that traditionally, all his children are entitled to inherit that parcel of land.
14. The plaintiff admitted that he showed the defendants where to build on parcel No. 226 and that they have built and settled therein with their families. He also admitted that the defendants have planted tea bushes and trees therein. He further admitted that the 2nd defendant on his permission planted tea bushes in parcel No. 337.
15. The plaintiff acknowledged that he does not relate well with his brothers. He accused them of teaming up with his sons to beat him up. He informed the court that he does not know what the grudge between him and his sons is about.
16. He stated that he defendants cultivate arrow roots on a portion of parcel No. 226 which is marshy and evergreen. That portion was being cultivated by the defendants' mother before she died. Explaining that he did not give that portion to the defendants, the plaintiff lamented that the defendants took it forcefully. He wanted to give that portion to his other sons who were unmarried at that time.
17. He denied the allegation that his second wife is the cause of the problems between him and the defendants as she does not cultivate any of the suit properties.
18. He has allocated land to cultivate to his other sons and an unmarried daughter.
19. He admitted that it's normal for a son to expect that they will be the ones to inherit the portion they have been working on.
20. Concerning his allegation that the defendants beat him up, he stated that the incidence was witnessed by about 50 persons, an administration police officer included. He reported the matter, got issued with a P3 form but nobody was charged.
21. In re-examination he stated that when he brought this suit he had a lot of anger and he wanted the defendants to be evicted from the suit properties but he no longer wants them to be evicted instead he wants them to stop cultivating where he has not shown them.
22. The 1st defendant, who testified as D.W.1, informed the court that he has built on 226 and cultivates on 337 with the consent of his father. He built in 226 in 1996. He denied the plaintiff's contention that they have encroached on his land. He informed the court that it is his father who showed them where to build and to farm. The dispute between them was taken to the area chief who directed that the dispute be resolved at home.
23. In cross-examination the 1st defendant admitted that he is a licensee of his father on the suit properties. He has no problem if the plaintiff tells him to stop farming where he is currently farming and shows him where else to farm because the land is his. He stated that they have not forcefully taken their father's land or disobeyed his instructions. He has many siblings, all of whom have been shown by their father where to build. Their father has not taken the other siblings to court. He blamed their woes on their step-mother who he accuses for alleging that they have plans to kill her, the plaintiff and her children.
24. The 2nd defendant, Stanley Thiongo Wachira, informed the court that they have lived in the suit properties for over 50 years. He lives in the suit land with his family. His father, the plaintiff herein, gave them permission to stay in the suit land before their mother died.
25. Like D.W.1 he stated that he has no problem vacating the portion he currently occupies but maintains his father should show him which portion to relocate to. While acknowledging that the suit properties belong to their father, he contended that they are entitled to their father's property. His other siblings though not sued by their father are not satisfied. They were sued for being very vocal.
26. Pointing out that he has a parcel of land in Nanyuki which he bought he stated that his family that's to say his wife, children and uncles can direct him on how to deal with the property as they would not wish his wife or children to suffer.
27. Nahashon Kanyiri, D.W.1, one of the plaintiff's brothers informed the court that the defendants effected developments on the suit properties with the permission of the plaintiff. Explaining that the problem between the plaintiff and the defendants arose after the defendants' mother passed on and the plaintiff re-married, D.W.3 stated that the plaintiff wants the defendants to vacate the suit property so that he can give it to the new wife. Explaining that as a family they have not had an opportunity to deliberate on the dispute he pointed out that after the court gave the parties an opportunity to settle the dispute out of court, the plaintiff came with people not belonging to their clan.
28. According to D.W.3, it is not fair for the plaintiff to evict the defendants from the suit property because they live there with their wives and children. He has no idea how the plaintiff wishes to deal with the developments the defendants have effected in the suit properties if they vacate.
29. In cross examination, he stated that his wish is that the plaintiff allows the defendants to continue occupying the portions he showed them even if he will not transfer the portions to them. He stated that the plaintiff should give the defendants land as there is nowhere else where

they can get land.

30. Moses Mwangi Wambugu, D.W.4, also a brother of the plaintiff, informed the court that it is the plaintiff who gave the defendants the portions of land they built on and where they cultivate. Like D.W.3, D.W.4 traced the problems between the plaintiff and the defendants to when the plaintiff married another wife following the demise of the defendants' mother. He does not know why the plaintiff stopped the defendants from utilizing the portions he had given them.

31. In cross examination, he stated that they were given land by their father and that it is their father who made the decision on how to share out his land. He was not present when the plaintiff showed the defendants the portions to cultivate and for how long.

32. He contended that the defendants have a right over their father's land because it was bought during their mother's lifetime and the other portion was given to the plaintiff by their grandfather. They have no problem with the plaintiff. They listened to the defendants when they came to them as uncles. They do not agree with the plaintiff's actions. He knows the procedure which should be followed in sharing one's property. The plaintiff has not followed that procedure.

33. He acknowledged that a licensee has a right to move the licensee from one portion of his land to another and contended that a licensor has no right to deny the licensee land. He also stated that it is mandatory for him to give his children land because he is their biological father.

34. He acknowledged that the defendants being 50 years old and above are not children according to law.

35. In re-examination he pointed out that the plaintiff has shown his other sons where to cultivate and that he is not evicting them. He also pointed out that the defendants have planted tea and built temporary houses in the suit property.

36. At the close of hearing, parties to this suit filed submissions which I have read and considered.

37. On behalf of the plaintiff it was pointed out that the defendants have agreed that they have no rights over the suit property except as licensees of the plaintiff and based on the decisions in the cases of **Mwaura Kimuhu v. Chairman Maragua Land Disputes Tribunal & Another (2007)eKLR**; **Muriuki Marigi v. Richard Marigi Muriuki & 2 Others (UR) Nyeri CA No.189 of 1996** submitted that a registered proprietor has absolute and indefeasible rights over his property and cannot be urged, directed or compelled to share the land in any particular manner.

38. According to counsel for the plaintiff, the plaintiff had only the good intention of giving his children portions of his land to live and cultivate which intention the defendants abused causing the plaintiff loss and damages.

39. Arguing that the loss and damage caused to the plaintiff can only be remedied by granting the plaintiff the reliefs sought in this suit, the plaintiff's counsel urged the court to grant the plaintiff the reliefs sought in the plaint.

40. In the case of **Mwaura Kimuhu** *supra*, it was held:

“There is no law in this country to compel a person to subdivide his land registered under the Registered Land Act among his children during his lifetime. The assets of a person are distributed upon his death under the provision of the Law of Succession Act Cap 160 Laws of Kenya.”

41. Similar sentiments were expressed in the case of **Muriuki Marigi** *supra* where it was stated:-

“The appellant as the registered owner of the suit property is still alive. His property is yet not available for sub-division and distribution among his wives and children except if he personally on his own will decides to sub-divide and distribute it among them. He may not be urged, directed or ordered to do it against his will.”

42. On behalf of the defendants, it was pointed out that it's not in dispute that it was the plaintiff who allocated the defendants the portions he was asking the court to evict them from. Explaining that the defendants have made substantial developments in the suit properties with full knowledge and consent of the plaintiff, it was submitted that the defendants' interest in the suit properties constitute overriding encumbrances to the plaintiff's interests in the suit property.

43. Because 226 is ancestral land, it was submitted that the defendants harbor legitimate right to work and develop on the parts of that land which the plaintiff allocated them.

44. Because the plaintiff voluntarily ceded his possessory rights to his children and allowed them to effect permanent developments thereon, it is submitted that a legitimate expectation arose and crystallized as an overriding interest on the land which should be respected.

45. According to counsel for the defendants, it would be unfair and insensitive for the court to be asked to sanction the unreasonable demands of the plaintiff merely because he is the registered proprietor of the suit property.

46. From the pleadings and the submissions the sole issue for determination is whether the plaintiff has made a case for being grant of the orders sought.

47. In answering this question, it is noteworthy that whilst the plaintiff instituted this suit seeking to *inter alia* permanently restrain the defendants from entering, remaining or in any other manner interfering with his use and enjoyment of the suit properties, in his testimony before court he resiled from that position and instead urged the court to order the defendants to stop cultivating where he has not shown them. From the evidence adduced in this matter, it also emerged that the defendants' use and occupation of the suit property is pursuant to a license granted to them by the plaintiff which license the plaintiff no longer wants to terminate save for the requirement that the defendant restricts their activities to the portions the plaintiff has given them.

48. As was observed in the **Muriuki Marigi** case (*supra*), a registered proprietor of land may not be urged, directed or ordered to deal with his land against his will. In line with that decision, the duty of the court is to give effect to the declared interest of the registered proprietor of the suit property which in the circumstances of this case is to restrict the defendants' activities in the suit properties to the portions he, the plaintiff, has granted the defendants permission to cultivate and live on.

49. Concerning the claim for damages, because the defendants' activities in the suit property were sanctioned by the plaintiff, I find that claim not to have been proven.

50. The upshot of the foregoing is that the plaintiff's case is allowed to the extent that the defendants' are restrained from occupying and using the portions of the suit property which the plaintiff has not granted them permission to use or occupy.

51. This being a family dispute parties shall bear their own costs of the suit.

Dated, Signed and Delivered in open court at Nyeri this 1st day of October, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiffs

Mr. Karweru for the defendants

Court assistant - Esther