



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC NO. 12 OF 2017

EPHRAIM MWAI GITHINJI..... PLAINTIFF

-VERSUS-

PETER KINYUA 1ST DEFENDANT

LUCY W. GITHINJI2ND DEFENDANT

JUDGMENT

BACKGROUND

1. By a Complaint dated 13th December, 2016 but filed herein on 31st January, 2017, Ephraim Mwai Githinji (*the Plaintiff*) prays for Judgment against the two Defendants for a declaration that the original suit land – LR No. Narumoru Block 1/Kieni East/122 and the suit land L.R. No. Narumoru/Narumoru/Block 1/Kieni East/1568 were registered in his name as the absolute owner thereof and are not subject of a trust in favour of the Defendants.

2. By consent of the parties that prayer was amended on 21st May, 2018 to read as follows:

“A declaration that the suit land L.R. No. Narumoru/Narumoru/Block 1 Kieni East/1658 were registered in the name of the Plaintiff as the absolute owner thereof and (is) not subject of a trust in favour of the Defendants.”

3. That prayer arises from the Plaintiff’s contention that he is the registered proprietor of the parcel of land known as LR No. Narumoru Block 1/Kieni East/222 (*“the original suit land”*) having acquired the same as a shareholder of Kieni East Farmers Company Limited. The Plaintiff accuses the Defendants who are his brother and sister respectively of laying a claim on the original suit land on a false account that their mother the late Ann Wanja was entitled to an undefined portion of the land.

4. The Plaintiff is aggrieved that the Defendants have persisted on their claim of the existence of a trust despite a determination made in Nyeri HCCC No. 161 of 1973 wherein the only family property being L.R. No. Magutu/Gatei/146 was duly distributed and the Plaintiff registered as the sole Proprietor of L.R. No. Narumoru/Narumoru/Block 1/Kieni East/1658.

5. Peter Kinyua and Lucy W. Githinji, the 1st and 2nd Defendants respectively are however opposed to the grant of the orders sought by the Plaintiff. In their joint statement of Defence dated 10th July, 2017, the Defendants dispute the Plaintiff’s claim to absolute ownership of the land and reiterate that the suit property has always been held by the Plaintiff in trust for himself and the Defendants in equal shares.

6. The Defendants further aver that the award of the Provincial Land Disputes Tribunal No. 1 of 2008 did not specify the acreage of the land for each party and urge the court to dismiss the Plaintiff’s claim with costs.

THE PLAINTIFF’S CASE

7. At the trial herein the Plaintiff testified as the sole witness in his case. Testifying as PW1, the Plaintiff told the court that sometime in the year 1970, he became a shareholder in Kieni East Farmers Company Limited, a land buying company then and paid for the required part of a block of land.

8. PW1 further told the court he was allotted L.R. No. Narumoru/Narumoru Block 1/222. He then gave his mother the late Anna Wanja a portion of the land to farm and stay in. PW1 testified that the Defendants herein who are his siblings plus their other brother Stephen Nguire used to visit him and his mother on the suit land until the demise of their mother in 2003.

9. PW1 further testified that during the funeral arrangements for their mother in November, 2003, the Defendants took advantage of the situation and moved in to reside on the suit property claiming that PW1 held the land in trust for themselves. PW1 told the court he had solely purchased the suit property and that his mother made no contribution towards its purchase.

10. PW1 further told the court that sometime in the year 2008, his siblings filed a claim before the Land Dispute Tribunal stating he held the land in trust for themselves. The Tribunal ruled that PW1 retains 10 acres of the land while his siblings would share out the balance. Accordingly, PW1 told the court that he did in the year 2013 sub-divide the land and that he has now retained less than 10 acres.

11. On cross-examination, PW1 testified that the original parcel – Narumoru/Block/1/Kieni East/222 measured 5.63 Ha. His siblings claimed he had purchased the land jointly with their mother and filed a claim before the Land Disputes Tribunal. In their award, the Tribunal gave land to the siblings and directed that PW1 retains only 10 acres of the land.

12. PW1 further told the court he started living on the suit land in 1982 and that his mother joined him there in 1983. Presently the 1st Defendant lives on the suit land in the house which PW1 had built for his mother. PW1 conceded he had not sought eviction orders against the Defendants in this suit. He further conceded that at one point in time, they had a dispute when his goats destroyed their mother's crops. PW1's mother asked him to put up a fence separating the 1 acre portion she occupied from the rest of the land. They held a meeting with the village elders to resolve the dispute.

13. PW1 told the court he has since sold 2 acres out of the original parcel and he was now left with 8 acres. He further told the court he had not complied with the orders of the Tribunal as the Tribunal lacked jurisdiction to deal with registered land.

THE DEFENDANTS' CASE

14. The 1st Defendant – Peter Kinyua Githinji also testified as the sole witness for the Defence at the trial. Testifying as DW1, the 1st Defendant told the court that the Plaintiff is his brother and that the suit property was purchased through the contribution of their mother who is now deceased. DW1 told the court their mother was at the time a farmer in Mr. Kenya Forest and that he was aware some receipts for the payments made had been issued in the presence of the Area Chief.

15. DW1 testified that he settled on the land together with their mother in 1971 and that the mother would sell stuff and give the proceeds to the Plaintiff to take to the land buying company. He further told the court that before her demise, their mother had requested that the land be sub-divided into two but the Plaintiff declined stating there was no money as their children were in school.

16. DW1 told the court the original land was 14 acres and that the Plaintiff had already sold 2 acres. It had been agreed that the land be divided into two with the Plaintiff getting half of the land as he had participated during the purchase. The Plaintiff being the first born was registered as a trustee of the land since by the time of registration, their father was already dead.

ANALYSIS AND DETERMINATION

17. I have taken a careful consideration of the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have equally taken into consideration the submissions filed herein by the Learned Advocates for the parties.

18. By a Plaint dated 13th December, 2016, Ephraim Mwai Githinji (*the Plaintiff*) instituted this suit against his brother Peter Kinyua Githinji (*the 1st Defendant*) and sister Lucy W. Githinji (*the 2nd Defendant*) seeking a declaration that the suit land being L.R. No. Narumoru/Narumoru Block 1/Kieni East/1658 was registered in his name as the absolute owner thereof and that the same is not held in trust for his two siblings.

19. In that respect, the Plaintiff told the court that sometime in the year 1970, he became a member of a land buying company by the name Kieni East Farmers Company Limited and paid the requisite money towards the acquisition of a parcel of land.

20. The Plaintiffs told the court that he was subsequently allotted L.R. No. Narumoru/Narumoru Block 1/222 by the company. When he took possession of the land, the Plaintiff told the court that he decided to invite their mother the late Anna Wanja to farm and stay in a portion of the land which was 14 acres in size.

21. It was the Plaintiff's case that his three siblings comprising the two Defendants herein and a brother by the name Stephen Ngunge lived elsewhere but they used to visit him with his mother on the suit land. When their mother passed away, the two Defendants herein took advantage of the situation and moved into the suit land where the 1st Defendant still resides to-date on the claim that the land was bought jointly by their mother and the Plaintiff and that the Plaintiff hence held the title thereto in trust for themselves.

22. The 2nd Defendant neither filed a statement nor testified in these proceedings. His brother the 1st Defendant in his testimony herein told the court that their mother had indeed contributed a sum of Kshs.1,500/- towards the purchase of the suit property and that some receipts for the payments had been issued in the presence of the Area Chief.

23. The 1st Defendant told the court that they had settled on the land with his mother in 1971 and that the mother would sell stuff and give the proceeds to the Plaintiff to go pay at the land buying company. He further told the court that before their mother's demise, she had requested that the suit property be sub-divided into two portions but the Plaintiff declined citing the burden of paying school fees for their children who were then in school.

24. The 1st Defendant told the court it had later been agreed before elders that the land be divided into two with the Plaintiff taking one half

thereof due to the fact that he had participated in the purchase. The rest of the siblings would share the other half.

25. It was otherwise the 1st Defendant's case that the Plaintiff had only been registered as the proprietor of the suit land on account of being their first born brother as, at the time of registration, their father had passed away and the Plaintiff was therefore a trustee of the land for the rest of the family.

26. As was stated by the Court of Appeal in **Charles K. Kandie –vs- Mary Kimoi Sang (2017) eKLR:**

“It is settled law that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:

“The law never implies, the court never presumes, a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intentions of the parties to create a trust must be clearly determined before a trust will be implied.” [See *Giochuki vs- Gichuki (1982) KLR 285 AND Mbothu & 8 Others -vs- Watimu & 11 Others (1986) KLR 171.*”

27. As it were, while the 1st Defendant insisted that the Plaintiff held the suit land in trust for their family, there was very little placed before me by way of evidence in proof of the said trust. Testifying at the trial herein, the 1st Defendant readily admitted that the suit property was not their ancestral land. He did acknowledge that the only ancestral land the family had was L.R. No. Magutu/Gatei/146. That land had been properly sub-divided amongst the family members. The 1st Defendant conceded that he received his portion of the ancestral land and that he subsequently sold the same.

28. While he claimed that his mother had participated in the purchase of the suit property, the 1st Defendant neither produced any receipt in the mother's name nor did he call any independent witness to corroborate his assertions. His own sister – the 2nd Defendant never testified in support of his version of events nor did he call his brother Stephen Ngure whom he told the court resides elsewhere to testify herein. Indeed not even a single close family member was called to support the position that their mother contributed towards the purchase of the suit land.

29. The fact that there was no evidence of such contribution has been known to the Defendants for quite some time now. When they first lodged a complaint over the land with the Land Disputes Tribunal in the year 2008, the Provincial Land Appeal Tribunal observed and determined as follows:

“Observation

The suit Parcel No. Narumoru/Narumoru/Kieni East/Block 1/222 belongs to Ephraim Mwai Githinji having purchased from Kieni East Farmers Company through shares and having acquired title deed under Cap. 300.

At around 1980 Ephraim Mwai settled in the suit land apportioned his mother Ann approximately 4 ½ acres where she build and has been staying there with her three children Mr. Peter Kinyua, Stephen Ngure and Lucy Wanjiku. Although the mother is today deceased her children are still leaving (sic) in the suit land.

The wish of the Appellant Mr. Ephraim Mwai is not to chase away his brothers and a sister because of his mother's respect. An agreement was produced which had alleged sharing of the said suit parcel but did not specify the size to be shared between him and the late mother.”

30. Having made those observations, the Tribunal went ahead to determine that the parcel of land Narumoru/Narumoru/Kieni East Block 1/222 be sub-divided into two portions with the Plaintiff to take 10 acres of land while his 3 siblings would share 4 ½ acres, each of them taking 1 ½ acres.

31. While the Plaintiff rightfully told this court that the Tribunal had no jurisdiction to deal with land with a registered title, it was apparent that shortly after the decision, he moved to have the land sub-divided. Accordingly the original parcel of land was sub-divided upon which the Plaintiff was on 27th March, 2013 issued with a new title for the sub-division now known as Narumoru/Narumoru Kieni East Block 1/1658. A perusal of the said title reveals that the approximate area taken by the Plaintiff is some 3.53 Ha. which, in my estimation, is less than the 10 acres the Tribunal had allocated to the Plaintiff.

32. When he testified herein, the Plaintiff produced receipts in his name indicating he had solely paid for the purchase of suit property from Kieni East Farmers Company Limited. There was no evidence produced by the Defendants to support the contention that their mother had contributed to the acquisition of the land. Regardless of that fact, it was apparent from the observation by the Nyeri Provincial Land Appeals Tribunal that, out of respect for his mother, the Plaintiff had no intention to evict his siblings from the portion of land that had earlier on been occupied by their mother.

33. The Plaintiff's magnanimity is again evident in his choice to register a smaller portion of the land in his name despite the finding that his siblings had no claim to the land. It was apparent that his 1st Defendant brother in particular was still not satisfied with this position and hence the Plaintiff's resort to this court for a declaration of his entitlement and right to the piece of land.

34. Having found that the Defendants have failed to satisfy this court that the land was held by the Plaintiff in trust for themselves it follows that I am persuaded that the Plaintiff's case has merit and that he has proved the same on a balance of convenience.

35. Accordingly, I hereby enter judgment for the Plaintiff as against the Defendants as sought in the Plaintiff's prayers herein.

36. The costs of their suit shall be borne by the 1st Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYERI THIS 2ND DAY OF DECEMBER, 2021

In the presence of:

Ms Maina for the Defendant

Mr. Amutallah for the Plaintiff

Court assistant - Wario

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J. O. Olola

JUDGE