



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC CIVIL SUIT NO. 83 OF 2010

MARY WANGUI KARANJA.....1ST PLAINTIFF

SALOME NJERI KARANJA2ND PLAINTIFF

VERSUS

RHODA WAIRIMU KARANJA.....1ST DEFENDANT

JOHN KIOI KARANJA.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiffs are executrices of the estate of their late father James Karanja Kioi (deceased) who died on 3rd January, 1985. The 1st defendant Rhoda Wairimu Karanja who is now deceased was the mother to the 2nd defendant and step mother to the plaintiffs. The 1st defendant who was the second wife of the deceased died on 22nd April 2013. The plaintiffs are children of the deceased from his first wife who passed on in 1958.

2. The plaintiffs brought this suit against the defendants seeking the following reliefs:-

- a. A declaration that the 1st defendant has committed trespass on LR No. 11595 as from 3rd February, 1995.
- b. An order that the 1st defendant pays to the 1st and 2nd defendant (sic) mense profits at Kshs 50,000/- per month from 3rd February 1995.
- c. A declaration that the 2nd defendant has committed trespass on LR No. 11595 as from 1st June 1995.
- d. An order that the defendants give vacant possession of the new house on LR No. 11595, forthwith.
- e. Interest on (b)
- f. The costs of this suit.

3. The defendants filed a joint statement of defence and raised a counterclaim in which they sought the following reliefs:-

- a. General damages
- b. Compensation for diversion of estate income and unjust enrichment.
- c. Costs of this suit and the counterclaim.
- d. Interest thereon at court rates.

e. Any other or further relief as this Honourable court may deem fit to grant.

4. While this suit was pending determination, the 1st defendant passed on and the 2nd defendant attempted to bury her remains on LR no. 11595. This forced the plaintiff to file a notice of motion dated 25th April 2013 which inter alia sought leave to amend the plaint in order to seek an order barring the 1st defendant from burying the remains of his mother on LR No. 11595 situated at Muguga (suit property). When the notice of motion dated 25th April 2013 was placed before Lady Justice Gitumbi in chambers, she allowed the prayer seeking to restrain the 2nd defendant from interring the remains of his mother on the suit property until further orders of the court. The Judge directed that the application be heard inter-partes on 7th May 2013.

5. On 7th May 2013, the application was placed before Justice Mutungi who asked for time to peruse the file with other related matters. He reserved a date for directions for 9th May 2013. On the 9th May 2013, Justice Mutungi gave directions to the parties. Among the directions given was a direction to the effect that the parties were to re-file the application dated 25th April 2013 in High Court succession cause No. 13666 of 1999 which was pending before the Family Division of the High Court. The parties proceeded to the Family Division and filed an application which was heard by Justice Musyoka who in a ruling dated 31st January 2014, found that the suit property belonged to the plaintiff by dint of the certificate of confirmation of grant dated 2nd December 2005 and proceeded to restrain the 2nd respondent from interring the remains of his mother on the suit property.

6. I have given the background of notice of motion dated 25th April 2013 because counsel for parties seem to be under the impression that leave to amend was granted. The record clearly shows that no leave was granted to amend the plaint. When the matter was placed before Justice Musyoka, the Judge only addressed himself to the issue of the will of the deceased and made a finding that the suit property belonged to the plaintiffs the basis upon which he issued restraining orders against the 2nd defendant from interring the remains of his mother on the suit property.

7. From the documents filed in this case, it is clear that the dispute which gave rise to this case has a chequered history. The deceased herein died testate on 3rd February, 1995. The plaintiffs took grant of probate which was issued on 15th December 1999 after protracted objections. A certificate of confirmation was finally given on 2nd December 2005. The deceased bequeathed the suit property to the two plaintiffs and their sister. The 2nd defendant and his deceased mother were bequeathed a 300 acre farm in Rongai in Nakuru known as San Marco. This is the basis upon which the plaintiff filed this suit seeking to evict the 2nd defendant from the suit property.

8. Shortly before the hearing commenced, Dr Kamau Kuria for the plaintiffs indicated to the court that his clients were abandoning prayers (a)(b) and (e) in view of the fact that the 1st defendant had died and her clients did not wish to pursue her estate. Dr. Kamau Kuria also applied orally to amend prayer (c) of the plaint to read that the trespass started from 1st June 2006. Both requests were allowed by the court.

Plaintiffs' case.

9. It is the plaintiffs case that the 2nd defendant is a trespasser on the suit property who should be removed from there. The plaintiffs through the 1st plaintiff testified that the deceased had bequeathed the suit property to them and their sister and that the deceased also bequeathed 300 acres in Rongai in Nakuru to the 2nd defendant and his deceased mother. The plaintiffs testified that despite protests by the 2nd defendant's mother and the 2nd defendant himself, the courts in the Family Division have declined to invalidate the will made by the deceased. They therefore argue that the 2nd defendant who is staying in one of the two houses on the suit property has no business staying there as the will clearly showed which property the 2nd defendant should take.

10. The plaintiffs state that the 2nd defendant and his deceased mother had filed a number of applications which they lost and that when they were ordered to pay costs, they went and had the Nakuru property subdivided into three portions and had it registered in the name of a niece of the 2nd defendant and other two persons. The plaintiffs filed Nakuru HCCC No. 354 of 2009 against the defendants and others but this suit was later compromised. The plaintiffs therefore contend that as the defendants have lost both in the High Court and Court of Appeal, the 2nd defendant who re-located from the United States of America to come and reside in the suit property should be evicted from the suit property.

Defendants case

11. The defendants case was stated by the 2nd defendant who testified that he was born in 1961 and that he started residing in the suit property when he was four years old. The 2nd defendant further testified that he resides in a house on the suit property where his mother used to stay until her demise on 22nd April 2013. He testified that the plaintiffs have not completed distribution of the estate of the deceased and that he has not been given any property where he can go to.

12. He further testified that since his mother died on 22nd April 2013, the body has been at Chiromo Mortuary as he has nowhere to bury her now that he was barred from burying her remains on the suit property. He stated that he lives in a house on the suit property which occupies less than one acre of the 36.5 acres. The 2nd defendant stated that though he has seen properties listed in the certificate of confirmation under his name, he has not been given any of those properties and that he has no idea about the 300 acre farm in Nakuru known as San Marco.

Analysis of evidence and issues for determination

13. I have carefully considered the evidence adduced by the plaintiffs and that of the defendant. I have also considered the submissions by the parties herein. As I have said herein above, this is a matter with a chequered history but the issues which emerge for determination as

concerns this case are fairly simple. The first issue is whether the 2nd defendant is a trespasser on the suit property. The second one is whether the counterclaim by the defendants has abated. The third issue is whether the parties herein are entitled to their respective prayers in their respective claims.

Whether the 1st defendant is a trespasser on the suit property.

14. There is no dispute that the deceased left a will which bequeathed the suit property to the plaintiffs and their sister Lucy Wambui. A certificate of confirmation was issued on 2nd December 2005. This is after the challenge of the will had been dismissed by Justice Githinji (as he then was) in a ruling delivered on 15th December 1999. The 2nd defendant's mother filed an application for reasonable provision which was dismissed by Justice Koome (as she then was). A notice of appeal was filed but it was struck out.

15. The issue of ownership of the suit property was reiterated in a ruling by Justice Musyoka delivered on 31st January 2014. The 2nd defendant's application for leave to appeal against the ruling was dismissed by Justice Musyoka. An appeal against Justice Musyoka's refusal to grant leave was dismissed by the Court of Appeal in a ruling delivered on 14th November 2014.

16. The evidence on record is that the 2nd defendant's mother came into the suit property in 2005 ostensibly to mourn her husband but she never returned to Nakuru where she used to stay. The 2nd defendant joined her in 2006, and has since remained in the suit property. The 2nd defendant does not have a right to remain on the suit property. The deceased's will bequeathed to him and his mother the 300 acres farm in Nakuru. Now that his mother is deceased and he is to inherit her share, he has no business claiming that he has nowhere to go to if he is evicted.

17. The Nakuru property has houses. The property was registered in the name of the 2nd defendant's niece and when a suit was filed by the plaintiffs, the suit was compromised as per the consent order recorded on 11th January 2010. The 2nd defendant in his submissions argues that he is not a trespasser as he entered the suit property by invitation of the deceased and that as he is a beneficiary of the estate which has not been fully distributed, he cannot be treated as a trespasser who is liable to be evicted.

18. The 2nd defendant further argues that the ruling of Justice Dulu is clear that the plaintiffs are in breach of the Provisions of the Succession Act in that they did not complete distribution within six months from the date of confirmation. The 2nd defendant further argues that the directions by Justice Mutungi have not been fully complied with and therefore the suit is premature. A reading of Justice Mutungi's directions is clear that he wanted the issue of ownership determined by the succession court. This was done by Justice Musyoka who reiterated that the issue of ownership had been decided upon. Justice Mutungi did not say that the distribution of estate had to be fully completed and parties get titles before this case could take off.

19. The moment the grant of probate was confirmed on 2nd December 2005, the 2nd defendant or his deceased mother became trespassers on the suit property. There is evidence that the 2nd defendant came from America and joined his late mother on the suit property in 2006. This is the time he trespassed on the suit property. Clerk & Lindsell on torts[19th Edition] at paragraph 19-01 defines trespass as follows:-

“...any unjustifiable intrusion by one person upon land in the possession of another. The slightest crossing of the boundary is sufficient. If the defendant places a part of his foot on the claimant's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it.”

20. It is therefore clear that the moment the 2nd defendant set his foot on the suit property in 2006, he became a trespasser who is liable to eviction. The 2nd defendant relied on the decision in the case of **Mergery Marigu Ndwiga- Vs- Fortunitus Mwaniki Ndwiga & Others [2015]eKLR** where the judge declined to issue an eviction order where distribution had not been completed. This case is distinguishable from the circumstances herein. In that case, the parties did not know where each was to occupy on the ground. This is why the judge did not issue eviction order. In the present case, the issue of ownership of the suit property has been settled. It is going to the plaintiffs and their sister Lucy Wambui. There is no issue as to which side the 2nd defendant is to occupy in the suit property. The deceased's will whose grant of probate has been confirmed is clear that the 2nd defendant's property is in Nakuru. I therefore find that the 2nd defendant is a trespasser on the suit property.

Whether the counterclaim has abated.

21. The heading of the counterclaim is clear that it was a joint counterclaim by the 1st defendant who is now deceased and the 2nd defendant. The death of the 1st defendant did not affect the counterclaim and there was therefore no need for the 2nd defendant to seek to revive the same. I therefore find that the counterclaim as far as the 2nd defendant is concerned is still alive.

Conclusion

22. Having dealt with the two issues herein the next issues for determination flow from the prayers in the respective claims. The 2nd defendant had sought general damages and compensation for diversion of the estate income and unjust enrichment. The 2nd defendant did not adduce any evidence to show that the plaintiffs had diverted the income from the estate or that they had unjustly enriched themselves. The evidence which emerged during cross-examination is that the distribution of the estate of the deceased was done in accordance with the will. There is therefore no basis upon which the 2nd defendant can justify a claim for compensation and in any case if there was misappropriation of the estate, the right forum to raise that was in the succession cause. The particulars of fraud enumerated in the counterclaim is a thinly veiled attack on the will of the deceased which has been settled by the court. I therefore find that the 2nd defendant's counterclaim is misconceived.

23. I have already found that the 2nd defendant is a trespasser in the suit property. Having found so, I find that the plaintiffs have proved their case on a balance of probabilities. In summary thereof, I proceed to dismiss the 2nd defendant's counterclaim with costs to the plaintiffs. On the other hand I enter judgment for the plaintiffs against the defendant as follows:

- a. A declaration that the 2nd defendant has committed trespass on LR No. 11595 as from 1st June 2006.
- b. An order that the 2nd defendant do give possession of the house he is occupying on LR No. 11595 forthwith.
- c. The defendant shall meet costs of this suit.

Dated, signed and delivered at Nairobi this 6th day of February 2020

E.O. OBAGA

JUDGE

In the presence of

Dr. Kamau Kuria for Plaintiffs and Mr Mbaabu for Defendants

Court Assistant: Hilda