



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 359 OF 2017

ELIJAH MBURU WANYOIKE.....PLAINTIFF

VERSUS

REGINA WANJIRU NGANGA.....1ST DEFENDANT

JOSEPHINE WANJIRU NDUNGU.....2ND DEFENDANT

JUDGMENT

By an **Amended Plaintiff** dated 29th June 2018, the Plaintiff herein filed this suit against the Defendants seeking for orders that;

- a) The Defendants be and are hereby ordered to vacate land parcels numbers Gatamaiyu/Nyanduma 3330, and Gatamaiyu/Nyanduma 3331 forthwith and the Plaintiff do take possession of the two parcels of land forthwith in default be forcefully evicted from the said land to enable the Plaintiff take possession.*
- b) There be a permanent injunction restraining the Defendants either by themselves, their agents and/ or servants from interfering with the Plaintiffs quiet possession of land parcels No.Gatamaiyu/Nyanduma 3330, and Gatamaiyu/Nyanduma 3331.*
- c) Any other further order that the Court may deem fit in the circumstances.*
- d) Costs of the suit.*

In his **Statement of Claim**, the Plaintiff averred that vide a **Sale Agreement** dated 5th November 2015, he purchased two parcels of land being land parcels **No.Gatamaiyu/Nyanduma 3330 & 3331**, for a consideration of **Kshs.2,400,000/=** from **Samuel Ndungu Nganga**, which he paid in full. That at the time of sale, **Samuel Ndungu Nganga** was the registered owner of the suit properties which were subdivisions from land **parcels No.Gatamaiyu/Nyanduma 654**. He also averred that the 1st and 2nd Defendants have never been registered as proprietors of the suit properties and he was therefore entitled to take possession of the suit properties upon execution of the sale agreement and payment of the purchase price. He further averred that, although he is the registered proprietor of the suit land, his efforts to take possession have been frustrated by the occupation of the suit property by the 1st and 2nd Defendants on the said portions without his permission and therefore he sought for eviction of the Defendants.

The suit is contested and the Defendants filed an Amended Statement of Defence and Counter claim dated 20th July 2018, in which they sought for the following orders;

- a) That the Plaintiff's suit be dismissed with costs.*
- b) That the title deeds issued to the Plaintiff in respect of land parcel No.Gatamaiyu/Nyanduma/3330 & Gatamaiyu/ Nyanduma 3331 be cancelled and or revoked.*
- c) That the Land parcel No.Gatamaiyu/Nyanduma/3330 and Gatamaiyu/Nyanduma/3331 be registered in the names of the Defendants.*
- d) General Damages.*
- e) Costs and interest of the counter claim.*

f) Any other relief the Court deems fit to grant.

The Defendants denied all the allegations made in the **Plaint** and

that land parcel **No.654**, was registered in the name of **Samuel Ndungu Nganga**, in his **implied trust** on his own behalf and for any other person claiming interest by virtue of him being the only son of the family and therefore the alleged purchase of the suit land from the deceased was illegal as the beneficiaries have never consented to the said sale. It was their contention that the Plaintiff had no right over the suit properties and asserted that they are lawfully entitled to occupy the property. They contended that the orders being sought are baseless and unfounded in law.

PLAINTIFF'S CASE

PW1 - Elijah Mburu Wanyoike, adopted his witness statement dated **26th July 2018**. He further produced his list of documents dated **27th February 2017**, as **exhibit 1**. He testified that when he bought the suit land on **5th November 2015**, from **Samuel Ndungu Nganga**, there was no caveat. He also denied that he colluded with the said **Samuel Ndungu Nganga** to dispose of the suit land.

He also testified that he visited the actual ground and there was a house, tea bushes and a cowshed that belonged to their father. That he bought the land for **Kshs.2.4 million**. He told the Court that one of the Defendant was residing in the house and that when he visited all the other parcels of land, there were only tea bushes that belonged to the seller. It was his evidence that he conducted a search and the outcome was a clear title registered in the name of **Samuel Ndungu Nganga**, having acquired the same on the **14th November 2014**, before it was **parcel No.654**. It was his testimony that the vendor told him that he wanted to move to **Kinangop**, but he had not given him vacant possession. Further that he only learnt through the **Replying Affidavits** that there were two ladies who had interest over the suit land and were each set to inherit **0.86 ha**. He told the Court that he had gotten the impression that the vendor had inherited the whole land from his father. It was his testimony that he bought the subdivisions of the mother title being parcels **No.3330 and 3331**, as the mother title had been closed after the subdivisions. That the seller was to get **2 acres and 2.6 acres** was to be shared equally amongst the three siblings and the Vendor was therefore supposed to get **2.86 acres**, and that he had bought **1^{1/2} acres**, from the Vendor which was less than what he was entitled to.

DEFENCE CASE

DW1 - Josephine Wanjiru Nganga, adopted her witness statement dated **24th May 2017**, as evidence in Court. She further testified that their father registered his son, **Samuel Ndungu Nganga** during the **State of Emergency** as the sole registered owner of the suit property though it was a family land. It was her evidence that the land is **4.6 acres**, and her share is **1 acre**, and her brother has a big share as their father had given him **2 acres** earlier. Further that the suit land is registered in the name **Samuel Ndungu**, who later sold it to the Plaintiff without their consent. She further testified that when they conducted an official search, it indicated that the titles were in her brother's name after subdivision. That when they went to the **Kiambu Land Disputes Tribunal**, they were directed to have the land subdivided into three portions and each person was to get an equal share.

She further told the Court that though the titles were in favour of the Plaintiff, the Defendants were not involved in the said transfer. Further, that **Samuel Ndungu Nganga**, sold the land to the Plaintiff and that the tribunal directed him to get **2 acres and 2.6 acres** remaining was to be divided amongst the three of them:- that is the Defendants and their brother, (**Samuel Ndungu Nganga**). She also informed the Court that they put a caveat on the suit land but there was no evidence of any caveat. She also testified that the remaining land was **2.6 acres**, and that the same was remaining for all of them and that the **Tribunal** did not give the position of each land. She confirmed that the portions that they occupy are the ones sold out to the Plaintiff. That their brother gave them those portions and further without their consents, he sold **1.8 acres**, to the Plaintiff.

After close of viva voce evidence, the Court directed the parties to file written submissions, which the Court has now carefully read and considered and renders as follows:-

Having considered the available evidence, the Court finds the issues for determination are;

- 1. Whether Samuel Ndungu Nganga held the suit property in trust for the defendants.***
- 2. Whether Plaintiff is entitled to orders sought.***
- 3. Whether the Defendants are entitled to the orders sought.***
- 4. Who bears the costs of this suit***

1. Whether Samuel Ndungu Nganga held the suit property in trust for the Defendants.

It is not in doubt that the suit property was originally **Gatamaiyu/ Nyanduma/654**, which was originally registered in the name of **Samuel Ndungu Nganga**. It is also not in doubt that the suit properties which are subdivisions of land parcel **654**, are now registered in the name of the Plaintiff herein having bought the said properties from **Samuel Ndungu Nganga**, who was the registered owner of the suit property. However, the Defendants have alleged that the said **Samuel Ndungu Nganga**, being the only son of their father held the suit property in **trust** for them and to this effect, the Defendants produced proceedings from the **Kiambu Land Disputes Tribunal**, which had held that the said **Samuel Ndungu Nganga**, held the suit property in trust and that the Defendants were also beneficiaries of the suit property.

The award of the tribunal was further adopted as an order of the Court and the said award had recognized that the Defendants were also entitled to a share of the said property. Further, it declared that the initial property being *Gatamaiyu/ Nyanduma/654*, should be subdivided amongst the three siblings. The deceased **Samuel Ndungu Nganga** was to get the initial **2 acres**, that had earlier been given to him by his father and the remaining **2.6 acres** was to be divided amongst the three of them – Defendants and the said **Samuel Ndungu Nganga** (now Deceased).

There is no evidence that the said award of the tribunal, which was later adopted as an order of the Court has ever been appealed against or that the same was ever overturned. In that regard therefore, it would mean that the Defendants together with the said **Samuel Ndungu Ng'anga**, who sold the suit property to the Plaintiff all had an interest over the suit land in accordance with the order of the Court, and therefore he held the suit land in trust for the Defendants. See the case of *Alice Wairimu Macharia ...Vs...Kirigo Philip Macharia [2019] eKLR* where the Court held that;

“The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that:- (a) the suit properties were ancestral clan land; (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; (c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.

“In the case of Isack Kieba M’Inanga Vs Isaaya Theuri M’Lintari & Another SCoK No 10 of 2015, the Supreme Court Justices held that;

“...each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:- (a) The land in question was before registration, family, clan or group land; (b) The claimant belongs to such family, clan, or group; (c) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group.”

This Court therefore finds and holds that the said **Samuel Ndungu Nganga**, held the suit property in trust for the Defendants and therefore the Defendants claim over the suit property is merited.

2. Whether the Plaintiff is entitled to the orders sought.

The Plaintiff has sought for orders of evictions and permanent injunction as against the Defendants. This Court has already held and found that **Samuel Ndungu Nganga**, held the suit property in trust for the Defendants and therefore they had beneficial interest over the suit property and therefore they were all entitled to some acres of the initial suit land. It is the Defendants contention that the part of the suit land that the Plaintiff is claiming is the part that they have been living on and they have further invested in the suit land. It was further the Defendants evidence which has not been controverted that their brother **Samuel Ndungu Nganga**, sold the suit property without their consent and therefore without their knowledge.

In his testimony, the Plaintiff also acknowledged that when he visited the suit property, there was a house and that one of the Defendants was staying in the said house. It is further not in doubt that the Defendants were in possession and occupation of the suit land. This Court notes that when the tribunal rendered its award, it awarded each party the acreage that one would possess. However, there was no indication as to which part of the portion of land that each party was to get. There was no evidence that was tendered to suggest which portion of the initial land before subdivision that any of the parties was to get and whether there was ever any such agreement. However, it is clear that the portions that the Plaintiff herein is claiming are occupied by the Defendants. Whether the said portions are equivalent to the acres that the Defendants are entitled to or not is not within the knowledge of this Court. However, it is not in doubt that the Defendants have been in possession and occupation of the suit land way before the suit land was sold to the Plaintiff. It is also very clear from the above findings of this Court that the Defendants are entitled to an interest over the suit property. Therefore this Court finds and holds that the Plaintiff is not entitled to the orders sought. This is so because the said **Samuel Ndungu Nganga**, held the land in trust for the Defendants and unless there was an allocation of portions, he needed to have sought the Defendants’ consents before selling the land.

This Court findings are based on the fact that the Plaintiff has never taken possession of the suit land. Further, the Defendants who are beneficiaries of the suit land have always been in possession of that part of the land being claimed by the Plaintiff and the fact that there was no specified area of occupation by the parties, it would naturally follow that the Defendants would have expected that the area that they were in occupation of was what belonged to them.

3. Whether the Defendants are entitled to the orders sought.

The Defendants had in their Counter claim sought to have the Plaintiff’s title revoked and have the suit properties registered in their name. The guiding provision of the law on cancellation of title is to be found in **Section 26 of the Land Registration Act** provides that;

“ (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud

or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

Therefore, this Court must then determine whether the title held by the Plaintiff falls under any of the above requirements for it to be impeached. It is not in doubt that the said **Samuel Ndungu Nganga**, held the property in trust for the Defendants. Though he had a portion of land, the said portion had to be determined for it to be said authoritatively that he had the rights over the said subdivisions. Without the same, he had the obligation to inform the other beneficiaries of his intention to sell the suit property as they had been in occupation of the property. It is therefore this Court’s considered view that the sale of the suit property was illegal as the said **Samuel Ndungu Nganga**, sold the properties without following the laid down procedures and consequently the titles held by the Plaintiff are impeachable. Further **Section 28(1)(b)** of the **Land Registration Act** provides customary trust as one of the overriding interest in land. It provides that as follows;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a) spousal rights over matrimonial property;

(b) trusts including customary trusts ;

(c)

Therefore, this Court finds and holds that the title to the suit property held by the Plaintiff is impeachable as the right procedure was not followed before the Plaintiff acquired title over the said parcels of land.

Section 80 of the **Land Registration Act**, gives the Court powers to order for cancellation and rectification of any land Register. See Section 80 which provides;

“the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. “

For the above reasons, the court finds and holds that there is need for the title held by the Plaintiff to be impeached and the register thereon be rectified.

However on the registration of the Defendants as the proprietors, this Court finds that there is need to establish whether the portions that are occupied by the Defendants are the same acres that they are entitled to.

In his **Plaint**, the Plaintiff had sought for various orders amongst them an orders that the Court should grant what it deems fit to grant. It is not in doubt that one **Samuel Ndungu Nganga**, was registered as the owner of the suit property at the time he was selling the said land to the Plaintiff. It is also not in doubt that the said **Samuel Ndungu Nganga** was a beneficiary and was therefore entitled to more than **2 acres** of the suit land. However, it is clear that the said **Samuel Ndungu Nganga**, is not a party to this suit and consequently no orders can be made against him. The Plaintiff can seek recourse from the estate of **Samuel Ndungu Nganga**.

4. Who bears the Costs of the suit?

Section 27 of the Civil Procedure Act gives the Court the discretion to grant cost. In this instant suit bearing in mind the circumstances of the case, the Court finds that each party should bear its own cost.

The Upshot of the foregoing is that the Plaintiff’s suit is found not merited. However, the Defendants’ suit is partially merited and their Counter claim is allowed in terms of prayers **(a)** and **(b) only** with no orders as to costs.

Having now carefully considered the Pleadings, the evidence produced before this Court and the written submissions, the Court finds and holds that the Plaintiff has failed to prove his case on the required standard of balance of probability and consequently plaintiff’s suit is dismissed with no orders as to costs.

However, the Defendants have partially proved their case on the required standard and therefore, the defendants’ counterclaim is allowed in terms of prayers **(a)** and **(b)** of the Counter claim with no orders as to costs. Further the court finds that the Defendants are each entitled to **0.87 acres** from the initial parcel of land which was **Gatamaiyu/Nyanduma 654**. For the above reasons, the Court cancels and revokes the initial subdivisions of **LR.No.Gatamaiyu/Nyanduma/654**, which was done without the consent and involvement of the defendants herein. This order is issued in accordance with **section 80(1)** of Land Registration Act.

After the said revocation and cancellation of the subsequent sub-divisions of **Gatamayu/Nyanduma/654** and reverting to the mother title, then the said land should be subdivided so that each of the Defendants herein can obtain her share of **0.87 acres** as per the tribunal’s award and the Plaintiff should then obtain the equivalent of what he purchased from the **late Samuel Ndungu Nganga** from his estate. That would only be obtained from the remainder of the land after the Defendants have gotten their rightful shares. Of course the above exercise has to be done with the involvement of the beneficiaries or representatives of the estate of the **late Samuel Ndungu Nganga**.

It is so ordered.

Dated, Signed and Delivered at Thika this 3rd day of March 2020.

L. GACHERU

JUDGE

3/3/2020

In the presence of

Plaintiff is present in person

No appearance for Defendants

Lucy - Court Assistant

L. GACHERU

JUDGE

3/3/2020