



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

LAND & ENVIRONMENT CASE NO.129 OF 2012

ROSE NAFUNA WANYAMA.....PLAINTIFF

VERSUS

NASURA NASAMBU CHIBANGA.....1ST DEFENDANT

AGATON WANYAMA alias MARK.....2ND DEFENDANT

JUDGMENT

[1]. The plaintiff in this case is the wife of Calistus Nyongesa Wanyama (deceased). She claims that her deceased husband was the sole heir and beneficiary of the estate of Wayeye Chimbanga also deceased.

She therefore claims to be sole owner of W.Bukusu/E.Siboti/264 which was previously registered in the name of the said Wayeye Chimbanga (deceased). She stated that the 1st defendant who is her brother in law used undue influence to convince his mother the 1st defendant to transfer the land to herself.

[2]. The plaintiff avers that the 1st defendant holds land parcel W.Bukusu/E.Siboti/263 in trust for her deceased husband Calistus Nyongesa Wanyama and that he should transfer the said land to her as heir beneficiary and personal representative. She has set out the particulars of fraud in respect of the 1st and 2nd defendants. She finally argues that the 2nd defendant is intermeddling with the estate of the deceased and he has no proprietary or beneficiary interest on the same.

[3]. The plaintiff Rose Nafuna Wanyama gave evidence and said that the deceased Calistus Wanyama was her husband and that he died in 1995. She took limited grant for his estate to enable her to file this suit. She told the Court that she has five children with the deceased. The plaintiff said that the land in question was 11 ½ acres. She averred that a quarrel ensued between herself and the 2nd defendant and the dispute was taken to a Mukasa and clan elders and that the 2nd defendant was awarded one acre. The clan said that though he was a brother of the plaintiff's husband, he was fathered by another man from a different clan and therefore that other clan is where he should inherit. She gave evidence that one acre had been sold and that left her 8 ½ acres.

The plaintiff said that the 1st defendant was her mother in law and that she wanted to sell the land and that she had already signed the transfer papers. She went on to say that she had gone to the land office and lodged a caution on the suit land. She produced her husband's death certificate, her limited grant and a search certificate of the suit land. She told the Court that her mother in-law had 3 children, her husband, Nelikitsa Nekesa and Agaton the 2nd defendant. She said that Nekesa was married.

[4]. The plaintiff called four witnesses to support her claim. The first one Bonventure Makhanu Wanyama said that he was the head of the clan for the last 25 years. That he was aware of the meeting held in December 2007 and that the 2nd defendant wanted to build on the suit land and was told to build on his biological father's land. That they made a resolution as a clan to give the 2nd defendant one acre to build a house and continue to live with his mother. The second plaintiff's witness said that he was present when the agreement was signed. The other witnesses basically supported the plaintiff's claim.

[5]. The 1st defendant Nusura Nasambu Chimbanga gave evidence and said that land parcel W. Bukusu/E.Saboti No.264 was her land. She said that she filed a Succession Cause in Kakamega to succeed her husband and on 9th July 1975 she was registered as the owner of West Bukusu/East Siboti/264 comprising of 4.4 hectares as the absolute owner. That recently she wanted to subdivide the land and give it to her two children. That she went to the D.O. Bumula. The consent was given. That she wanted to give the plaintiff five acres, the 2nd defendant five acres while she retains one acre. She produced a consent dated 25/10/2012 to subdivide W.Bukusu/E.Saboti/264 comprising of 4.4. hectares into three portions of 2 ha, 2 ha and balance. She was unable to transfer the land because of the caution lodged by the plaintiff.

[6]. The second defendant Agerton Wanyama stated that he knows the plaintiff as his late brother's wife. He said that the 1st defendant is his mother. That he was born and raised in Mukwaa and on land parcel E. Bukusu/S. Siboti/264. That he has no other land. That his mother wished to sub-divide the land and give five acres to the plaintiff, five acres to himself while she retained the balance estimated as one acre. That the relevant consent of the Land Control Board was obtained and all transfer documents signed and lodged in Bungoma Land Registry but could not be registered since there was a caution lodged by the plaintiff.

[7]. The issues in this case are simple, they can be set out as follows:-

(a) Was this land held in trust by the 2nd defendant for her son Calistus Nyongesa Wanyama and therefore to the plaintiff herein and her children?

(b) Was the transfer from one Wayeye Chimbanga (deceased)

The 2nd defendant's husband to the 2nd defendant (his wife) herein fraudulent?

(c) Was Calistus Nyongesa Wanyama the deceased plaintiff's husband the only child of Wayeye Chimbanga?

(d) Is the 1st defendant the registered proprietor entitled to dispose of the suit land as she wishes?

(e) Who is entitled to costs of the suit?

TRUST

[8]. Land parcel W. Bukusu/W. Siboti/264 comprising of 4.4 hectares was registered in the name of the 1st defendant on 11/7/75 as an absolute proprietor.

Calistus Nyongesa Wanyama the husband of the plaintiff was not married to the plaintiff. He was then 17 years and died on 24/3/95 then aged 37 years. The plaintiff in her own evidence admits that she was not married in 1975. She got married in 1984. This was eleven(11) years after the 2nd defendant had filed suit in Kakamega and got herself registered as absolute proprietor. By the time of registration of this land into the 1st defendant's name the plaintiff's husband was a minor obviously dependent on his mother. I am convinced that the 2nd defendant was not a trustee and was registered as an absolute proprietor. The transfer to the 1st defendant was facilitated by a Succession Cause filed in Court at Kakamega. It has not been shown by the plaintiff that there was no such suit and/or that the decision was ever challenged. The

plaintiff and her children were seen nowhere in the scene and the deceased Calistus Nyongesa Wanyama was a minor dependent on the 1st defendant.

[9]. There is absolutely no fraud proved before me and that claim is dismissed. Calistus Nyongesa Wanyama was not an only child, there was evidence from the plaintiff and the defendants that the 1st defendant and her deceased husband had three(3) children namely Calistus Nyongesa Wanyama, Nelikitsa Nekesa now married and Agerton Wanyama the 2nd defendant herein.

The agreement that Agerton Wanyama was not a biological son of Wayeye Chimbanga (deceased) and therefore cannot inherit is completely misplaced. There was no evidence placed before me for such an allegation. To the contrary it was proved that all along he had lived with his mother all of his younger days on the suit land. Then he moved to Nairobi for work. It was not also argued that he was not his mother's (1st defendant) son and that his mother was not Wayeye Chimbanga's wife.

I find that the 2nd defendant is a son of Wayeye Chimbanga and is therefore the brother of the plaintiff's husband. He has an equal right to inherit as his deceased brother. The defendant herein is registered as absolute proprietor. She was so registered in July 1975. She has every right to distribute her land as she wishes. In this case, she wishes to give the plaintiff and her five children five acres. I have no reason to disturb her distribution. Infact, I find it fair and reasonable. To the contrary the plaintiff wants the entire land for herself and her children. That is unreasonable and unfair to the other beneficiaries.

The end result is that this suit is dismissed. The caution lodged by the plaintiff in the suit land shall be removed forth with by the Land Registrar and the transfer registered as per consent of the Land Control Board herein.

As parties are close relatives, each party shall bear their own costs.

Judgment read in open court in the presence of both Counsels.

DATED at BUNGOMA this 6th day of April, 2017

S.N. MUKUNYA

JUDGE

In the presence of:

Court Assistant: Gladys

Obwatinya: Holding brief for Mr. Were for the defendant

Mr. Murunga for the Plaintiff - Present