



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 779 OF 2017**

**PAUL NGIGI NJOROGE.....PLAINTIFF**

**VERSUS**

**EDWARD PETER WAWERU NJOROGE.....DEFENDANT**

**JUDGMENT**

By a Plaint dated 3<sup>rd</sup> October 2017, the Plaintiff herein brought this suit against the Defendant seeking for orders that;

- a) A Declaration that all parcel of land Known as L.R No. Muguga/Kahuho/408, is family land*
- b) A cancellation of the title deed that the Defendant holds to all that parcel of land known as L.R No. Muguga/Kahuho/408.*
- c) An order for the transfer of the suit property to family members in equal shares*
- d) damages*
- e) Costs of this suit.*

In his statement of Claim, the Plaintiff averred that the parties are family members and dependants of the Estate of **Peter Njoroge Waweru** (Deceased) and particularly dependants of the suit property. He averred that following the demise of **Peter Njoroge Waweru**, the suit property was transferred to and registered in the name of **Lawrence Njenga**(deceased) a son of the deceased and who was to hold the property in trust for the dependants of the deceased. That further following the demise of the said **Lawrence Njenga**, the suit property was again transferred to and registered in the name of the Defendant to hold it in trust for the family of **Peter Njoroge Waweru**, and have the same subdivided amongst the family members. He contended that the Defendant has failed to exercise diligence in the matter and has totally refused to have the suit property subdivided, claiming that the same is his sole property and despite various demands he has refused to have the land subdivided.

He further averred that the Defendant has fraudulently, maliciously and without any colour of right assumed sole ownership of the suit property in total disregard of the rights of the other family members, who are also beneficiaries of the Estate of **Peter Njoroge Waweru**. He particularised fraud as; refusing to have the suit property subdivided amongst the rightful beneficiaries, holding and taking possession of the suit property with the malicious intention of retaining sole ownership, refusing to cause the **Land Control Board** convened for purposes of obtaining **Consent** for subdivision and transfer of the suit property to the rightful beneficiaries. He further contended that unless the Court grants the prayers sought, the Defendant will continue in his malicious attempts to hold and possess the property as the sole owner.

The suit is contested and the Defendant filed a defence dated 15<sup>th</sup> December 2017, and denied all the allegations made in the Plaint. He admitted that the parties are family members, but denied that the Plaintiff is a dependant of the suit property. It was his contention that he became the beneficial owner of the suit property following the demise of **Lawrence Njoroge**, but denied that he was to hold the property in trust for the Dependants. He further contended that the suit property is his sole property. It was his contention that the suit is bad in law, incompetent and no good cause of action has been demonstrated against him.

The matter proceeded by way of viva voce evidence. Though the Defendant filed a Defence, he did not call any witnesses and the Plaintiff called two witnesses and closed his case.

**PLAINTIFF'S CASE**

**PW1 Paul Ngigi Njoroge**, adopted his witness statement dated 3<sup>rd</sup> October 2017, and testified that the Defendant is his step brother. He further testified that his father inherited the land from his father and that he died in 1974. That the land was transferred to his elder brother to hold it **in trust** for the family as his father had 3 wives. He further testified his father registered the land in the name of **Lawrence Njoroge**

to hold it in trust for the family. Further that **Lawrence** transferred the land to the Defendant and to hold in trust for the family. However, the Defendant has refused to transfer the suit property to other family members.

He further testified that he had a witness to prove that the suit property is family land. He produced minutes of the family meeting as exhibit 1 and minutes at the Chief office as exhibit 2, Land Restriction as exhibit 3.

**PW 2 Edwin Wilson Mungai Njoroge**, testified that the Defendant is his step brother. It was his testimony that the suit property is family land and that the family wants the land to be subdivided, but the Defendant has refused stating that the property was given to him by **Lawrence**. He testified that their father left the land to Lawrence to hold in trust for the family members and that **Lawrence** transferred it to **Edward**, when he was ailing. He further testified that they met and discussed the matter and that **Lawrence** was present and confirmed that he was holding the land in trust for the family. It was his testimony that there was no consideration when the land was transferred to **Edward** and that he was to hold it in trust.

The Parties filed written submissions which the Court has now carefully read and considered. It is the Court's considered view that the issue for determination is *whether the Plaintiff is entitled to the orders sought*.

Though the Defendant filed a defence, he did not adduce any evidence in support of his claim and therefore all the averments in his Defence remain mere allegations as averments in pleadings are not evidence. Therefore, the Plaintiff's evidence remains uncontroverted. In the case of *Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, where the Court cited the case of Janet Kaphiphe Ouma & Ano...Vs...Marie Stopes International (Kenya), Kisumu HCC No.68 of 2007*, the Court held that:-

*“In this matter apart from filing its statement of Defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations....Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same.”*

Even though the Defendant did not call any evidence, the Plaintiff still had an obligation to call evidence and prove his case on the required standard. It is evident that uncontroverted evidence is not automatic proof.

The Plaintiff has alleged that that the Defendant is holding the suit property in trust for the family and that he ought to be compelled to subdivide the property and have the same transferred to the other beneficiaries. Though the Defendant in his defence denied that he was holding the suit property in trust for the other family member, he did not give evidence and therefore his defence remains mere allegations which have not been substantiated.

The Plaintiff testified that the suit property is family land and that the Defendant was merely holding it in trust for the family. His evidence has been corroborated by PW 2 who testified that the Defendant had consented in a family meeting that he held the suit property in trust for the whole family. Further the Plaintiff has also produced in evidence minutes of a family meeting confirming that the suit was held in trust. Therefore, this court is satisfied that the Defendant held the suit property in trust for the family.

Having held and found that the Defendant is holding the suit property in trust for the family, it is then only fair that each family member gets their own share of the suit property. It is thus then follows that that the suit property must first be subdivided and then the same transferred to the beneficiaries of the **Estate of Peter Njoroge Waweru**. Consequently, the Court finds that the Plaintiff is entitled to the orders sought.

The suit land is registered under **Cap 300 Laws of Kenya** (repealed) and **Section 143** of the said **Registered Land Act (repealed)** which is replicated in **Section 80 of the Land Registration Act**, gives the Court the powers to order for the cancellation of the title to the Defendant. There being no evidence to controvert the Plaintiff's evidence, this Court finds that the said prayer is merited and allows the same.

The Upshot of the foregoing is that the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities and therefore the end results is that the court enters Judgement for the Plaintiff against the Defendant as prayed in the Plaint dated **3<sup>rd</sup> October 2017** in terms of prayers No. **(a) (b) (c) and (e)**.

It is so ordered.

**Dated, signed and Delivered at Thika this 15<sup>th</sup> day of June 2020**

**L. GACHERU**

**JUDGE**

**Court Assistant - Jackline**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**By Consent of:**

**None for the Plaintiff**

**None for the Defendant**

**L. GACHERU**

**JUDGE**