



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 151 OF 2014

DAVID NGATIA WANGONDU.....PLAINTIFF

-VERSUS-

JOHN KIHUMBA WANGONDU.....DEFENDANT

JUDGMENT

Introduction

1. **On 8th July, 2014** the plaintiff herein, David Ngatia Wangondu, brought the current suit seeking an eviction order against the defendant, John Kihumba Wangondu, from land parcel number **Nyeri Gatarakwa/1854** (hereinafter referred to as the suit property). The plaintiff also wants the defendant to be compelled to remove all his properties to wit, a house, water tank, a toilet and trees from the suit property.
2. It is common ground that the suit property is a sub-division of Nyeri Gatarakwa/848 which belonged to the father of the parties to this suit one Wangondu Karungu (deceased).
3. It is also common ground that after the deceased person herein passed on, the parcel of land Known as Nyeri Gatarakwa/848 was divided between his two houses to wit the house of Hannah Wagaki Wangondu and Hannah Muthoni Wangondu.
4. The children of the two houses then shared their respective share amongst themselves.
5. It is the plaintiff's case that their houses share was divided into 5 portions, one each for his four siblings and one for their mother. The plaintiff explains that during partitioning of the land, some of the developments effected by the defendant on the land before it was partitioned fell on his portion. For that reason, it was expected that the defendant would remove his development from his parcel to his own portion. However, despite having been given ample time to do so, the defendant refused to remove and shift his properties to his parcel rendering the current suit necessary.
6. In his statement of defence dated 4th August, 2014 the defendant denies that he was supposed to remove and shift the developments he had effected in his father's land before sub-division and contends that sub-division of the land was to ensure that everyone remained where they were left by their father. The defendant contends that sub- division of his father's land, in fact took into account the developments the respective beneficiaries had effected on their father's land and to that extent the portion in contention

fell on his share of the land.

The Plaintiff's Case

7. When the matter came up for hearing, the plaintiff reiterated the contention that during sub-division of their houses' share of the land which belonged to their deceased's father, some developments effected on the land by the defendant fell on his land. To enable him to take vacant possession of his share of their father's land, the plaintiff explained that it was necessary for the defendant to remove/shift the developments he had effected on the suit property.

8. The court heard that whereas other family members did not have any problems removing their developments to ensure that the persons entitled to the portions where their developments stood obtain vacant possession of their respective shares, the defendant refused to remove or shift his developments rendering the current suit necessary. The court heard that all family members were involved in the sub-division of the land and no one raised any issues.

9. The following documents were produced in support of the plaintiff's case:-

- a. Mutation form **Pexbt-1**;
- b. Title deed in respect of the suit property **Pexbt-2**;
- c. Search in respect of the suit property **Pexbt-3**.

10. The plaintiff explained that during sub-division, they had agreed that the sub-division was to take into account the developments effected by the beneficiaries. However, he stated that this did not happen. The court heard that, initially the parties were agreeable to the land being sub- divided in a manner that took into account the developments effected by the beneficiaries but owing to the conduct of the defendant, the plaintiff is no longer willing to have that arrangement given effect.

11. The plaintiff admitted that there was a verbal agreement that the sub-division of the land would take into account the developments effected by the beneficiaries to the land.

12. It is common ground that the mutation form signed by the parties was blank when signed (Sketch was drawn later)

13. According to the testimony of P.W.2, David Ngata, a surveyor, informed the court that a mutation form is signed by all the parties concerned after they are satisfied with the drawn development plan. P.W.2 explained that the mutation form held in lands office corresponds with the one produced by the plaintiff (P.W.1) as **Pexbt-1**. He also stated that the map for the parcel of land in question was amended in accordance with that mutation form and the RIM amended accordingly. He produced the RIM as **Pexbt-5**.

14. According to P.W.2, it was irregular for the parties to sign the mutation forms before the sketches thereon were drawn. The court also heard that if a person refuses to sign the mutation form, it cannot be registered. In the circumstances of this case, blank mutation forms were signed making the entire process irregular.

15. According to P.W.3, **Hannah Wangaki Wangondu**, who is the mother of the parties to this suit, the defendant had agreed to move out of the land belonging to the plaintiff but later changed his mind and refused to do so. P.W.3 informed the court that the defendant had been shown the portion of the suit land in dispute by his father but explained that the defendant's father had not said that he should not move from that parcel of land.

16. Contrary to the testimony of the plaintiff to the effect that they had verbally agreed that sub-division be done taking into account developments effected by beneficiaries, P.W.3 told the court that

beneficiaries had agreed that boundaries should be straight (Should not take into account developments effected by the beneficiaries on the land being shared).

The Defence Case

17. On his part, the defendant who testified as D.W.1, maintained that sub-division was done taking into account the developments the beneficiaries had effected in the land being sub-divided.

18. Terming the mutation form produced by the plaintiff (**Pexbt-1**) unauthentic, the defendant explained that they only signed a blank mutation form.

19. The defendant admitted that he is the one who brought the surveyor and maintained that sub-division was done taking into account their respective developments in the land being shared. With regard to the drawing/sketch map produced by the plaintiff (**Pexbt-1**) he stated that it does not reflect what they had agreed on.

20. The defendant vehemently denied the allegation that some of his things/properties are in plaintiff's parcel of land and that he had agreed to remove them.

21. The defendant also admitted that his siblings moved out of the parcels of land they initially occupied in order to enable the beneficiaries of the portions in question to take vacant possession of their respective entitlements.

22. D.W.2, **Charles Wangai Gitahi** told the court that he had been informed by a brother to the father's of the parties herein that the father of the parties herein wanted sub- division of his land to be done taking into account the developments effected by the beneficiaries thereon. He was, however, not privy to the arrangement that had been made between the parties to this dispute.

23. D.W.3, **Harrison Karungu Wangondu**, a brother to the parties herein, informed the court that during sub-division of their father's land they agreed that the sub-division between the plaintiff and the defendant was to take into account the developments effected by the defendant on the parcel of land being shared.

24. The court heard that the effect of that agreement was that the boundary of the land parcels of the plaintiff and defendant were not going to be straight. He, however contradicted himself by explaining that it had been agreed that the defendant would compensate the plaintiff for the parcel that fell in the plaintiff's parcel.

25. He also informed the court that there was no family decision to the effect that the defendant moves out of the suit land. That notwithstanding, he informed the court that there was a family meeting in which it was recommended that the defendant removes his properties from the portion of the land falling in the plaintiff's land.

Analysis and determination

26. From the pleadings filed in this suit and the evidence adduced in support thereof, the following are common ground or undisputed:-

1. That the suit property is a sub-division of Nyeri Gatarakwa/848 that belonged to the deceased person herein.
2. That before sub-division of Nyeri Gatarakwa/848 between the beneficiaries of the house of the parties to this suit, there was an oral agreement that sub- division would take into account the developments effected by the beneficiaries of the property being sub-divided;
3. That the beneficiaries signed blank mutation forms.

4. That despite the oral agreement referred to in (2) above, the sub-division did not take into account the developments effected by the beneficiaries.

5. That despite being affected by the sub-divisions, except the defendant herein, the other beneficiaries of the parcel of land being subdivided moved their developments to enable their siblings take vacant possession of their respective entitlements in accordance with the sub-division.

6. That the defendant who was not satisfied with the sub-division as effected refused to remove his developments that fell on the plaintiff's parcel in order to allow the plaintiff to take vacant possession of his entitlement as per the impugned sub-division.

7. That efforts to amicably settle the dispute concerning the sub-division of the parcels held by the plaintiff and the defendant have been in vain.

27. Although it is clear from the foregoing that the sub-division of the suit property was not done in accordance with the wishes of the beneficiaries, by dint of the provisions of **Section 31** of the Survey Act, the error if any, effected pursuant to that survey exercise could only be rectified in accordance with the provisions of the survey Act, in particular, **Section 31(2)** of the Survey Act which provides as follows:-

“31.(2) The Director, or a Government surveyor duly authorized to authenticate a plan under section 32 of this Act may, by notice in writing, instruct any licensed surveyor to correct at his own expense within a time specified in such notice any error made by him in the survey represented by the plan submitted for authentication:

Provided that such notice shall not be sent more than twelve months after the date on which the plan was sent to the Director under section 30.”

28. Under **Section 33** of the Survey Act, the Director may, subject to the provisions of that Section and the provisions of **Section 31** of the Act, cancel the authentication of a survey plan and may recall any copies which may have been issued in respect thereof.

29. Whilst it's not in dispute that the survey plan herein was not done in accordance with the wishes of the parties to this suit, in that, it did not accord to the oral agreement of the parties that the sub-division of the suit property be carried taking into account the development the beneficiaries had effected on the suit property, it is clear that the impugned survey plan was not challenged by any of the parties to this dispute using the mechanism provided for by law.

30. Having not been challenged by the parties to this suit, the impugned survey plan was acted upon and titles issued to the parties to this suit. Issuance of titles in accordance with the impugned survey plan changed not only the interest of the position of the parties to this suit but also the other beneficiaries of the estate.

31. In my view, if this court were to accede to the defendant's argument that he is entitled to continue occupying the position of the suit land which as a result of the impugned subdivision went to the plaintiff, it would mean that the survey process be done afresh hence affecting the rights of the other beneficiaries of the estate, who are not parties to this suit.

32. Although the defendant will definitely suffer some prejudice if the orders sought are granted by losing his investment, I take judicial notice of the fact that when it comes to subdividing family land, such losses are sometimes inevitable and being of the view that the loss, if any to be suffered by the defendant, cannot form a ground of allowing the defendant to continue living on the plaintiff's land, I find the application herein to be merited and allow the same as prayed.

33. Cognizance of the fact that the defendant requires ample time to remove his developments from the portion of the suit property in dispute, I will stay the execution of the orders hereto for three months (90 days) from the date of this ruling in order to give the defendant ample time to remove his developments

from the suit property. If the defendant shall not have voluntarily removed his development from the suit property at the expiry of the time specified herein, the plaintiff shall be at liberty to initiate his forcible removal there from.

Orders accordingly.

Dated, signed and delivered at Nyeri this 11th day of July, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Muhoho h/b for Mr. Wagiita for the defendant

Ms Kainga h/b for Mr. Wachira for the plaintiff

Court assistant - Lydia