



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO.80 OF 2012

SOLOMON NGARI GATOTO)

JOHN PETER NDUNGU).....
PLAINTIFFS

VERSUS

DANIEL NDIRITU
WACHIRA.....DEFENDANT

J U D G M E N T

The plaintiffs have sued the defendant claiming to be jointly registered as owners of plot No.14 and 31B Ndunyu Market together with one Wachira Kinyua deceased and Esther Nyakihui (deceased).

The plaintiffs claim is that since the death of Wachira Kinyua, the defendant has without any authority from the plaintiffs taken over the running of the property where the same are leased out for rental income. The defendant has been benefiting alone from the rental income of the aforesaid properties without due regard of the registered owners. They are praying for an order that the interest in plot Nos.14 and 13B Ndunyu Market be sold by public auction and for the said accounts/profits to be shared equally among the proprietors and their personal representatives taking into account the gains by the defendant from rental income since Wachira Kinyua died. They pray that the sale to be conducted by Hippo General Marchants in Nyeri. They have also prayed for costs and interest of the suit.

The defendant was served with summons to enter appearance but failed to do so hence interlocutory judgment was entered against him for the plaintiffs on 10/7/2013 and the matter was to proceed to formal proof.

On the 18/7/2013 the matter proceeded for formal proof when Mr. John Peter Ndungu the second plaintiff testified and stated that he is a farmer based in Othaya. He knows the 1st plaintiff as they are in the same company of buying plots. Their plots are 14 and 31B.

He relied on the statement dated 27/3/2012 where he states that he is the registered proprietors of Plot Nos.14 and 31B Ndunyu Market after being declared so by court in Nyeri CMCC Award No.69 of 2000. That the plots have shops and rooms for rental. He stated that two of the joint proprietors Wachira Kinyua and Esther Nyakinyua have since died and therefore it is only two of them who are remaining and that Daniel Nderitu Wachira(defendant) is a son to Wachira Kinyua (deceased) and has taken over the collection of the rental income since the death of his father who was one of the proprietors. That they have tried severally to have the premises repaired and even went to the Business Premises Tribunal but

Wachira Kinyua's family and the defendant have been very uncooperative. They have issued demand letters calling for meetings to deliberate on the best way forward but they have refused to attend or reply to the letters and therefore the best solution would be to have the premises sold through public auction and the proceeds shared equally amongst the proprietors and their personal representatives but taking into consideration all the benefits and financial gains the defendant has gained on behalf of the estate of Wachira Kinyua so that there can be justice and fairness to all the parties.

He produced a search certificate issued by the county council of Nyeri which shows that plot No.14 in Ndunyu Kamoko sub-location of Othaya Division is registered under the names of, **Wachira Kinyua, John Peter Ndungu, Esther Nyakihui, Solomon Ngari Gatoto** under Minute No.19/2004 (77) WTPMC.

He also produced a search certificate issued by the city council of Nyeri which shows that plot No.31B at Ndunyu Market Kamoko sub-location Othaya Division is registered in the names of **Wachira Kinyua, John Peter Ndungu, Esther Nyakihui Wachira, Solomon Ngari Gatoto** under minute No.6/2001 (68) WTPMC.

He further proved that Wachira Kinyua suddenly died on 17th April 2005 at Ugachiku sub-location by producing the certificate of death. He further produced limited grant of letters of administration and colligenda bona obtained under section 67(1) of the Act to prove that Esther Nyakihui Wachira died. The letter dated 3rd of November 2011 was produced to prove that the plaintiffs had informed the defendants of their intention to sell the plots aforementioned.

On the 10th of November 2000, the Chief Magistrate's court at Nyeri Award No.69 of 2000 adopted a decision of the Tribunal as a decision of the court that Solomon Ngare Gatoto, John Peter Ndung'u and Esther Nyakihui Wachira be registered as joint owners of plot numbers 14 and 31B Ndunyu market Mahiga.

On the 18/10/2010 the plaintiffs through their lawyers Rika & Co. Advocates wrote to the Estate of Wachira Kinyua, Mahiga location requesting for a meeting with the family of the late Wachira Kinyua to deliberate on the best way forward on how to dissolve their partnership.

The plaintiff further stated that the plots are being used by the defendant Daniel Ndiritu Wachira while they pay rates to the council. There are approximately 10 houses on the plots. Plot No.31 has 4 houses whilst plot No.14 has 10 houses hence a total of 14 houses and two shops from which they receive nothing. He prayed that the plot be auctioned to enable them share the money.

The plaintiff called a witness by the name Joseph Waitiki Gatoto who stays in Othaya and knows the plaintiffs and defendant. Solomon Gatoto is his brother while John Peter Ndung'u is the nephew. He stated that plot No.14 & 31B belonged to Wachira Kinyua. Plot No.31 was created from plot No.14. James Gathoga Ndirangu left the plots to John Peter Ndungu, the second plaintiff. Wachira Kinyua was the father of Daniel Ndiritu the defendant herein. Esther Nyakihui was the wife to his cousin. Her share was left to her children. This witness was given powers to collect proceeds from the estate through the limited grant of letters of administration and colligenda bona under section 67 (1) of the Succession Act. The plot No.14 has 2 business houses and 8 residential houses totaling to 10.

Plot No.31B has 2 business premises and 4 residential houses totaling 6. the plots are situated at Ndunyu and are being utilised by the defendant who does not pay the plaintiffs anything and yet he has been receiving rent from the date his father died on 17/4/2005.

The matter proceeded for further hearing on 27/9/2013 when Solomon Ngari Gatoto testified. He gave evidence that he knew Daniel Ndiritu Wachira. He was their partner and a son of the late Wachira Kinyua who has been collecting rent in plot No.14 and 31B at Ndunyu market at Mahiga location Othaya Division without giving them the proceeds or allowing them to collect. He has been collecting rent for the last 20 years. They have demanded that they sell the plots but he has refused. He prayed that the claim be allowed as prayed in the plaint.

I have considered the testimony of the plaintiffs and their witness and do find that plots No.14 and 31B at Ndunyu market are registered in the names of the plaintiffs thus Solomon Ngare Gatoto and John Peter Ndungu and the late Wachira Kinyua and Esther Nyakihui Wachira. Mr. Wachira Kinyua and Esther Nyakihui Wachira are deceased. Mr. Joseph Waitiki Gatoto obtained letters of administration and colligenda bona under section 67 (1) of the Act.

On the 10th of May 2000 the Chief Magistrate's Court Nyeri ordered that Solomon Ngare Gatoto, John Peter Ndung'u and Esther Nyakihui Wachira be registered as joint owners of plot numbers 14 and 31B Ndunyu Market.

The court finds that the plaintiffs have satisfied the court that they are the owners of the property in dispute and therefore do grant the prayers sought in the plaint that plot numbers 14 and 31B Ndunyu Market be sold by public auction and the proceeds of the sale to be shared amongst the plaintiffs and the defendant. The plaintiffs are also awarded the costs of the suit plus interest.

Dated and Delivered at Nyeri this 14th day of March 2014.

A. OMBWAYO

JUDGE