



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT
CIVIL CASE NO.191 OF 2012

FRANCIS MWANIKI NGUMBA)

STANLEY WACHIGO NGUMBA).....PLAINTIFF

VERSUS

THOMAS NGUMBA WAMAI.....DEFENDANT

R U L I N G

In the plaint dated 27/8/2012 the plaintiff, a male adult of Mairi Village, Mairi Location in Murang'a County sued the defendant also of Mairi village in respect of land reference No.Maragua Ridge/153 measuring 14 acres or thereabout.

The plaintiffs averred that by an agreement made on 14/4/1976, the defendant agreed with the 1st plaintiff that he would allocate him a piece of land measuring 1 acre on condition that the 1st plaintiff repaid the loan owed by the defendant to the Settlement Fund Trustees. The 1st plaintiff paid to the Settlement Fund Trustees the total sum of Kshs.17,000/= or thereabouts and was entitled to 1 acre out of L.R. No.Maragu Ridge/153. The defendant has refused to give to the 1st plaintiff his 1 acre.

It is alleged by the plaintiffs that by agreement dated 14/4/1976, the defendant agreed to give the 1st plaintiff 1 acre at the price of Kshs.4,000/=. Moreover that 1st plaintiff in pursuance to the agreement repaid to the Settlement Fund Trustee the sum of Kshs.17,000/= which entitled him to 4½ acres out of L.R.Magarua Ridge/153. The defendant and the plaintiffs agreed he would share out L.R.Magarua Ridge/153 to his sons including the plaintiffs. The 2nd plaintiff grew up and has always regarded L.R.Magarua Ridge/153 as his home until the defendant demolished the house where he lived. He argues that it is in the policy of the Kenyan Constitution and Government that all persons are entitled to own land to avoid creating a landless and destitute population. The plaintiffs aver that they are entitled to portions of L.R.Magarua Ridge/153 as agreed on 14/4/1976 or as per Kikuyu Customs.

The plaintiffs prays that the defendant be ordered to transfer 1 acre out of L.R.Magarua Ridge/153 to the 1st plaintiff and a further 3½ acres to be given to the plaintiffs equally with his other sons.

The suit was accompanied with a Notice of Motion dated 27/8/2012 seeking orders that the defendant, his servants agents, surveyors, registrars be restrained from subdividing, transferring, executing or registering documents of transfer of land L.R.Magarua Ridge/153 or portion of it before the hearing and disposal of this suit which application was based on grounds that the defendant/respondent agreed to transfer land measuring 1 acre to the 1st plaintiff but he has now refused to do so and that the respondent now has brought buyers to the suit premises and intends to sell the whole land which will render the applicants

destitute.

The application is supported by the affidavit of Francis Mwangi Ngumba where he depones that the defendant/respondent is their father who had 3 wives among them their mother Nyakondo Ngumba who died many years ago. The defendant has throughout the years mistreated him and other children of their late mother for no reason at all.

That on 14th April 1976, the defendant requested him to help him to pay a loan to Settlement Fund Trustees given to him to buy L.R.Magarua Ridge/153 estimated to be kshs.4,000/= and the defendant was to give him 1 acre over and above the acreage he was to give all his other children. He charged his salary with Teachers Service Commission to repay the loan with monthly deductions and at the end he had paid Kshs.17,000/= and he is now entitled to 4 ½ acres at the rate of Kshs.4,000/= per acre. He has been asking the defendant to transfer at least the 1 acre to him but he has refused.

He lodged a caution against the land on 23rd July, 2009 when it came to his knowledge that the defendant was intending to sell the suit premises. The defendant wanted to remove the caution and instituted a hearing before the Land Registrar Murang'a on 11/9/2011 where he agreed to give him at least 1 acre. The defendant filed an application for consent of the Land Control Board but to date he has refused to give him even the one acre. The 1st plaintiff has settled on another parcel of land owned by the defendant and the defendant now says if he gives him one acre he has to vacate his other land.

The 1st plaintiff fears that the defendant schemes to sell land L.R.Maragua Ridge/153 to give the money to one of the sons of his youngest wife to put up a school to the detriment of all his other children including them. That buyers have often been going to the land and it is common knowledge the defendant wants to sell the whole land without giving him any land and it had been said they were to go to the Land Board for consent on 29/8/2012 .

When the matter came before Justice Wakiaga on 29/8/2012, the application was certified urgent and a temporary order of injunction granted against the defendant from selling the suitland pending the interparte hearing.

The defendant was served hence filed a replying affidavit whose gist is that he is the registered proprietor absolutely of L.R.Magarua Ridge/153. He has three wives of which two are deceased. He denies having mistreated the plaintiffs and other children of their mother and has since brought them up peacefully and educated them .It is true that on 14/4/1976, he requested the 1st plaintiff to pay the sum of kshs.4,000/= being balance of the loan from Settlement Fund Trustee. However,the agreement was that the said money was to be refunded by all his brothers. The excision of one acre in his favour was only if the brothers did not refund the money. He denies the allegation that the plaintiff paid Kshs.17,000/= and states that there was no agreement that he was to be given 4½ acres in lieu of the Kshs.17,000/= or at all. The 1st plaintiff lodged a caution which was later removed after a hearing before the Murang'a District Land Registrar. He denies that there was undertaking on his part that he would give the 1st Plaintiff the 1 acre for the caution to be vacated. However, he had always been willing to give him the one acre but 1st Plaintiff has not been cooperating in order to facilitate the surveying and excising the said land from the larger portion. He applied for land board consent for the subdivision which has been granted but the first plaintiff's application is premature and attributed by malice. It is fatally defective and therefore incompetent. He states that there is no cause of action against him as the suit is a futile attempt to inherit his estate when he is alive. The same should be struck out at the preliminary stage. He denies that he is selling any parcel of and whatsoever but adds that in any case, the land is his absolutely and he has all the right to sell or dispose off the same in any manner that he would wish.

I have considered the application, supporting affidavit, replying affidavit and rival submissions and do find that this matter should be determined on the principles set out in ***Giella -VS- Cassman Brown (1973) EA 338***. Thus the applicant must show;

1. ***that he has a prima facie case with a probability of success.***
2. ***that he is likely to suffer irreparable injury.***

3. ***That the balance of convenience tilts to his favour.***

Has the applicant established a prima facie case? The applicant claims 1 acre out of L.R.Magarua Ridge/153 and a further 3½ acres as the father is to give land equally to his other sons. The applicant's claims are based on an agreement dated 14/4/1976. The 1st plaintiff is settled on another parcel of land owned by the defendant. He has not disclosed the size of the parcel of land.

The 1st plaintiff placed a caution on the suit land which caution was removed by the consent of parties on condition that the 1st plaintiff be given 1 acre out of the said parcel of land.

Though the defendant argues that he is the registered proprietor of the suit land as an absolute proprietor and not as a trustee of anybody the agreement dated 14/4/1976 betrays him. Without going into the merits of the case, it appears that there was a family meeting where it was agreed that the 1st plaintiff pays the loan in respect of the parcel of land in contention and his brothers were to refund him failure of which he was to be given an extra acre by the defendant at the time of distributing his piece of land to his sons. The agreement appears to have been signed by the defendant. The 1st plaintiff acted on this agreement and paid the loan which was deducted from his salary.

This court finds that the fact that the family of the defendant held a meeting and agreed that the 1st plaintiff pays the loan to Settlement fund Trustees on condition that he would be refunded failure of which he was to be given an acre out of the suitland and the consent entered into before the land registrar Murang'a, establishes a ***prima facie*** case with likelihood of success by the 1st plaintiff. The suit is not frivolous and the issue of consent of land control board need to be canvassed in view of the fact that the agreement was neither based on a sale of land or a gift as the same was a family resolution to salvage the parcel of land in issue. I do find that the 1st plaintiff/applicant has established a case with the probability of success.

On the second issue, I do find that the land in issue appears to be family land having been acquired through monies paid by family members. If an order of injunction is not granted as sought and the suitland is disposed off, the 1st plaintiff is likely to suffer irreparable loss or injury in view of the fact that the agreement was made in 1976 and money paid at the said time hence if the court was to order the plaintiff compensated by way of damages, the said damages are not likely to place him where he could have been had the money been repaid in 1976.

Had I been in doubt, which am not, I could have decided on a balance of convenience in favour of the 1st plaintiff since the suitland is family land, it should be preserved for the benefit of the family until the matter is heard fully and determined.

The application is allowed. Costs in the cause.

Dated, signed and delivered on 4th day of July 2014.

A. OMBWAYO

JUDGE