



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 6 OF 2012

ROSA CHEROP BURUKUT..... PLAINTIFF

VERSUS

PAULINE RUGUT

ELIKANA TOWET

JAMES TANUI..... DEFENDANTS

J U D G E M E N T

1. The Plaintiff and the first defendant are co-wives. The 2nd and 3rd defendants are sons of the first defendant. The plaintiff is the registered owner of LR NO. Kwanza/Kwanza Block 5/Korosi/223 which measures 4.614 hectares.

2. The Plaintiff filed this case against the defendants claiming the following reliefs;-

(a) A declaration that she is entitled to exclusive and unimpeded right of use, possession and occupation of all that parcel of land known as LR Kwanza/Kwanza Block 5/Korosi/223.

(b) A permanent injunction restraining the defendants or any other person from trespassing, claiming, accesing or in any other way interfering and/or dealing with the suit land.

(c) General damages for trespass and mesne profits.

(d) Costs.

3. The defendants filed defence to the plaintiff's claim and raised a counter-claim in which they allege that the plaintiff fraudulently curved out their 4.3 acres and as such they seek cancellation of the title which is in the name of the plaintiff.

PLAINTIFF'S CASE

4. The plaintiff testified that she is the registered owner of the suit land. She produced the title to the land as exhibit 2. On 15/12/2011 the defendants removed fencing posts from her land exposing her plot to animals which destroyed her crops. This prompted her to file a suit in court seeking the orders in the plaint.

5. The plaintiff called Malakwen Arap Rugut her husband who testified that he subdivided his land among his wives and that the plaintiff has obtained title to her parcel whereas the first defendant who is also his wife has refused to obtain title to her portion.

DEFENDANTS CASE

6. The first defendant testified that she is a co-wife of the plaintiff. She testified that her husband had three wives. Her husband had LR NO. 117 which was 18 acres. She further testified that her husband had a six acre plot at Chebarus where the first wife of her husband who is now deceased used to reside. Her husband gave the son to his first wife 2 acres at Korosi to make it 8 acres. The husband also gave each of the two that is the plaintiff and the first defendant 8 acres each to utilise.

7. The first defendant testified that the plaintiff had herself registered as owner of 12.4 acres thus depriving her of her 4.4 acres. The first defendant contends that she has been utilising 8 acres and that she cannot be evicted from her portion.

8. The first defendant called two witnesses that is DW2 Julius Kipkering Chepkwony and DW3 Pius Kipkorir Kibet who testified that they are neighbours of Malakwen Rugut and that when one of Malakwen's wives complained to them regarding sub-division of their husband's land, they came and in company of other elders subdivided Malakwen's land equally between the plaintiff and the first defendant.

ANALYSIS OF EVIDENCE

9. The first defendant is contending that she is entitled to 8.4 acres of her husband's land but that she is instead having only 4 acres the rest of the land having been taken by the plaintiff and the son of the first wife of Malakwen Arap Rugut. Whereas the first defendant claims that the plaintiff is having 12.4 acres, the plaintiff's title shows that he land is 4.614 hectares which is about 11.401 acres. It is therefore not true that the plaintiff is occupying 12.4 acres as the first defendant claims.

10. The first defendant did not attempt to produce the green card which would have shown the history of her husband's land said to be plot No. 117. The plaintiff had herself registered as owner of the suit land in 2009. This was after her husband transferred the same to her upon sub-division of his land.

ISSUES FOR DETERMINATION

11. (A) Was the suit land fraudulently or irregularly registered in the name of the plaintiff?

(B) Is the first defendant entitled to 4.4 acres out of the suit land?

(C) Was Malakwen Rugut influenced by the plaintiff to allocate her 11 acres?

12. On the first issue, the first defendant did not adduce any evidence to show that the plaintiff had herself registered as proprietor of the suit land in any improper manner. She called her husband Malakwen Rugut who testified that she gave the plaintiff a bigger share because it is the plaintiff who takes care of the children of his first wife who died. Though the first defendant testified that the son to the first wife was given two acres at Korosi in addition to the 6 acres at Chebarus, there was no evidence to show that that was the case. Her allegation that the plaintiff obtained title fraudulently have therefore no basis.

13. The husband of the plaintiff and defendant was at liberty to sub-divide his land in the manner he did. What the husband did was not repugnant to justice and morality. In African traditions, a man is entitled to give more acres to one wife than the other. There is no requirement that each should get the same acres. What Malakwen Rugut did is not extraordinary. The first defendant's witnesses claimed that they were present when Malakwen Rugut's land was sub-divided equally among the plaintiff and first defendant. Their evidence is doubtful in view of the fact that the first defendant had attempted to have a

Tribunal rule that she was entitled to equal share as the plaintiff. This attempt was made after the plaintiff had obtained her title.

14. There was no evidence adduced that Malakwen Rugut was under any pressure from anyone to do what he did. I observed Malakwen Rugut when he testified. He was not very advanced in age. He spoke good swahili and appeared to be a man capable of doing his things independently. I do not find anything to suggest that he did what he did under influence from anyone.

DECISION

15. There was no proof that the plaintiff obtained her title in an improper manner. It therefore follows that the defendant's counter-claim fails as the title in favour of the plaintiff cannot be cancelled in the absence of any evidence that the same was fraudulently obtained. On the other hand, I find that the plaintiff has proved her case on a balance of probabilities. Accordingly, a declaration is issued that she is entitled to exclusive and unimpeded right of use, possession and occupation of LR. NO. Kwanza/Kwanza Block 5/Korosi/223. A permanent injunction is hereby given restraining the defendants or any other persons from trespassing, claiming, accessing or in any other way interfering and/or dealing with the suit land.

16. The claim for general damages for trespass and mesne profits is hereby declined as there was no evidence upon which the same could be granted.

17. As the parties herein are family members, I will not make any order as to costs. This means that each party shall bear their own costs.

Dated, signed and delivered at Kitale on this 9th day of July, 2014.

E. OBAGA

JUDGE