



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 763 OF 2014

FRANCIS MANYARA WAIRAGI.....PLAINTIFF

=VERSUS=

LUCIA WAIRIMU WAIRAGI.....DEFENDANT

JUDGMENT

At all material times, all that parcel of land known as Limuru/Bibirioni/1427 (Plot No. 1427) was registered in the name of Wairagi Manyara, deceased (hereinafter referred to only as “the deceased”). On 4th January, 1980, Plot No. 1427 was subdivided which subdivision gave rise to among others, land parcel number Limuru/Bibirioni/1495(hereinafter referred to only as “the suit property”). The suit property which measures 4.7 acres was registered in the name of the deceased on 4th January, 1980. The deceased was issued with a land certificate in respect thereof on 11th October, 1980.

The plaintiff is a son of the deceased while the defendant is the deceased’s widow and the plaintiff’s stepmother. In his lifetime, the deceased had four wives. The defendant is the deceased’s fourth wife while the plaintiff is the son of the deceased’s first wife who is deceased. It is not clear from the evidence on record whether the deceased’s other wives are alive. On 2nd April, 1990, the deceased transferred the suit property to the defendant as a gift. The defendant was issued with a title deed in respect of the suit property on the same date. The deceased died on 20th September, 1990 at the age of 94 years. On 12th October, 1990; less than a month after the death of the deceased, the plaintiff registered a caution against the title of the suit property claiming beneficial interest.

The plaintiff brought this suit against the defendant on 13th June, 2014 after a period of over 23 years from the time he registered the said caution seeking an order that the suit property be divided equally between him and the defendant. The plaintiff did not bring the suit as a legal representative of the deceased but in his personal capacity. The suit was brought on the ground that on 2nd April, 1990, the defendant using false pretenses caused the deceased who was suffering from mental illness to transfer the suit property to her.

The defendant filed a statement of defence on 26th June, 2014 in which she denied the plaintiff’s claim. The defendant averred that the plaintiff’s suit was defective, bad in law, vexatious and amounted to an abuse of the process of the court. The defendant averred that the suit property was transferred to her by the deceased during his lifetime as a gift and that she was the absolute owner thereof. The defendant averred that the suit property was given to her by the deceased in 1986 through a deed that was witnessed by the plaintiff among others. The defendant averred that through the same deed, the plaintiff was also given a parcel of land bigger than the suit property as a gift. The defendant averred that the plaintiff’s suit was time barred. The defendant urged the court to make an order for the removal of a caution that the plaintiff had registered against the title of the property which she claimed was registered without any lawful basis.

At the trial, the plaintiff gave evidence and called three witnesses who included his wife. On her part, the defendant also gave evidence and called one witness who was her son. After the close of the parties’ respective cases, the parties informed the court that they did not wish to make closing submissions.

I have considered the pleadings and the evidence that was given by the parties and their witnesses. From the pleadings the issues that arise for determination in this suit are the following;

1. Whether the plaintiff’s suit is time barred.
2. Whether the defendant acquired the suit property from the deceased wrongfully by false pretenses.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Who is liable for the costs of the suit?

Whether the plaintiff's suit is time barred.

It is not disputed that the suit property was registered in the name of the defendant on 2nd April, 1990 on which date she was also issued with a title deed. The plaintiff was aware of this fact as at 12th October, 1990 when he registered a caution against the title of the property. It is also not disputed that the suit herein was brought by the plaintiff on 13th June, 2014 after a lapse of over 23 years from the time the suit property was registered in the name of the defendant and when the plaintiff became aware of that registration. Section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides that no action shall be brought for the recovery of land after 12 years from the time when the cause of action arose. In this case, the cause of action arose on 2nd April, 1990 when the defendant was registered as the owner of the suit property or on 12th October, 1990 when the plaintiff became aware of such registration assuming that the property was registered in the name of the defendant fraudulently and that the fraud was concealed to the plaintiff until 12th October, 1990. Either way, the plaintiff should have bought the suit herein by 12th October, 2002. Due to the foregoing, it is my finding that the plaintiff's suit was filed out of time and as such the same is time barred.

Whether the defendant acquired the suit property from the deceased wrongfully by false pretenses.

As I mentioned earlier in this judgment, the plaintiff's claim was brought on the ground that the defendant acquired the suit property wrongfully from the deceased through false pretenses. The plaintiff claimed that the deceased who had a mental ailment was deceived by the defendant to transfer the suit property to the defendant. False pretenses is defined in Garner, Black's Law Dictionary, 10th Edition as follows:

“The crime of knowingly obtaining title to another's personal property by misrepresenting a fact with the intent to defraud.”

The plaintiff did not place any evidence before the court showing that the defendant misrepresented a fact to the deceased with the intention of defrauding him of the suit property and that the deceased transferred the suit property to the defendant as a result of the said misrepresentation. In his evidence in cross-examination, the plaintiff claimed that when the deceased was sick and was being taken to the hospital, the defendant forced him to put his thumb on the instrument of transfer. The plaintiff claimed that the deceased was threatened by the defendant that unless he signed the document, he would be denied food. The plaintiff did not tell the court how he came about this information regarding the defendant's threat to the deceased. The court was not told whether the plaintiff accompanied the deceased to the hospital and as such was privy to his communication with the defendant and if he did not, how he obtained that information. Secondly, even if it is assumed that the defendant had threatened to deny the deceased food unless he transferred the suit property to her, that in my view did not amount to false pretense. The onus was upon the plaintiff to prove that the defendant acquired the suit property fraudulently through misrepresentation.

Section 27(a) of the Registered Land Act, Chapter 300 Law of Kenya (now repealed) under which the suit property was registered provided that the registration of a person as the proprietor of land vested on that person the absolute ownership of that land together with all rights and privileges associated therewith. Section 28 of the said Act on the other hand provides that the right of a proprietor whether acquired on first registration or subsequently shall not be liable to be defeated except as provided in the Act. Under Section 143 (1) of the said Act, the court is empowered to cancel registration if it is satisfied that the same was obtained by fraud or mistake. The plaintiff has not satisfied me that the suit property was registered in the name of the defendant fraudulently or wrongfully.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

The plaintiff having failed to demonstrate that the defendant acquired the suit property wrongfully, there is no basis upon which the court can cancel the defendant's title to the suit property and direct that the property be shared between the plaintiff and the defendant equally. There are also other obstacles standing on the plaintiff's way. First, as I have held above, the plaintiff's suit is time barred and as such even if the plaintiff had established his claim, the court would not have granted the reliefs sought. Secondly, the suit property belonged to the deceased and not to the plaintiff. It is the deceased who is alleged to have been defrauded of the suit property. It follows therefore that the plaintiff who is not a legal representative of the deceased had no *locus standi* to bring a suit for a wrong done to the deceased.

Who is liable for the costs of the suit?

Costs are awarded at the discretion of the court. As a general rule, costs follow the event. In the case before me, the parties are relatives and they have been in court for several years. I am of the view that in order not to worsen the rift between them, each party should bear its own costs.

Conclusion:

In conclusion, I find no merit in the plaintiff's suit. The same is dismissed with each party bearing its own costs. So as to prevent the filing of another suit or application over the same subject matter, I order that the caution that was lodged against the title of the suit property, land parcel No. Limuru/ Bibirioni/1495 by the plaintiff on 12th October, 1990 shall be lifted forthwith by the Land Registrar.

Delivered and Dated at Nairobi this 22nd Day of October 2020

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

N/A for the Defendant

Ms. C. Nyokabi-Court Assistant