



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO 894 OF 2014

FRANCIS THANDE JAMES KIARIE.....PLAINTIFF

-VERSUS-

JOHN KARANJA KAHIRA.....1ST DEFENDANT

NELLIE NGONYO MWAURA.....2ND DEFENDANT

BY WAY OF COUNTER CLAIM

JOHN KARANJA KAHIRA.....1ST PLAINTIFF

NELLIE NGONYO MWAURA.....2ND PLAINTIFF

- VERSUS -

FRANCIS THANDE JAMES KIARIE.....DEFENDANT

JUDGEMENT.

Introduction.

1. The Plaintiff is a cousin to the 1st Defendant and a brother to the 2nd Defendant. The dispute in this matter relates to L R No.Dagoretti/Kangemi/307 (suit property) which is currently registered in the name of the Plaintiff. The suit property has its origin from Kahira who owned the land which was about 10.8 acres. Kahira had two wives. The first wife was called Wairimu who had a son called Mungai Kahira. The 2nd wife was Loise Wanjira Kahira. During land demarcation in 1958, Kahira's land was registered in the name of his first born son from the first house that is Mungai Kahira in trust for his two wives. This is the land which was known as LR No. Dagoretti/Kangemi/204.

2. In 1965, Mungai Kahira had his step mother's name put in the title as owner of 1/5 share. In 1969 Loise Wanjira Kahira's portion of 1/5 was transferred to her grandson who is the Plaintiff. The Plaintiff later processed title to the suit property which was registered in his name on 10th July 1973.

3. Loise Wanjira Kahira who died intestate on 4th May 1974 had three daughters. The first born daughter was Wanjiru Kahira, the second born was Elizabeth Ngonyo and the last born was Milka Waceke. The Plaintiff and the 2nd Defendant are children of Milka Waceke whereas the 1st Defendant is son to Wanjiru Kahira.

4. The Defendants contention is that though the suit property is registered in the Plaintiff's name, the registration was fraudulently done and that the suit property belongs to the beneficiaries of the three daughters of Loise Wanjira Kahira who are all deceased. In 2011, the Plaintiff agreed to subdivide the suit property and share it amongst the beneficiaries of the three daughters of Loise Wanjira Kahira but he later changed his mind and filed a suit against the Defendants in which he seeks the following reliefs:-

a. A declaration that the Plaintiff is the lawful owner of the suit premises.

b. The Plaintiff be and is hereby given possession of the suit premises.

c. The Defendants be and are hereby restrained by way of a permanent injunction whether by themselves, servants, agents, assigns or in any other manner howsoever from remaining on or continuing in occupation or possession of or from entering, interfering with, alienating, dealing in LR No. Dagoretti/ Kangemi/307 the suit premises.

d. Damages for trespass with interest thereon.

e. Costs of this suit together with interest on (d),(e), and (f).

f. Further or other relief that this Honourable Court may deem fit to grant.

5. The Defendants through an amended defence and counter-claim, seek the following reliefs: -

i. A permanent injunction restraining the Defendant and or his agents or servants from evicting, threatening and or harassing the Plaintiffs and or interfering, subdividing or making any claim over the land parcel No.Dagoretti/Kangemi/307.

ii. An order for cancellation of the title to land parcel L R No. No.Dagoretti/Kangemi/307 purportedly registered in the Defendants name.

iii. An order for the rectification of the register and title to reflect the name of the deceased (Loise Wanjira Kahira) as proprietor of land parcel L R No. No.Dagoretti/Kangemi/307.

Plaintiffs case.

6. It is the Plaintiff's case that he is the registered owner of the suit property which was registered in his name on 10th July 1973. He put up a residential house on the same and put up rental houses which he has rented out to tenants. In or around 2011, the Defendants trespassed into the suit property and put up temporary structures and started laying claim to the suit property. The Plaintiff argued that the trespass by the Defendants has made it difficult for him to exercise quiet possession and that the trespass by the Defendants is interfering with his tenants. It is on this basis that he is seeking the reliefs in the plaint.

Defendants Case

7. It is the Defendants case that the registration of the suit property in the Plaintiff's name was done fraudulently. They state that their grandmother Loise Wanjiru Kahira was too old and illiterate as at the time the plaintiff claims to have been given the suit property as a gift. The Defendants argue that their grandmother did not sign or thumbprint on the transfer documents and that the transfer documents and that the transfer was signed by Mungai Kahira which should not have been the case.

8. The Defendants further argue that when their grandmother was taken before the Land Control Board, she was about 100 years and did not sign any documents as she was old. They argue that the plaintiff took advantage of the advanced age of their grandmother and the fact that he was the only educated member of the family.

9. The Defendants state that in 2011 the Plaintiff had agreed to share out the suit property amongst the beneficiaries of the three daughters of Loise Wanjiru Kahira. He brought a surveyor who carried out the subdivision and even received Ksh.50,000/- to cover the expenses of developing a portion which fell on the side of the family of Wanjiru Kahira. Consent of the Land Control Board had even been obtained but the Plaintiff changed his mind and filed a suit in which he sought to evict the Defendants from the suit property.

10. The 1st Defendant stated that his mother had separated from her husband and that his mother came and resided on the suit property. The 1st Defendant was born after the mother had separated and does not know of any other home apart from the suit property. Through their counterclaim, the Defendants are seeking cancellation of the title held by the Plaintiff so that the same can be reverted to their grandmother's name so that the same can be shared after the process of succession of her estate is carried out

Analysis

11. I have gone through the evidence adduced herein as well as the submissions filed by the parties herein. There is no doubt that the suit property has its origin in L.R. No. Dagoretti/Kangemi/204 which has since been closed on subdivision. The green card produced herein shows that the property was first registered in the name of Mungai Kahira on 4th January, 1958. The same green card shows that on 9th June, 1965, the name of Kanyari Muiro was entered as having 1/5 share, Hassan Njenga Njuguna who had 2/5 share, Loise Wanjiru Kahira who had 1/5 share. The green card further shows that the plaintiff's name was put in the register on 9th July, 1969. This followed a transfer of 1/5 undivided share in favour of the Plaintiff as a gift in consideration of Ksh.4,000/-.

12. The issues which emerge for determination are firstly whether the registration of the suit property in the name of the Plaintiff was lawful. Secondly, whether the Defendants are trespassers on the suit property. Thirdly, whether the title held by the Plaintiff should be canceled and the same reverted to the name of Loise Wanjiru Kahira. Lastly, are the parties herein entitled to their respective claims?

13. In the case of Munyu Maina Vs Hiram Gathiha Maina [2013] eKLR, the Court of Appeal stated as follows: -

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the

instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register’.

14. In the instant case, the Plaintiff is seeking the court to declare that he is the lawful owner of the suit property. He has not tendered any evidence to show that the acquisition of the title was lawful. The transfer of the 1/5 share which was in his grandmother’s name has not been proved to have been transferred lawfully to him. His grandmother was not involved in the transfer. No single document was produced to show that the process leading to the registration was aboveboard.

15. As early as 1986 one of the daughters of Loise Wanjiru Kahira namely Elizabeth Ngonyo had filed a suit against the plaintiff in which she wanted to have the title held by the plaintiff cancelled and the same registered in the names of the three daughters of Loise Wanjiru Kahira. The Plaintiff however died before the case could be heard and as there was no succession, the suit abated. This was Civil Case No. 708 of 1986 **Elizabeth Ngonyo Kangethu –vs- Francis Thande James.**

16. The Defendants have demonstrated that Loise Wanjira Kahira was not involved in the transfer of the 1/5 of her share to the Plaintiff. She is said to have died at the age of 120 years. It is therefore clear that as at the time the transfer was being done, she may not have had proper mental faculties to gift the land to the Plaintiff. The 1st Defendant’s evidence is that he was born after his mother had separated from her husband and has lived in the suit property throughout. The evidence of the Plaintiff’s witnesses that the 1st Defendant opted not to adopt use of the name of his father Matheri so that he could lay claim to the Plaintiff’s land has no basis.

17. Loise Wanjira Kahira had three daughters and as the Plaintiff has failed to show that the registration of the land in his name was lawful and the Defendants having demonstrated that Loise Wanjira Kahira was not involved in the transfer, I find that the transfer was fraudulent and it was meant to disinherit the children of the other daughters of Loise Wanjira Kahira.

18. The Plaintiff had agreed to share out the suit property amongst the families of the three daughters of Loise Wanjira Kahira. He reneged on this after the subdivision process had gone too far. The Defendants had been shown their respective portions and the Plaintiff had received Kshs 50,000/- as compensation for the costs he had incurred on improving the portion which went to the family of the 1st Defendant. There is therefore no way he can turn around and call the Defendants trespassers who should be ejected from the suit property. The Defendants are on the suit property by virtue of their mother’s entitlement in the suit property.

19. The title held by the Plaintiff was not obtained lawfully. The acquisition was meant to disinherit the other beneficiaries of the children of Loise Wanjira Kahira. This is a title which should be cancelled so that the beneficiaries of Loise Wanjira Kahira can share it out. The Plaintiff in his submissions argued that the Defendants counterclaim is statute barred. The Plaintiff did not raise the issue of limitation in the plaint and cannot therefore raise it for the first time in submissions.

Disposition.

20. From the analysis herein above, it is clear that the plaintiff has failed to prove his claim to the required standards. On the other hand, I find that the plaintiffs by way of counterclaim have proved their case on a balance of probabilities. I therefore make the following final orders.

1. The Plaintiff’s suit is hereby dismissed with costs to the Defendants.

2. Judgment is entered for the Plaintiffs in the counterclaim as follows: -

a. A permanent injunction restraining the Defendant and or his agents, servants from evicting, threatening, and or harassing the Plaintiffs and or interfering, in any manner with LR No. Dagoretti/Kangemi/307.

b. An order is hereby given for cancellation of title for LR No. Dagoretti/Kangemi/307 in the name of the Defendant.

c. An order is hereby given for rectification of the register to reflect the name of Loise Wanjira Kahira as proprietor of LR No. Dagoretti/ Kangemi/307.

d. The Defendant to pay costs of the counterclaim to the Plaintiffs.

Dated, Signed and Delivered at Nairobi on this 7th day of December 2020.

E.O.OBAGA

JUDGE

In the virtual presence of:-

Mr Njogu for Plaintiff

M/s Daudi for Defendants

Court Assistant: Hilda

E.O.OBAGA

JUDGE