



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 227 OF 2015

BONFACE KAMAU.....1ST PLAINTIFF

CHIKU MPONDA.....2ND PLAINTIFF

VERSUS

NGUGI GITAU.....DEFENDANT

JUDGMENT

1. The 1st plaintiff and the defendant are siblings. They are sons of the late Wamundara Gitau. The relationship of the 2nd plaintiff to the other parties to this suit is not clear from the pleadings and evidence on record.

2. On 17/3/2015, through a plaint dated 16/3/2015, the plaintiffs brought this suit seeking the following orders:

a. That the defendant be compelled to sign the transfer documents for transfer of the plot numbers A & B measuring approximately 0.4047HA and 0.348HA curved out from land parcel number Ngenda/Mangu/1339 size 1.214HA for transfer and registration in the plaintiffs names.

b. In the alternative, if the defendant delays, neglects, or in any way refuses to sign all the requisite transfer papers on the said land parcels in favour of the plaintiffs, this honourable court do issue orders that the Registrar of this honourable court do sign all the requisite transfer papers of the said land parcels in favour of the plaintiffs within 30 days from the date the court shall issue the orders.

c. That a permanent injunction do issue against the defendant either by himself, his agents or any other person acting in his name or authority to restrain them from trespassing, occupying, or in any way interfering with the plaintiffs' land known as plot numbers A&B measuring approximately 0.4047HA and 0.3487HA curved out from land parcel number Ngenda/Mangu/1339 size 1.21HA.

d. Defendant, his agents or any person acting in his name or authority be evicted from the plaintiffs land known as plot numbers A&B measuring approximately 0.4047HA and 0.3487HA curved out from land parcel number Ngenda/Mangu/1339 size 1.214HA.

e. That the costs of this application be provided for.

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

3. It was the plaintiffs' case that the late Wamundara Gitau appointed the defendant as a trustee to hold in trust Land Title Number Ngenda/Mangu/1339 measuring 3 acres for Boniface Kamau (1st plaintiff) and Mohammed Buki Mponda. The land was a subdivision out of Parcel Number Ngenda/Mangu/1045 which belonged to the late Wamundara Gitau. The land was to be transferred to the plaintiffs at a later date. The plaintiffs contended that the defendant had refused to sign the transfer documents to facilitate transfer of the said property to the beneficiaries. They added that on 12/12/2014, they appeared before the Area Chief in Mang'u Location where it was agreed that the defendant was to be paid Kshs.108,000/= as caretaker expenses and he was to transfer the land to the beneficiaries.

4. The defendant's case was that he was entitled to a one third share of the suit property he was holding in trust. He contended that the subdivision proposed by the plaintiffs blocked him from accessing the main road. He added that he had made proposals that the land be subdivided horizontally for everyone to access the main road but the plaintiffs wanted a vertical subdivision. He contended that the amount he received was not meant to compel him to sign any documents.

5. The 1st plaintiff, Bonface Kamau (PW 1) testified on behalf of the plaintiffs. He adopted his written statement dated 16/3/2015 and filed

on 17/3/2015. He testified that the suit property was distributed by his late father. He stated that the only dispute between the parties was about how the land should be demarcated. He contended that the defendant occupies one acre of the land which was already developed while the remaining two acres had not been developed. He further contended that the undeveloped portion should be transferred into their names. The defendant did not lead any evidence.

6. The plaintiffs filed their submissions on 3/11/2018. They submitted that the suit property was narrow and subdividing it horizontally as demanded by the defendant would render the land of little economic use. The defendant did not file any submissions.

7. I have considered the parties' pleadings. I have also considered the plaintiffs' evidence and submissions. The interest of the 2nd plaintiff in the suit property was not spelt out in the pleadings and evidence. It was similarly not canvassed through submissions. What is clear from the evidence before court is that Mohammed Buki Mponda is one of the beneficiaries named in the relevant instrument of transfer executed by the late Wamundara Gitau. The relationship between the 2nd plaintiff and Mohammed Buki Mponda is, however, not clear.

8. What emerges from the parties' pleadings and from the evidence and submissions of the 1st plaintiff is that there is common ground between the 1st plaintiff and the defendant that the 1st plaintiff and the defendant are each entitled to one acre out of the suit property and Mohammed Buki Mponda is similarly entitled to one acre. Similarly, this is the position canvassed in the written submissions before court. The only dispute therefore is on how the land should be demarcated. The 1st plaintiff takes the position that the suit property is narrow and it makes sense to demarcate it vertically. Through pleadings, the defendant takes the position that the demarcation should be horizontal so that he is able to access the main road. It is noted from the mutation maps that one acre within the suit land is separated and served by a road which vertically cuts across the land. The said one acre is already developed and occupied by the defendant. The other two acres are not developed and are the ones the plaintiffs want to be registered in the names of the other two beneficiaries. It is also not in dispute that the portion occupied by the defendant is properly served by a public road. The plaintiffs vouch for vertical subdivision as opposed to a horizontal subdivision. The defendant vouches for a horizontal demarcation so that his parcel can have access to the bigger road besides the smaller road which cuts across the land and serves the two portions.

9. The defendant did not lead any evidence. It is however clear from his statement of defence that the only contest is about how the land should be subdivided among the two beneficiaries and the defendant. Through his pleadings, he vouches for a horizontal subdivision while the plaintiffs vouch for a vertical subdivision.

10. I have carefully examined the shape of the suit property. It measures approximately 3 acres and it is a narrow piece of land. Secondly, a public road vertically cuts across the narrow stretch separating the 3 acre parcel into approximately 2 acres and one acre portions respectively. The contention that a horizontal demarcation will render the resultant three subdivisions of little economic use, in my view, is not baseless. I therefore agree with the plaintiffs that a vertical subdivision makes sense as opposed to a horizontal subdivision. I find the defendant's concerns baseless because the portion he occupies is sufficiently served by a public road which cuts across the land.

11. I am however not able to grant the 2nd plaintiff the prayers sought in this suit. She did not lead any evidence. Her claim to the suit property is therefore completely unsupported. The person entitled to a portion of the suit property is Mohammed Buki Mponda. It was incumbent upon the 2nd plaintiff to define her legal relationship with Mohammed Buki Mponda and evidentially support her claim. She did not. For this reason, no award will be made in her favour. The portion belonging to Mohammed Buki Mponda will go to him or his estate as the case may be.

12. In light of the above findings, I hereby grant the 1st plaintiff's plea for subdivision and possession of the suit property in the following terms:-

a. Land Parcel Number Ngenda/Mangu/1339 shall be subdivided vertically into three equal portions to be shared out between (i) Boniface Kamau (1st plaintiff); (ii) Mohammed Buki Mponda (or his estate as the case may be); and (iii) Ngugi Gitau (the defendant).

b. The defendant shall have the one acre portion separated by the road while the other two beneficiaries shall have the other two acre portion to be vertically subdivided.

c. The defendant is ordered to avail title documents and sign all instruments necessary for subdivision and transfer of the resultant parcel within 60 days.

d. In default of (c) above, the Deputy Registrar of this Court shall execute all instruments necessary for subdivision and transfer of the resultant parcels and the Land Registrar shall issue titles in the three names of the respective beneficiaries.

e. Subject to the defendant complying with the above order within 60 days, there shall be no order as to costs of this suit. However, In default of compliance, the defendant shall bear the 1st plaintiff's costs of this suit.

f. Costs of subdivision and transfer shall be equally borne by the three parties entitled to the suit land.

g. The claim by the 2nd plaintiff is dismissed with no order as to costs because she did not lay a basis for her claim.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF FEBRUARY 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Kingangi holding brief for Mr Nyasani for the defendant

Mr Makori holding brief for Mr Nyangau for the plaintiffs

June Nafula - Court Clerk