



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 17 OF 2015

(Formerly Nyeri HCC No. 181 of 2009)

PETER WANJAU MURIITHI.....PLAINTIFF

-VERSUS-

AMOS NDIRANGU MURIITHI.....DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 17th December 2009, the plaintiff brought the suit herein seeking orders of eviction against the defendant and his family members from the parcel of land known as **Othaya/Gura/249** (the suit property); costs of the suit and any other or better relief as the court may deem fit to grant.
2. The plaintiff's claim is premised on the ground that he is the registered proprietor of the suit property the same having been transferred to him by his mother, Teresia Nyaguthii Muriithi in 1999.
3. The plaintiff faults the defendant who is his younger brother for having failed to vacate the suit property despite having been required by his parents and him to move to his parcel of land in West Laikipia to wit plot No. 2751 SA.
4. Vide his statement of defence dated **23rd February 2010**, the defendant acknowledges that the plaintiff is the registered proprietor of the suit property but contends that the registration of the plaintiff as the proprietor of the suit property was tainted with fraud (was obtained through coercion and/or misrepresentation).
5. The defendant denies the allegation that he was given another parcel of land in Laikipia or any other place and avers he has the right to occupy, work and own the portion of the suit property his family has always occupied throughout the whole of their life. That his claim before Othaya Land Disputes Tribunal is still pending and that the plaintiff's claim can properly be dealt by the Tribunal.
6. The defendant acknowledges having received the demand notice to vacate the suit property but owing to the foregoing reasons, could not comply with the notice.

The plaintiff's case

7. When the matter came up for hearing, the plaintiff informed the court that the defendant and he are the sons of Mureithi Njure and Teresia Nyaguthii Muriithi both of whom are deceased; that their father had two parcels of land the suit property and plot No. 2751 SA which is unregistered.
8. The plaintiff informed the court that before his father died, he called a family meeting and told them, the defendant included, that he wanted to remove the defendant from the suit property because he was violent to all family members. Their father gave him (plaintiff) the suit property and the defendant the land in Laikipia. Their father passed on shortly thereafter before the defendant had vacated the suit property. Their mother obtained grant of letters of administration in respect of the estate of her husband, the suit property included. The defendant objected to grant of letters of administration being issued to their mother but lost the case.
9. After their mother became the administrator of her husband's estate, she transmitted the suit property to herself and later on transferred the suit property to him. He maintained that the defendant was ordered to move to the land in Laikipia but refused to move claiming that he was given a portion of the suit property which claim is untrue.

10. Explaining that the coffee in the suit property was planted by his father, the plaintiff denied having misled his mother to go to the land control board or sign transfer forms in his favour.
11. Explaining that he is in court to comply with the wishes of his father, the plaintiff urged the court to order the plaintiff to vacate the suit property failing which he be forcefully evicted therefrom.
12. The court heard that the defendant has on several occasions attacked the plaintiff and that in one occasion the defendant and his wife were convicted and jailed for two years for assaulting the plaintiff.
13. In cross examination, the plaintiff stated that the defendant and he were not born in the suit property. They settled there in 1953-4. When the defendant got married, their father showed him where to build and cultivate in the suit property.

The defendant lives in the suit property together with his family (wife, 5 children and 6 grandchildren). He was also shown where to build and cultivate in the suit property by his father. The plaintiff told the court that he does not have the minutes of the family meeting where his father distributed his land. He stated that when his mother was transferring the land to him, she was 80 years and not literate and that the people who witnessed the distribution of his father's land are all dead. The defendant sued him before the Tribunal but he stopped the case through the High court. He admitted that his mother never filed any suit seeking to evict the defendant from the suit property.

14. In re-examination, the plaintiff stated that before his father died in 1992, he had asked the defendant not to build any other structures. The defendant defied that order and built a house in another part of the suit property and extended the portion he was cultivating. Their mother filed the succession cause because she was the one in charge of their fathers' affairs. Despite the defendant having objected to the succession proceedings, the court gave the suit property to his mother who in turn gave it to him. The court heard that by giving the suit property to him, his mother was fulfilling their father's wishes. He stated that he does not know why his brother chose to file a case before the Tribunal against him as opposed to his mother who had transferred the land to him.

15. P.W.2, Alice Wambui Maina, a sister to the parties to this dispute, informed the court that all her siblings were born and brought up in the suit property. Both the plaintiff and the defendant married while on the suit property and built there. The coffee in the suit property was planted by their father. After their father died, he left the coffee to the plaintiff to take care of. The land was left to their mother but with instructions that she gives it to the plaintiff. When her father was sharing out his land, she was present together with clan elders. She stated that she has no claim to the suit property.

16. In reexamination, P.W.2 stated that the defendant was not getting along with his father. He was given land in Kieni (5 acres). She could not tell when the defendant built his house in the suit property but it was after their father died.

17. P.W.3, John Thiongo Mugo, informed the court that the plaintiff and defendant grew up in the suit property. He was a witness in proceedings before the District Officer in which the plaintiff's mother gave evidence to the effect that her husband had given the suit property to the plaintiff and that the defendant had been given land elsewhere.

18. The court heard that the family had no problems when their father was alive. According to P.W.3, problems started when the defendant was asked to move to Laikipia. He informed the court that he knows where the land in Laikipia is; that it measures 4.5 acres and that no one uses it.

19. In re-examination, P.W.3 informed the court that the plaintiff's mother gave the reason for separating the parties herein. She stated that the defendant was violent and was not getting along with her and the plaintiff. The District Officer (D.O.) ordered that the father's instructions be followed.

20. Explaining that the land in Laikipia is bigger than the suit property, P.W.3 stated that he could not remember where the land is exactly despite having been there severally.

The Defence case

21. In his testimony, the defendant maintained that their father did not call any meeting either for the family or clan elders. However, he had earlier called a meeting between the plaintiff, his mother and himself. At no time did his father say he should move from the family land and go to live in Laikipia. He informed the court that his father had 3 parcels of land in Laikipia measuring five acres each and had asked the plaintiff and him to share the land in Laikipia and Othaya. He does not know where the land in Laikipia is. He stated that he never fought with his mother and father. He admitted that he was jailed for 2 years for assaulting the plaintiff after his father had died but his mother was still alive at that time.

22. He also admitted having unsuccessfully objected to the succession proceedings filed by his mother in respect of his father's estate and that his mother was granted letters of administration against his wish.

23. He stated that he does not know how his mother transferred the suit property to his brother but he challenged the transfer at the D.O's office.

24. He conceded that in his defence, he has not asked for a portion of the family land in Othaya.

25. In reexamination, he explained that the offence of assault had nothing to do with land. He explained that he objected to the succession proceedings because he feared that people would take advantage of his mother. He maintained that he has never seen the land in Laikipia or documents relating to it.

26. At close of hearing, parties filed submissions which I have read and considered.

Plaintiff's submissions

27. On behalf of the plaintiff, an overview of the cases of the parties to this dispute is given and submitted that the defendant's defence does not disclose any triable issues. It is further contended that the defendant's case should be dismissed because he did not file any counterclaim.

28. Arguing that the plaintiff as the registered proprietor of the suit property is entitled to exclusive rights over his land, it is reiterated that the defendant was given his own land and he should move there or wherever he chooses.

29. The defendant's continued stay in the suit property is said to be unwelcome as it is causing tension. In that regard, it is pointed out that the defendant had beaten the plaintiff on several occasions. Arguing that the right to enjoy one's property is enshrined in our laws, it is submitted that the plaintiff requires protection by evicting the defendant and his family from the suit property as they have no right to continue occupying the land. The plaintiff urges the court to allow his claim with costs.

Defendant's submissions.

30. On behalf of the defendant, an overview of the cases urged by the parties to this suit is given and submitted that it is common ground that the suit property comprises family land. Arguing that there is no evidence that there was any intention to exclude the defendant from the suit property on account of his alternative entitlement to a separate parcel of land in Laikipia or at all, based on the provisions of **Sections 107 and 109** of the Evidence Act which places the burden of proof on the party alleging existence of facts on the basis of which the party seeks judgment, it is submitted that the plaintiff failed to prove that there exists such land in Laikipia or the defendant was required to move to such land to give the plaintiff exclusive possession of the suit property.

31. Based on the provisions of **Section 30 (g)** of the Registered Land Act Cap 300 Laws of Kenya (now repealed), **Section 28** of the Land Registration Act, LRA, 2012, **Section 50** of the Land Act, 2012 and the cases of **Mbui v. Mbui** (2005) 1 E.A 256, **Gatimu v. Muya** (1976) KLR 253 and a passage in the **Halbury Laws of England**, 4th Edition Vol 48-paragraph 630, it is submitted that the defendant has established a valid defence to the plaintiff's claim on account of his beneficial interest in land arising out of his right to occupy land based on trust in his favour and on account of limitation of action law which makes the plaintiff's claim statute barred.

Analysis and determination

32. From the pleadings and the submissions filed, this court finds the sole issue for determination to be whether the plaintiff has made up a case for being granted the orders sought or any of them.

33. With regard to that issue, being the one desiring the court to give him judgment on the basis of his allegation that the registration of the plaintiff as the proprietor of the suit property is vitiated by the pleaded fraud in the registration, it behooved the defendant to prove that the registration of the plaintiff as the proprietor of the suit property is indeed vitiated by the pleaded fraud. In that regard, see the provisions of **Sections 27, 28 and 143** of the Registered Land Act, RLA (now repealed) as read with **Section 107** of the Land registration Act, 2012 (RLA, 2012) which provide:-

“27. (RLA) Subject to this Act-(a) The registration of a person shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

28. (RLA) The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

a. to leases, charges and other encumbrances and to conditions and restrictions if any, shown in the register; and

b. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and not declared by section 30 not to require noting on the register.

Provided that nothing in this section shall relieve a proprietor from any duty or obligation to which he is subjected as a trustee.

143 (RLA) (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than first registration) has been obtained, made or omitted by fraud or mistake.

2. The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

“107. LRA, 2012 (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be

governed by the law applicable to it immediately prior to the commencement of this Act.

(2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.”

34. By dint of the provisions of **Section 107** of LRA, 2012 *supra*, the law applicable to the title held by the plaintiff is the Registered Land Act, Cap 300 Laws of Kenya, the same having been issued before the Land Registration Act, 2012 came into force. (the title held by the plaintiff was issued on 15th December, 1999).

35. By dint of the provisions of **Section 143** *supra*, to successfully impugn the title held by the plaintiff, the defendant needed to prove the pleaded fraud in the registration of the suit property in the plaintiff's name. On whether the defendant discharged that burden, having reviewed the evidence adduced by the defendant, I find it incapable of proving any of the pleaded particulars of fraud as the defendant did not produce the documents relied on in transfer of the suit property to assist the court in determining that the documents were not valid as alleged. The defendant also failed to prove that his mother intended to subdivide the suit property into two equal portions and transfer one of the portions to him but owing to coercion or undue influence by the plaintiff she transferred it to the plaintiff alone. The defendant also failed to prove that the plaintiff took advantage of their mother's illiteracy or that the plaintiff coerced her into executing transfer documents in his favour. As the person who desired judgment on the basis of those assertions, it behooved the defendant to produce evidence capable of proving the pleaded particulars of fraud and unlawfulness in the transfer of the suit property to the plaintiff, but failed to do so. In that regard see **Section 107** of the Evidence Act, Cap 80 Laws of Kenya.

36. The evidence adduced in this case, and which evidence this court has no reason for disbelieving is to the effect that the parties mother wanted to separate the plaintiff and the defendant on account of the differences that existed between them.

37. The upshot of the foregoing is that the defendant has not made up a case for impugning the title held by the plaintiff on the basis of the pleaded fraud.

38. As to whether the title held by the plaintiff is subject to any overriding interest in favour of the defendant, it is common ground that the defendant and his family are in occupation of a portion of the suit property. Under **Section 30(g)** of Cap 300, (repealed) the rights of the defendant as a person in possession or actual occupation of the suit property for the purpose of the said possession or occupation only, are protected unless upon inquiry such rights are not disclosed.

39. In the circumstances of this case, the defendant's occupation is premised on the fact that the suit property was family land before it was transferred to the plaintiff and that he has been in occupation of the suit property all his life. No determination has been made concerning his right to occupy the suit property as the case he filed before the defunct Land Disputes Tribunal is yet to be heard and determined.

40. Having carefully considered the cases urged by the parties to this suit and the law applicable, in particular **Section 28(b)** as read with **Section 30(g)** of Cap 300 *supra*, I find and hold that the title held by the plaintiff is subject to an overriding interest in favour of the defendant as a person in occupation and possession of a portion of the suit property.

41. Being of the view that the evidence adduced in this case is incapable of forming a basis for holding that the defendant has no right to continue occupying the portion of the suit property he has been occupying before the suit property was transferred to the plaintiff and even after the suit property was transferred to the plaintiff, I decline to grant the plaintiff the orders sought.

42. This being a family dispute, parties shall bear their own costs of the suit.

43. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 12th day of February, 2019.

L N WAITHAKA

JUDGE

Coram:

Ms Nyakio h/b for Mr. Kebuka Wachira for the plaintiff

N/A for the defendants

Court assistant - Esther