



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 439 OF 2013

RAPHAEL KARIUKI GICHUKI.....PLAINTIFF

VERSUS

PETER MUYA GICHUKI.....DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff filed a plaint against the defendant seeking the following orders:

- 1. A declaration that the defendant fraudulently caused land parcel No. GICHUGU/SETTLEMENT/SCHEME/111 to be sub-divided and/or portioned and that the defendant is not entitled to ownership of L.R. No. GICHUGU/SETTLEMENT/SCHEME/2058 being 10 acres.***
- 2. An order cancelling title number GICHUGU/SETTLEMENT/SCHEME/2058.***
- 3. Costs of this suit.***

On 26th October 2009, the defendant filed defence denying the plaintiff's claim. On 24th July 2018, this Honourable Court considered an application dated 25th November and allowed one ERICK GICHUKI MUYA to appear and plead for and on behalf of the defendant pursuant to a power of Attorney registered as IP/A 567 15/1.

PLAINTIFF'S CASE

The plaintiff in his evidence in chief referred to his written statement filed in Court on 28th January 2015 which was adopted by the Court as his evidence. In brief, he stated that he is a resident of Murinduko and works as a farmer. He stated that Muya Gichuki (deceased) was his brother and the defendant is his step-brother. Regarding the suit property, the plaintiff testified that the land was owned by his elder brother who is now deceased having been allocated by the Government. He stated that his elder brother (deceased) passed away late 1960's and having died without a wife or family, he was the only surviving beneficiary of his Estate. However, being unable to read or write, his step-brother who was educated took advantage of his ignorance and took out letters of administration without involving him and thereafter allocated him 5 acres out of the total 15 acres.

The plaintiff only came to realize that the defendant had sold part of the land when he saw strangers constructing on his deceased brother's piece of land. He conducted a search at the Lands office where he

discovered that the land had been sub-divided into two portions wherein the defendant was registered solely in one plot and caused him to be registered jointly with the defendant in the second plot. He also discovered that the defendant had secretly taken out letters of administration in SRMCC No. 234/1994 (Kerugoya). On cross-examination, the plaintiff told the Court that him and the defendant are brothers but from different mothers. He also stated that their brother Muya Gichuku (deceased) was allocated L.R. No. GICHUGU/SETTLEMENT/SCHEME/111 by the clan during the Land Adjudication period to hold in trust for the family members. The plaintiff also admitted that at one point in time, he attempted to sell the suit property to a lady by the name Jane but the defendant was opposed to the sale and even caused the two titles being GICHUGU/SETTLEMENT/SCHEME/888 and GICHUGU/SETTLEMENT/SCHEME/889 issued to the said Jane to be cancelled and the property reverted to the original owner. The plaintiff also admitted that he was aware that a succession cause was filed leading to the distribution of the suit land. However, he confirmed that he was not involved in the succession proceedings and that he is of sound mind and understanding.

DEFENDANT'S CASE

The defendant testified and in his evidence in chief relied on his written statement filed on 29th November 2018. In his evidence, the defendant stated that the initial registered proprietor of L.R. No. GICHUGU/SETTLEMENT/SCHEME/111 was Gichuki Muya which was allocated to him by the clan. He stated that the said Gichuki Muya was brother to the plaintiff. The said Gichuki Muya had two (2) wives. Gichuki Muya was blessed with two sons, Peter Gichuki and Raphael Karuiki from different mothers. It was decided that Gichuki Muya who was the eldest in the family be registered in the suit property to hold in trust for the family. Sometime later, the said Gichuki Muya passed on without a family.

ISSUES FOR DETERMINATION

The following are the issues for determination in this case:

- (a) Whether the defendant fraudulently caused L.R. No. GICHUGU/SETTLEMENT/SCHEME/ 111 to be sub-divided into two portions namely: GICHUGU/SETTLEMENT/SCHEME/2057 (five acres) registered in the name of the plaintiff and GICHUGU/SETTLEMENT/SCHEME/2058 (10 acres) registered in the name of the defendant.***
- (b) Is title number GICHUGU/SETTLEMENT/SCHEME/2058 fraudulent, null and void and ought to be cancelled and the same to be registered in the name of the plaintiff?***
- (c) Whether Muya Gichuki held L.R. No. GICHUGU/SETTLEMENT/SCHEME/111 in trust for his younger siblings.***
- (d) Whether the defendant was a beneficiary of the Estate of the late Muya Gichuki.***
- (e) Who is liable to pay costs of this suit?***

DECISION

I have considered the testimony of the plaintiff and the defendant. I have also looked at the documents produced by the parties and the submissions by their counsels. In order to adequately resolve the real matters in controversy, I now proceed to analyze the identified issues for determination as follows:

ISSUE NO. 1

It is apparent from the documents especially the green card produced as Plaintiff Exhibit No. 2, that the original registered proprietor of the suit property was Muya Gichuki on 6/2/1958. The land was transferred to the joint names of the plaintiff and one Jane Effery Wanyoike on 24/10/1994 in equal

shares. The title was to be closed on sub-division after two new numbers were created being GICHUGU/SETTLEMENT/SCHEME/1888 and 1889. The three entries were to be cancelled on 27/2/1996 through case No. 1604/95 (Kerugoya). The land was later portioned and transferred to the defendant Peter Gichuki Muya (10 acres) and Peter Gichuki Muya jointly with Raphael Kariuki Gichuki (five acres) through Succession Cause No. 234/94 (Kerugoya). The sub-division and transfer of the suit property from parcel No. GICHUGU/SETTLEMENT/SCHEME/111 to GICHUGU/SETTLEMENT/SCHEME/2057 and GICHUGU/SETTLEMENT/SCHEME/2058 were through a succession which is a Court process. The plaintiff has not petitioned the Court which issued the grant for revocation of the same. The plaintiff therefore cannot be heard to say that the process of sub-division of the suit property and transfer was fraudulent. If the plaintiff is aggrieved by the manner in which the Succession Court issued the letters and distributed the Estate of Gichuki Muya, he should address his grievances in that Court.

2ND ISSUE

The issuance of title No. GICHUGU/SETTLEMENT/SCHEME/20158 in favour of the defendant was done through a Court process. The same was not fraudulent unless an aggrieved party petitions the same Court and present evidence which if satisfied will then revoke the same.

ISSUE NO. 3 AND 4

I am satisfied that sufficient evidence has been shown by the parties that the original registered proprietor of the suit land Gichuki Muya held the same in trust for himself and his siblings being the eldest son in the family. As such, the Court is satisfied that the plaintiff and the defendant were entitled to a portion of the Estate of the said Gichuki Muya being legitimate beneficiaries.

ISSUE NO. 5

The plaintiff and the defendant are brothers. In the interest of cohesion and co-existence between the two protagonists, the appropriate order on costs is that each party to bear her own costs.

In the upshot therefore, the suit fail for lack of sufficient evidence and the same is hereby dismissed with each party to bear her own costs. It is so ordered.

READ and DELIVERED in open Court at Kerugoya this 22nd day of March 2019.

E.C. CHERONO

ELC JUDGE

22ND MARCH, 2019

In the presence of:

Mr. Magee holding brief for Mr. Muriithi