



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 487 OF 2013**

**DANIEL NDERI NJOGU.....PLAINTIFF**

**VERSUS**

**LYDIAH MUTHONI KIBAGE.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

The plaintiff first initiated this suit in Nairobi vide HCCC No. 985/2000 which was later transferred at Embu and registered as HCCC No. 34 of 2009 and subsequently transferred to this Honourable Court. The plaintiff is seeking the following reliefs:

- (a) An injunction restraining the defendant by herself, or through her agents or savants or howsoever from encroaching into half of land parcel No. Ngariama/Nyangati/49 or from interfering with the plaintiff's possession of the said half of land parcel No. Ngariama/Nyangati/49 pending the hearing and determination of this case.***
- (b) A declaration that the plaintiff owns half of land parcel No. Ngariama/Nyangati/49.***
- (c) An order that the defendant transfer the plaintiff half of land parcel No. Ngariama/Nyangati/49 to the plaintiff's name.***
- (d) Costs of this suit with interest thereon.***
- (e) Such other or further order this Honourable Court may deem to grant.***

In paragraph 4 of the amended plaint dated 3<sup>rd</sup> December 2000, the plaintiff averred that between 1965 and 1967, he bought land parcel No. Ngariama/Nyangati/49 from Phares K. Gakuya at a consideration of Ksh. 4,000/= which he paid. The plaintiff further averred that he was advanced a sum of Ksh. 500/= from his brother Kibage Daniel (deceased) with the understanding that they would sub-divide the land equally between themselves. The plaintiff further averred that they also agreed with his late brother that the land No. Ngariama/Nyangati/49 would be registered in the deceased's name in trust for himself and the plaintiff. Pursuant to their mutual agreement, the suit land was registered in the name of the deceased who took possession of half of the said parcel of land while the plaintiff took up possession of the other half. The plaintiff planted tea, macadamia and other crops on his portion where he also lives with his family. The plaintiff also averred that the defendant has unlawfully encroached a portion of the plaintiff's portion of land by construction a timber house and threatening to encroach further unless restrained by this Honourable Court. In her statement of defence and counter-claim dated 21<sup>st</sup> July 2003, the defendant denied the plaintiff's claim and in particular averred that the plaintiff was allowed by her late husband the late Kibage Daniel to use a small portion less than a quarter of an acre to plant tea. The defendant by way of a counter-claim averred that the deceased is the absolute and indefeasible owner of parcel No. Ngariama/Nyangati/49. The defendant also averred that the deceased was not so registered in trust for the plaintiff as alleged. In conclusion, the defendant wants the plaintiff to give vacant possession of the suit property failing which an order be issued evicting him.

**PLAINTIFF'S CASE**

The plaintiff testified on oath that he was born in 1928 and is now aged about 80 years. He stated that he was detained during the struggle for independence in Kenya. After he was released, he was not given land. He bought land from one Phares Gakuya between 1965 and 1967 for a consideration of Ksh. 4,000/=. Since his brother had been released with him from detention and had nowhere else to go, he agreed that they should settle on the land and they share the suit land each occupying 4 acres. Upon going to the Lands office, they were informed that the land on the area could not be sub-divided below 5 acres. Therefore he chose to have the land registered under his brother's name. This was for the reason that his brother had suffered and he feared that if anything happened to him, his children would chase his brother away. Therefore his brother was to hold the suit property in trust for the plaintiff and himself.

They took possession of their respective portions and later requested his brother to transfer his portion to his name but his brother indicted he did not have any money. They therefore lived peacefully in their portions until his brother passed away in 1993 whereupon the defendant being the wife of his brother together with her children started encroaching on his portion.

The plaintiff called Albert Njogu who is his son who was born in 1953. The witness stated that the suit land parcel No. Ngariama/Nyangati/49 was bought by his father who is the plaintiff. Around 1967, they started cultivating the land. In 1968, they planted tea bushes while his uncle Daniel Kibage planted tea on his portion of the suit property.

#### **DEFENDANT'S CASE**

The defendant stated that her late husband Daniel Kibage bought the suit property LR. No. Ngariama/Nyangati/49 from Phares Gakuya and the seller swore an affidavit to that effect but could not attend Court to testify due to old age. The defendant testified that the plaintiff had fraudulently caused the suit property to be registered in his name by filing succession proceedings but the grant was later revoked and the land reverted back to the deceased's name. However, the same was not rectified at the Lands registry. The defendant testified that the plaintiff only utilizes 1½ acres which her late husband had allowed him to use since he has other parcels of land. She stated that the suit is statute barred since the plaintiff entered into a sale agreement in 1967 yet he instituted this suit in 2009.

#### **PLAINTIFF'S SUBMISSIONS**

The plaintiff through the firm of Masore Nyangau & Co. Advocates submitted that the plaintiff has proved that he purchased the 8 –acre suit land and agreed with his deceased brother, who had nowhere to go, that they would share the land equally on the ground but the same would be registered in the deceased's name. The learned counsel cited the following cases:

- (1) Muthemwa Vs Muthemwa (2002) 1 K.L.R 91*
- (2) Paul Muthuita Vs Wanoe (1982) e K.L.R*
- (3) Leah Chelangat Tirop Vs Joel Kiprono Kering (2018) e K.L.R*
- (4) Re Estate of Njoroge Gitau (deceased) (2017) e K.L.R.*

#### **DEFENDANT'S SUBMISSIONS**

The defendant through the firm of Mugambi Njeru & Co. Advocates submitted that the testimony by the plaintiff, his efforts to have the 8 acre piece of land sub-divided into two failed due to Government police is baseless as the plaintiff did not produce a Gazette notice to prove the same. The learned counsel submitted that the allegation by the plaintiff that he approached his late brother to sub-divide the land later but his late brother had no money is another ploy and a mere excuse. The defendant also submitted that the plaintiff illegally and fraudulently caused the suit property to be registered in his name and that of the defendant on or about 1999 by secretly filing succession proceedings in respect of the defendant's late husband in Succession Cause No. 2478/96 (Nairobi). It is only when the plaintiff wanted to have the suit property sub-divided that the defendant was summoned in Court and objected to the said sub-division. Subsequently, a grant which had been issued in favour of the plaintiff was revoked and the title deed to the land parcel number Ngariama/Nyangati/49 reverted to the names of the defendant's late husband. The defendant also submitted that the plaintiff utilizes 1½ acres of the suit land and not 4 acres as alleged. It was further submitted that the suit is statute barred under **Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya** in that a claim in land required action for recovery to be commenced before the expiry of 12 years.

#### **ANALYSIS AND DECISION**

The plaintiff in his plaint is seeking judgment against the defendant for:

- (a) An injunction restraining the defendant by herself, or through her agents or savants or howsoever from encroaching into half of land parcel No. Ngariama/Nyangati/49 or from interfering with the plaintiff's possession of the said half of land parcel No. Ngariama/Nyangati/49.*
- (b) A declaration that the plaintiff owns half of land parcel No. Ngariama/Nyangati/49.*
- (c) An order that the defendant transfer the plaintiff half of land parcel No. Ngariama/Nyangati/49 to the plaintiff's name.*
- (d) Costs of this suit with interest thereon.*
- (e) Such other or further order this Honourable Court may deem fit to grant.*

From the evidence adduced by the plaintiff, he bought the suit property from one Phares Gakuya but agreed to be registered in the name of his younger brother Daniel Kibage (deceased). The plaintiff vide Succession Cause No. 2478 of 1996 obtained a grant of letters of administration which were subsequently revoked by the Court in May 2000. It therefore follows that if the grant which had been issued and confirmed by the Court was subsequently revoked, the title remains in the name of the original proprietor Kibage Daniel. The defendant in her testimony stated that she has not filed succession cause in respect of the Estate of her late husband Kibage Daniel. If that be the case, it therefore means that the plaintiff has sued a party without capacity and this suit is therefore incompetent. I have noted that the plaintiff in this case had filed a Succession Cause No. 2478 of 1996 in Nairobi. The suit land is situated in Kirinyaga County. Though the Courts

authorized to deal with succession matters have territorial jurisdiction, the plaintiff's choice of filing the succession cause in Nairobi High Court instead of Kerugoya Law Courts raises more questions than answers. The plaintiff has not also attached copies of the citations and pleadings in the said Succession Cause No. 2478/1996 showing that he had issued notice to show cause why she should not take out the letters of administration in respect of the Estate of her late husband. The plaintiff selectively produced the certificate of confirmation and not the entire proceedings. The plaintiff also stated in his testimony that he was the one who bought the suit property from one Phares K. Gakuya at a consideration of Ksh. 4,000/= which he paid in full. The plaintiff did not call the seller or any of the witnesses. The explanation for registering the suit property in the name of his brother Kibage Daniel to hold in trust for himself and the plaintiff is untenable. There were no convincing reasons why the plaintiff would agree to have his land registered in the name of his brother without putting the same in writing. It is also curious that the plaintiff and his late brother agreed to share the suit property equally without having the suit property registered in their joint names. I find these reasons and explanations by the plaintiff not convincing considering that the said Phares Gakuya who purportedly sold him the suit property was not called as a witness. These are issues that put into doubt the plaintiff's claim making it untenable.

In the upshot, I find that the plaintiff has not established his claim on a balance of probabilities. Suffice to add that the cases cited by the counsel for the plaintiff are distinguishable and therefore irrelevant in establishing a claim for trust in land.

In the upshot, this suit must fail and the same is hereby dismissed with costs. As regards the defendant's counter-claim, I find that the defendant has proved the counter-claim on a balance of probabilities. The following orders are therefore issued:

***(1) The plaintiff be and is hereby ordered to give vacant possession of the portion of land he is currently occupying in L.R. No. Ngariama/Nyangati/49 within six (6) months from today failing which he shall be evicted.***

***(2) The costs of the counter-claim to be borne by the plaintiff.***

**READ and SIGNED in open Court at Kerugoya this 14<sup>th</sup> day of March 2019.**

**E.C. CHERONO**

**ELC JUDGE**

**14<sup>TH</sup> MARCH, 2019**

In the presence of:

1. Ms Githaiga holding brief for Mugambi Njeru for Defendant
2. Plaintiff – present
3. Mbogo Court clerk – present