



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 287 OF 2012

STEPHEN MUTERU KABURU.....PLAINTIFF

VERSUS

HARON MUCHIRI MUTERU.....DEFENDANT

AND

HUMPREY MUTERU KABURU.....PROPOSED INTERESTED PARTY

JUDGMENT

(Plaintiff filing suit for eviction of defendant; in the course of the trial, plaintiff transferring the suit land to his son; defendant filing counterclaim against plaintiff and his son alleging that half of the suit land was held in trust for him; evidence showing that their late father had transferred the property to plaintiff for purposes of securing a loan but intention being that this property would be owned jointly by the plaintiff and the defendant; counterclaim by defendant succeeds; order that the suit land be subdivided into two and one portion be registered in the name of the defendant).

1. This suit was commenced by way of a plaint which was filed on 1 October 2005 in the High Court at Nakuru through the law firm of M/s Waiganjo & Company Advocates. It was later transferred to the Environment and Land Court upon its creation pursuant to Article 162 (2)(b) of the Constitution, 2010. In the plaint, the plaintiff pleaded that he is the registered proprietor of the land parcel Bahati/Kabatini Block 1/2512 (the suit land). He pleaded that in December 1993, the defendant who was then living in Molo South, asked him for assistance as he had been forced to flee due to tribal clashes, and he was allowed to settle on the suit land. On 18 April 2005, the defendant placed a restriction in the register of the suit land which the plaintiff contended was without justifiable cause and that since then the plaintiff has unlawfully demanded a share of the plaintiff's property. In the suit the plaintiff asked for orders of eviction, removal of the restriction, and a perpetual injunction against the defendant.

2. The defendant filed a defence which he later amended to include a counterclaim on 6 October 2015. He pleaded inter alia that the suit land is family land originally owned by their deceased father, and that he (defendant), was entitled to half a share of it. He contended that the plaintiff holds this half share in trust for him and on behalf of their elderly mother. He averred that he placed the restriction to protect his interest. He pleaded that while the case was still pending, the plaintiff transferred the suit property to his son (2nd defendant to the counterclaim) on 6 January 2015 with the aim of circumventing justice. In the suit, he asked for a declaration that the plaintiff holds half the suit land in trust for him and for the cancellation of the title of the 2nd defendant to the counterclaim.

3. The plaintiff appears to have moved to the United States of America and the law firm of M/s Waiganjo & Company Advocate, who had appeared on his behalf, applied to cease acting, which order was granted.

4. The 2nd defendant to the counterclaim appointed the law firm of M/s Mwangi, Mukira & Company Advocates, but no defence to counterclaim was filed, and I have seen that the said firm applied to cease acting, but did not prosecute their application. They did not appear when the matter was heard, and neither did the plaintiff and the 2nd defendant to the counterclaim, despite being also personally served. The only evidence that I have is therefore that of the defendant to the main suit.

5. In his evidence, he stated that the plaintiff is his elder brother and the 2nd defendant to the counterclaim is his (plaintiff's) son and both reside in USA. He testified that their father had 8 sons and 3 daughters and was buried on the suit land. He stated that the suit land was acquired by their father in the year 1984, and on 16 April 1999, their father transferred the suit land to the plaintiff to enable him procure a loan to advance his car selling business. He stated that before his death, their father had distributed his property, and the suit land was distributed to himself and the plaintiff, but now the plaintiff is claiming that it belongs to him wholly. He testified that he placed a restriction and he does not know how the property was transferred to the son of the plaintiff because the restriction was in place. He mentioned that the land is 1.6 acres and what he wants is only half of it which comprises his rightful share.

6. PW-2 was Francis K. Muteru, a brother to the plaintiff and defendant. He testified that before his death their father had distributed his wealth. He mentioned how all the children are now settled in land that was previously owned by their father. He stated that the suit land was distributed to both the plaintiff and the defendant.

7. PW-3 was Geoffrey Gichuki Mutero also a brother to the plaintiff and defendant. He had a Certificate of Death showing that their father died on 27 August 2002. A succession matter was filed and he had the confirmed grant which he produced as an exhibit. He testified that no land was distributed to the defendant as his share comprised of the suit land.

8. I have considered the evidence on record. The case of the plaintiff is basically that despite the registration of the plaintiff, and later his son, as proprietors of the suit land, they hold half of it in trust for him. His evidence has been confirmed by his siblings who stated that this land was reserved for the plaintiff and the defendant. When the estate of their deceased father was distributed, they did not get a share of what was registered in the name of their father, the reasoning being that their share was in the suit land which had by then been registered in the name of the plaintiff on 16 April 1989. I have seen that the defendant did place a restriction on 18 April 2005 and that on 6 January 2015, the property was transferred to the plaintiff's son. I do not know how the property could have been properly transferred given that the defendant had already placed a restriction and the plaintiff also knew that through this suit the defendant was claiming a portion of it. The transfer could only have been effected by collusion or fraud aimed at defeating the course of justice.

9. The evidence of the plaintiff is not challenged. I am persuaded that the suit land, though at some point registered in the name of the plaintiff, was only registered in his name to enable him procure financing for his car business. Despite this registration, the defendant still held a half share to the property. This appears to have been the consensus within the family, because when the property of their father was distributed, they did not get a share of it, the understanding being that their share was comprised in the suit land. I am persuaded by this evidence. It will be recalled that the registration of a person to immovable property does not divest him of his obligations as trustee. This was provided for in the proviso to Section 28 of the Registered Land Act (Cap 300) (repealed), operative when this suit was filed, which section was drawn as follows :-

28. 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 the leases, charges and other encumbrances and to the 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 are declared by section 30 not to require noting on the register:

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

10. The Land Registration Act, Act No. 3 of 2012, which repealed the Registered Land Act, has not changed this provision. Section 25 provides as follows :-

Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or 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 the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by [section 28](#) not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

11. Just as in the proviso to Section 28 of the Registered Land Act (repealed), Section 25 (2) still provides that the registration of a person as proprietor does not relieve him from any duty or obligation as trustee.

12. From the facts of this case, I am prepared to hold, and do hold, that the registration of the plaintiff as the proprietor of the suit property did not vest him with full proprietary rights as he held half of the property in trust for the defendant. The transfer of the property to his son, was clearly aimed at defeating the plaintiff's interest. It was a transfer tainted with fraud, as I do not see how the transfer could have been effected above board in light of the fact that the defendant had registered a restriction. In any event, the plaintiff knew that the defendant, through this suit, was claiming his half share of the property, and I am not persuaded that these facts were not in the knowledge of the 2nd defendant to the counterclaim, given that he is son to the plaintiff. The transfer of the property to the 2nd defendant to the counterclaim does not obliterate the fact that the property is still held subject to the unregistered interest of the defendant which is a half share of the property.

13. I see no merit in the plaintiff's suit which is hereby dismissed with costs. The counterclaim of the defendant must succeed.

14. I thus enter judgment for the defendant and make the following orders :-

(i) That the defendant, Harun Muchiri Muteru, is entitled to half share of the land parcel Bahati/Kabatini Block 1/2512.

(ii) That the title of the 2nd defendant to the counterclaim, Humphrey Muteru Kaburu, be cancelled.

(iii) That the land parcel Bahati/Kabatini Block 1/2512 be subdivided into two equal portions, one portion to be registered in the name of the defendant, Harun Muchiri Muteru, and the other half to be registered in the name of Humphrey Muteru Kaburu.

(iv) That the Deputy Registrar is hereby directed to execute all requisite instruments and documents to ensure the suit property is so subdivided and transfer effected as directed herein above.

(v) That the District Land Registrar Nakuru, is hereby directed to dispense with the production of the original title deed to the land parcel Bahati/Kabatini Block 1/2512, so that the above orders may be executed.

15. The defendant will also have the costs of the main suit and of the counterclaim.

16. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 3rd day of April 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Ms. Ogange holding brief for Mr. Kiburi for the defendant.

No appearance on the part of the plaintiff and the 2nd defendant to the counterclaim.

Court Assistant :Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU