



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 234 OF 2014

(FORMERLY KERUGOYA ELC 39 OF 2012)

SIMON KARIUKI NGURUKIA.....PLAINTIFF

VERSUS

FRANCIS NJUE KIURA.....DEFENDANT

JUDGEMENT

1. By a plaint dated 19.02.2010 and amended on 20.09.2013 the Plaintiff sought the following reliefs against the Defendant;

a. Transfer of 1.2 ha out of 1.6 ha comprised in land parcels Nthawa/Riandu/3541 & 3543 to the plaintiff.

b. An order directed to the Land Registrar Mbeere to cancel entry of Francis Njue Kiura and directly transfer / and register land parcel No. Nthawa/Riandu/3541 into the names of Simon Kariuki Ngurukia. (sic)

c. Costs of this suit.

2. The Plaintiff pleaded that he and the Defendant were sons of the late Ngurukia Muruanjugi (hereinafter the *deceased*) who died in 1984. He further pleaded that prior to his death, the deceased had sought to exchange his *Title No. Gaturi/Nembure/3300* (hereinafter *parcel 3300*) with *Title No. Nthawa/Riandu/58* (hereinafter *parcel 58*) then belonging to one Charles Nyaga M'nginyi (hereinafter *Nyaga*).

3. It was further pleaded that pursuant to an arrangement between the deceased and Nyaga, the deceased transferred parcel 3300 to Nyaga but Nyaga was unable to transfer parcel 58 to the deceased during his lifetime. It was the plaintiff's case that later on Nyaga decided to transfer parcel 58 to the Defendant in fulfilment of the exchange arrangement he had with the deceased.

4. It was the Plaintiff's case that upon transfer of parcel 58 to the Defendant, the latter had treated it as absolutely his and refused to give him half a share. The defendant had instead sub-divided the said parcel into 3 parcels namely *Nthawa/Riandu/3541, 3542 and 3543* (hereinafter collectively called the *suit properties*) and disposed of at least one of them.

5. The Defendant filed a defence dated 11.03.2010 which was amended on 10.01.2016 denying the Plaintiff's claim in its entirety. The Defendant denied acquiring parcel 58 by reason of any exchange arrangement between Nyaga and the deceased. He pleaded that he had lawfully purchased parcel 58 from Nyaga on his own for valuable consideration. He also denied holding any of the suit properties in trust for the Plaintiff.

6. At the trial hereof the Plaintiff testified on his behalf as the sole witness. He adopted his witness statement dated 8.9.2011 as his sworn testimony. He maintained that there was an agreement for exchange of parcels 3300 and 58 between the deceased and Nyaga. It was his case that the only reason why Nyaga transferred parcel 58 to the Defendant was because the deceased was no longer alive when Nyaga was in a position to effect the transfer. He, therefore, considered the Defendant to be holding the suit properties merely as a trustee for the family of the deceased.

7. The Defendant testified on his behalf at the trial and called one witness, David Mugo (DW2), to support his defence. It was the Defendant's case that he was unaware of any exchange arrangement between the deceased and Nyaga. His case was that he simply purchased parcel 58 for valuable consideration directly from Nyaga. He stated that the deceased had transferred parcel 3300 to Nyaga by way of sale. It was his case that although the purchase price was Ksh.180,000/- the documents indicated Kshs.30,000/- in order to evade payment of higher stamp duty.

8. The evidence of DW2 was not very useful. He was not involved in the sale between the Defendant and Nyaga. He only witnessed the

payment of the last instalment of the purchase price in a hotel within Embu town. He did not know the location of the property the subject of the sale. He did not even know its parcel number and had never been to the property. He did not even see any sale agreement between the parties.

9. The record shows that the parties did not file an agreed statement of issues for determination. The Plaintiff filed a statement of five (5) issues whereas the Defendant filed a list of seven (7) issues for determination. The court shall, therefore, frame the issues for determination as provided for in law.

10. Under the provisions of **Order 15 rule 2 of the Civil Procedure Rules**, the court may frame issues for determination from the pleadings, the contents of documents produced by the parties, or the sworn statements tendered by the parties. The court has considered the pleadings, documents and evidence on record in this matter. The court is of the view that the following issues arise for determination in this suit;

a. Whether the Defendant acquired parcel 58 from Nyaga by way purchase or by reason of an exchange agreement between Nyaga and the deceased.

b. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.

c. Who shall bear the costs of the suit.

11. The court has considered all the evidence and material on record on the first issue. The question would have been easily resolved if Nyaga had testified at the trial hereof. The court was informed at the trial hereof that he was deceased. The material on record, however, indicates that he recorded two contradictory statements in this matter. First, he recorded a statement dated 8.11.2011 in favour of the Plaintiff in which he fully supported the Plaintiff's case of an exchange of parcels 3300 and 58. Second, by an undated statement filed on 24.04.2013 in favour of the Defendant, he claimed that he had sold parcel 58 to the Defendant absolutely at a consideration of Ksh.180,000/-

12. Given that state of affairs it is unlikely that the said Nyaga could have been a credible or useful witness had been alive at the time of trial. The court shall not accord any probative value to the said contradictory statements by Nyaga.

13. The other source of information which would have shed light on the transaction in issue was the Land Registry. The court of its own motion summoned the Land Registrar - Mbeere to attend court and produce the parcel file for parcel 58. Although the Land Registrar attended court, he was unable to produce the parcel file whose contents would have shed light on the first issue. The court was informed that the parcel file could not be traced.

14. The court has considered the scanty material which is on record on the first issue. The court has noted that the copies of documents from the Land Control Board indicate that the transaction between Nyaga and the Defendant was a sale and transfer for a consideration as opposed to an exchange. The copy of the transfer document on record does not indicate that the consideration for the transfer of parcel 58 to the Defendant was an exchange with any other parcel. The certified copies of the land registers for both parcels 58 and 3300 also indicate that the transfers were for a consideration of Kshs.30,000/- each and not by way of exchange.

15. Although the Plaintiff contended that there was an exchange arrangement between Nyaga and the deceased with respect to parcel 58, the documentary evidence on record does not support that view. It was the responsibility of the Plaintiff to tender material evidence to prove his allegations as stipulated by the Evidence Act.

16. The provisions of Section 107 of the Evidence Act (Cap 80) regarding the burden of proof state as follows;

“(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

17. The court, therefore, finds and holds that the Plaintiff has failed to prove the existence of the underlying agreement or arrangement of an exchange of parcels 3300 and 58 between Nyaga and the deceased. In the event, he has not demonstrated that parcel 58 was transferred to the Defendant as a trustee. The court therefore finds for the Defendant on the first issue.

18. The second issue is whether the Plaintiff is entitled to the reliefs sought in the amended plaint. It is obvious that the reliefs sought are entirely dependent upon the Plaintiff's success on the first issue. The court has found that the Plaintiff has failed to demonstrate the existence of an exchange arrangement between Nyaga and the deceased and that the Defendant acquired parcel 58 on the basis of such arrangement. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the amended plaint or any one of them.

19. The third and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event as stipulated in Section 27 of the CPA (Cap. 21). As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court is aware that the parties herein are blood brothers whose relationship is already strained. The court is of the view that it would cause further disharmony by awarding costs to one of them against the other. The court is of the view that each party should bear his own costs.

20. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his case against the Defendant to the required standard. The court consequently makes the following orders;

a) The Plaintiff's suit against the Defendant be and is hereby dismissed in its entirety.

b) Each party shall bear his own costs.

21. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 16TH day of MAY, 2019.

In the presence of the Plaintiff in person and Mr. Gachuba holding brief for Mr. Momanyi for the Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

16.05.19