



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 277 OF 2017

CHRISTINE WAMBUI MWAURA.....PLAINTIFF

VERSUS

NJAMBI L. K GITHEGI alias MARY NJAMBI GITHEGI...DEFENDANT

JUDGMENT

By a plaint dated 30th July 1998 and amended on 9th July, 2001 and further amended on 26th May 2004 the plaintiff herein sued the defendant seeking for the following prayers:

- a) A temporary injunction restraining the defendant from charging, transferring or disposing of the whole or any portion of Eldoret Municipality Block 14/354.
- b) A declaration that the defendant holds a portion of the 50 acres of land parcel Block 14/354 and portions out of the subdivision of the suit land in trust for the plaintiff.
- c) An order compelling the defendant to do all necessary acts and sign all necessary documents to effect the transfer of such portions of the new subdivision as comprising of 50 acres of the original block 14/354 to the plaintiff.
- d) An order directing the Eldoret District Land Registrar to rectify the titles by cancelling the registration of the defendant as the proprietor of the suit land and substituting the defendant herein with the plaintiff.
- e) An order nullifying the registration of the defendant as the owner if such portions as constitutes ½ of the new parcels arising from the subdivision of the suit land and a substitution of the plaintiff as the owner thereof.

BRIEF BACKGROUND TO THE CASE

It was the plaintiff's case that on or about 29th October 1968, Mr. Livingstone Kariuki Gathengi (Mr. Gachogu) and Mr. Birure Kihoria acquired 200 acres of land (L.R No. 7731/1) equally owned by both parties which was later registered as I.R 10069/5 on 20th September 1977. Mr. Gachogu's share was 100 acres (Chania farm)

Mr. Gachogu together with Mr. Henry Mwaura Thiong'o bought land elsewhere (L.R No. 776/2/1) measuring approximately 33 acres in size which was also equally owned by both parties. As the land was developed they found it difficult to divide it equally and therefore Mr. Gachogu decided to grant Mr. Thiong'o half his share of Chania farm.

As a result, Mr. Gachogu held the 50 acres in trust. Mr. Gachogu and Mr. Thiong'o both passed away leaving behind the parties herein as widows. The initial 200 acres was subdivided in 1995 into two equal portions and Mr. Birure Kihoria granted a title to a parcel of land known as 14/353 and left block 14/354 to be divided amongst the widows. The defendant registered the whole property in her name and this resulted in this suit.

PLAINTIFF'S CASE

The plaintiff testified that there was an oral exchange agreement between the plaintiff's deceased husband and the defendant's husband which created an interest in the land in favour of the plaintiff enforceable by way of a constructive trust.

The plaintiff further testified that there was a common intention between the defendant's husband and the Plaintiff's husband in relation to the suit property whereby Mr. Kariuki and the Plaintiff's husband acquired a parcel of land L.R 776/2/1 Eldoret measuring 33 acres and located within Eldoret Municipality. That after jointly purchasing it the 2 agreed that the defendant's husband should live on the parcel of

land with his two wives.

It was the plaintiff's evidence that the defendant's husband agreed to surrender and transfer 50 acres of land being half his share in Chania farm but the defendant's husband died before a transfer was effected but the boundary marks had already been placed indicating the respective shares. That possession of the 50 acres of land had been given to the late plaintiff.

The plaintiff's claim of the existence of an agreement indicating a common intention was buttressed by the application for letters of administration for the estate of the late Livingstone. A consent was entered into by the family members of the deceased settling how the estate would be distributed and showed that the defendant was entitled to 50 acres of the Chania farm.

PLAINTIFF'S SUBMISSION

Counsel for the plaintiff filed written submission and gave a brief background to the case and submitted that it is on record that the defendant signed a consent which was witnessed by the Judge and the letters of administration and confirmation of grant was a further confirmation of the knowledge and acknowledgement of the plaintiff's claim on the said property.

Counsel also submitted that the exchange agreement took place prior to the amendment of the Law of Contract Act that required all dispositions in land be in writing and therefore the allegation that there was no contract or document evidencing the same lacks a legal basis. Further, an oral agreement can be established by the common intention of the parties as well as the conduct of the parties. Counsel relied on the case of **Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR** on the creation of an interest in property by an oral agreement for sale of property.

Counsel for the plaintiff further submitted that the consent by the family showed the extent of the acreage by the defendant on Chania farm as 50 acres further demonstrates acknowledgement and knowledge of the plaintiff's claim by the defendant and the family of the late Mr. Livingstone Kariuki.

Further that in the meeting convened by the elders on 25th January 1996 in which the defendant was present, the defendant acknowledged that the plaintiff was entitled to 50 acres from the Chania farm and that she was entitled to a refund of kshs. 125,200/- from the plaintiff as expenses incurred by her in the process of subdivision. The plaintiff agreed to pay subject to production of receipts evidencing the same and subsequently an agreement was entered into and executed by both parties. That the plaintiff testified that there was a joint survey plan which was prepared and the same was submitted to Eldoret Municipal Council for approval and that the defendant should be estopped from denying the existence of this agreement.

Counsel for the plaintiff further submitted that the dealings regarding the proprietorship of the suit property emanating from the arrangements between the plaintiff and the defendants' deceased husbands purely results in the creation of a constructive trust. The suit land in contention before this court was under a trust arrangement held by the defendant on the understanding that she will transfer the same to the plaintiff but the defendant went ahead to subdivide the suit property in outright disobedience of the court with the intention of denying the plaintiff what was held on her behalf in a fiduciary capacity.

It was Counsel's submission that by the time the defendant caused herself to be registered as the proprietor of the whole piece of land she was a constructive trustee for the plaintiff and it would be unjust and inequitable to allow the defendant to retain the 50 acres she holds in trust.

Counsel further relied on the **Macharia Mwangi case (supra)** to buttress the point that the defendant being in possession created a constructive trust. Further, the plaintiff cited section 38 of the Land Act on the exception of the creation or operation of a resulting or implied trust to the provision that no suit shall be brought upon a contract for disposition of an interest in land unless the contract upon which it is founded is in writing. That the actions of the defendant to blatantly deny the plaintiff her share of the 50 acres where there existed a consent order is a blatant breach of constructive trust.

Counsel submitted that under the Registration of Titles Act which was in force at that time defined fraud under section 2 as including on the part of a person obtaining registration, a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he or she knowingly and wrongfully defeats by that registration.

It was Counsel's submission that a meeting was held on 8th January 1978 to determine the assets, liabilities and the distribution of assets of the defendant's husband and it was further established that the plaintiff's husband was entitled to 50 acres of Chania farm due to the fact that Mr. Mwaura had contributed kshs. 8,500/- to L.R 776/2/1 to the 33-acre land. It was further clarified that Mr. Gachogu and Mr. Mwaura had agreed that Mr. Mwaura be compensated his share of contribution by getting half of the Chania farm as per page 5-6 of the plaintiff's list of documents.

As per page 30 of the list of documents it is evident that Mrs. Njeri Githegi and the defendant entered into a consent that provided that Njambi L.K Githegi takes 50 acres at Chania farm.

In the year 1995 block 7739/1 was subdivided into two equal portions of 100 acres each and the defendant collected the title document for Block 14/354 without disclosing the same to the plaintiff. In a meeting held on 25th January 1996 the defendant acknowledged the plaintiff was entitled to a transfer of 50 acres and the same was executed by both parties and a map was prepared and submitted to the municipal council as per page 27-28 of the plaintiff's list of documents.

The plaintiff sought orders of the court to restrain the defendant from interfering with the suit land and the same were granted on 21st march 2001 as per page 29 of the Plaintiff's list of documents. The defendant subdivided the suit land in complete disregard of the orders on 18th

August 2004. This was evidenced on pages 31 to 126 of the plaintiff's list of documents.

The question of Limitation of Actions is res judicata as the same was determined by the ruling of 18th March 2007 dismissing an application filed by the defendant on the same. Counsel therefore urged the court to grant the plaintiff the orders as prayed

DEFENDANT'S CASE

The defendant testified that the plaintiff did not produce any evidence to prove that her husband had any interest in L.R No. 776/2/1 or any proprietary interest. The defendant stated that the letters of administration do not show that the suit land was listed as one of the assets and neither was her late husband listed as a liability in respect of the defendant's late husbands' estate.

The defendant denied that the plaintiff's husband owned the suit land and therefore he was not capable of transferring any proprietary interest that he did not have.

The defendant gave evidence and stated that DW2, the Lands officer tendered evidence that the plaintiff had no proprietary interest in L.R 776/2 and 776/1 and the interest given to the parties by the government were licenses which are not transferrable. The plaintiff not having an interest in the land, could not transfer anything to 3rd parties or obtain any proprietary interest. The defendant therefore urged the court to dismiss the plaintiff's claim with costs.

DEFENDANT'S SUBMISSION

Counsel for the defendant submitted that the Limited Grant of Letters of Administration granted to Margaret Wanjiru Waweru, Wangare Mwaura and Veronica Njeri Mwaura in ad litem application no. 99 of 2014 is not sufficient to enable the aforesaid to represent the deceased plaintiff in this case.

It was his submission that they were supposed to obtain Grant of Letters of Administration Intestate to enable them file suit. Further, that the plaintiffs claim is time barred as it was brought more than 12 years since the alleged particulars of fraud arose.

Counsel also submitted that whether or not the defendant surrendered or transferred any proprietary interest is only possible where there was consideration and if consideration is not paid there can be no valid transfer.

Further that it was established during cross examination that during application for letters of administration of the estate of her late husband Mr. Mwaura the plaintiff did not state the acreage of the land her late husband owned (50 acres) in L.R No. 7739/1 which was solely owned by the husband of the defendant. Counsel urged the court to dismiss the plaintiff's claim for lack of proof on a balance of probabilities.

ANALYSIS AND DETERMINATION

This is an old case which has taken a long time in court. It was transferred from the High Court to the Land and Environment Court when the court was established to deal with land matters. The issues for determination are as follows:

- a) Whether there was a constructive trust created in favour of the plaintiff
- b) Whether there was a breach of trust
- c) Whether the defendant acted fraudulently

Whether there was a constructive trust created in favour of the plaintiff.

From the elaborate evidence on record by both the plaintiff and the defendant it is easy to deduce whether there existed a constructive trust in favour of the plaintiff. In the case of **Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR**, the Court of Appeal examined and stated the law on constructive trusts as follows: -

A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

From the foregoing we need to establish

- Whether there was a constructive trust established
- Whether the trustee took advantage of their position for his/her own benefit.

To establish whether there was a constructive trust the court looks at the circumstances leading up to the acquisition and exchange of interests in the properties.

In Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri [2014] eKLR the court of appeal stated;

In Yaxley – vs- Gotts & Another, (2000) Ch. 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel.

The argument that a contract for disposition in land should be in writing does not apply to this suit based on the fact that the agreement was made before the amendment to the Contract Act which provides for the same.

Given that the parties that entered into the agreement are deceased, a look into the conduct is the most plausible way to establish whether such an agreement existed. The consent order at page 30 of the list of documents, signed by the defendant shows that she was entitled to 50 acres of the Chania farm property. She was aware that she was only entitled to 50 acres of the land, which was her husband's share.

The minutes of the meeting of the Gachogu family members is evidence that Mr. Mwaura contributed for a share of the 33 acres known as L.R No. 776/2/1 and was to be compensated for his contribution by getting 50 acres of Chania farm. The defendant was present at said meeting and had knowledge of the same.

The agreement between the plaintiff and the defendant for the refund of kshs. 125,200.00 on 25th January 1996 wherein the defendant acknowledged that the plaintiff was entitled to 50 acres of the land and that payment would be made for the expenses incurred in subdivision is further proof that she was aware of the plaintiff's entitlement to 50 acres of the suit land.

I find that there existed a trust arising from the arrangement between the plaintiff and defendant's husbands. The consent and the agreement for the refund are proof that there was an oral agreement the result of which was the sharing of the suit land. The defendant was a constructive trustee at the time she caused the land to be registered in her name.

Whether there was a breach of trust.

By taking possession of the 100 acres and excluding the plaintiff the defendant breached the constructive trust between her husband and the Plaintiff's husband. It therefore follows that there was a breach of trust.

Whether the defendant acted fraudulently.

Fraud is defined in Black's Law Dictionary as follows;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

The consent entered into by the defendant during distribution of her husbands' estate in Probate and Administration Cause No. 8 of 1982 and the meeting of elders held on 25th January 1996 are proof that the defendant was well aware that she was only entitled to 50 acres of land. Her concealment when she received the title for the 100 acres is proof of a deceitful practice with intent to deprive another of her right. Further, the defendant went against an order of the court that barred her from subdividing the suit land and divided it into 99 portions in her name which she admitted in court. From the demeanour of the defendant she appeared as an arrogant person who does not respect the law and authority. She acted with impunity by disregarding court orders. She should have been cited for contempt.

I find that the defendant acted fraudulently and deprived the plaintiff of her share in the land. The titles are therefore liable for cancellation under section 26 of the Land Registration Act on the grounds of fraud and misrepresentation. The defendant's husband held the suit land in trust for the plaintiff.

The court is empowered under Section 80 (1) of the Land Registration Act, 2012 to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. This is what happened in this case and I so order for the rectification of the register.

I have considered the pleadings the evidence of the parties, the submissions and relevant authorities and find that the plaintiff has proved her case on a balance of probabilities. I therefore make the following orders:

- a) That an injunction is hereby issued restraining the defendant from charging, transferring or disposing of the whole or any portion of land Parcel No. Eldoret Municipality Block 14/354.
- b) That a declaration is hereby issued that the defendant holds a portion of the 50 acres of land parcel No. Eldoret Municipality Block 14/354 and portions out of the subdivision of the suit land in trust for the plaintiff.
- c) That an order is hereby issued compelling the defendant to do all necessary acts and sign all necessary documents to effect the transfer of such portions of the new subdivision as comprising of 50 acres of the original block 14/354 to the plaintiff.

d) An order is hereby issued directing the Uasin-Gishu County Land Registrar to rectify the titles by cancelling the registration of the defendant as the proprietor of the suit land and substituting the defendant herein with the plaintiff.

e) An order is hereby issued nullifying the registration of the defendant as the owner of such portions as constitutes ½ of the new parcels arising from the subdivision of the suit land and a substitution of the plaintiff as the owner thereof.

f) The defendant to pay costs of the suit to the plaintiff.

Dated and delivered at Eldoret on this 31st day of July, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of Miss.Awinja holding brief for Mr.Nyachiro for defendant and in the absence of Waweru Gatonye & Co.for the Plaintiff

Mr.Mwelem – Court Assistant