



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 410 OF 2000

PETER KAMONI WAMAHIU.....1ST PLAINTIFF

BERNARD NJAMURI GORO.....2ND PLAINTIFF

VERSUS

JOSEPH NJOROGE NJUNGE.....1ST DEFENDANT

JUDGEMENT

1. The Plaintiffs filed the Originating Summons on 15/23/2000 seeking an order directing the Land Registrar, Kiambu, to delete the Defendant's name from the register in respect of the land known as Kiambaa/Kanunga/458 ("the Suit Property"), and replace it with the Plaintiffs' names. The summons was supported by the affidavit sworn by both Plaintiffs on 21/2/2000 in which they deponed that they were the only children of the late Njamuri Kirika who with his half-brother, Maina Kirika, jointly bought the Suit Property and had it registered in Njamuri Kirika's name to hold in trust for himself and his brother. The Plaintiffs claim that they got married within the vicinity of their home and continued cultivating their late father's portion of the Suit Property measuring 0.55 acres.
2. The Plaintiffs claimed that five months after their father died, the Defendant presented himself to both the Land Registrar, Kiambu and District Officer, Kiambu and pretended to be Njamuri Kirika's son yet he was only a nephew, and got registered as proprietor of the Suit Property. The Defendant was subsequently registered as proprietor of the Plaintiff's late father's share of 0.55 acres while Maina Kirika was registered as the proprietor of 0.45 acres.
3. The Plaintiffs averred that the process through which the Defendant got registered as proprietor of the suit land through transmission of land was undertaken without their knowledge and claimed that they learned of the Defendant's action in 1996 when he issued a notice to the Plaintiffs to vacate the suit land.
4. The Plaintiffs filed dispute number LND/16/20/12 against the Defendant through which the Plaintiffs aver that the elders directed the Defendant to transfer 0.55 acres to the Plaintiffs, which he refused to do. They attached a copy of death certificate showing that their father died on 29/4/1973. They also attached a copy of the green card showing Joseph Njoroge was registered as proprietor of the land known as Kiambaa/Kanunga/454 measuring 0.62 acres on 24/5/1958. The land was transferred to Macharia Kamonye on 25/7/1958 and was later transferred to Joseph Gitau Kimani on 27/12/1962. The notice notifying the Land Registrar of the death of Njamuri Kirika, which was copied to the District Magistrate, Kiambu gave the relative of Njamuri Kirika as the Defendant stating that he was his son. The notice also gave the names of two sisters, a brother and Peter Ngaru also indicated to be a son. The copy of the green card in respect of the suit land shows that Njamuri Kirika was registered as the owner of this land on 14/5/1958 and a land certificate was issued to him on 5/7/1971. Joseph Njoroge Njunge, the Defendant was registered as the owner of 55/100 share on 2/12/1974 while Maina Kirika was registered as the owner of 45/100 share in consideration of the succession case. The card shows that Njamuri Kirika was deceased. The Plaintiffs also produced a copy of the proceedings and ruling of the District Land Dispute Tribunal held at the District Officer's office on 20/1/1998.
5. The Defendant filed his replying affidavit on 24/5/2001 in opposition to the Plaintiffs' claim. He claimed that he bought an acre from Mungai Muhoho in 1957 and had it consolidated with the half acre that was bought by Maina Kirika. He claimed that his acre and Maina Kirika's half acre was registered in the name of Njamuri Kirika to hold in trust for the Defendant and Maina Kirika and that 0.25 of an acre was excised from the land to provide an access road leaving land 0.77 of an acre. The Defendant claimed that he started occupying the Suit Property in 1973 and that after Njamuri Kirika died, he filed the succession cause in which he was registered as the owner of 55% of the suit land while Maina Kirika was registered as the owner of 45% share. He claimed that the Plaintiffs knew all along that he together with Maina Kirika were to inherit the Suit Property. He maintained that the grant was confirmed on 11/1/1974 in his presence and that of Maina Kirika and the 2nd Plaintiff who he claimed did not raise any objection. He denied that he obtained registration of the Suit Property in his own name fraudulently. He stated that he gave the Plaintiffs notice to stop cultivating the Suit Property in 1996 because he wanted to use the land. He stated that the dispute was resolved by the Chief Kanunga and further, that the Plaintiffs filed a case before the Kiambaa Disputes Tribunal whose decision he added, was overturned by the Provincial Land Disputes Tribunal at Nyeri.
6. The court has looked at the ruling and notes that the Provincial Land Disputes Appeals Tribunal at Nyeri ruled that any aggrieved party could only appeal against the judgement in the succession cause to a higher court since the succession dispute had been determined by a

court of law. The Defendant urge that the Plaintiffs claim is res judicata.

7. Parties agreed to file written submission on 3/4/2019 to be determined based on the list of issues filed on 15/10/2018. Parties filed submissions which the court has considered. The Plaintiffs submitted that the Defendant was not entitled to part of the Suit Property and relied on the ruling delivered by the District Land Tribunal at Kiambaa. Further, they urged that the proceedings commenced by the Defendant in Succession Cause number 21 of 1973 were conducted through fraud and misrepresentation through which the Defendant presented himself as the son of their late father without disclosing that the late Njamuri Kirika had two daughters who are the Plaintiffs in this suit. After obtaining the letters of administration, the Defendant was registered as the proprietor of the Suit Property. They argued that this court was the proper forum to determine this case.

8. The Defendant submitted that the Plaintiffs had neither sought to revoke the grant of administration of the Estate of their late father, nor had they appealed against the consent judgement through which he was registered as the owner of the Suit Property. He urged that this suit was *res judicata* since the subject matter of this suit was determined in Kiambu District Magistrate Succession Cause number 21 of 1973 which was determined by a court of competent jurisdiction.

9. The court agrees with the Defendant that the Plaintiffs ought to have applied to revoke the grant of letters of administration vide which the Defendant obtained title over the Suit Property as a beneficiary of their late father. The Plaintiffs should have challenged the grant of letters of administration and the subsequent distribution of the assets of the estate in Kiambu District Magistrate Succession Cause number 21 of 1973 instead of filing a separate suit. It is regrettable that this suit has been pending since 2000 when it was filed in court.

10. The court declines to grant the orders sought in the Originating Summons filed in court on 15/23/2000. Each party will bear its own costs.

Dated and delivered at Nairobi this 29th day of July 2019

K.BOR

JUDGE

In the presence of: -

Mr. M. Njoroge holding brief for Maingi Kamau for the Plaintiffs

Mr. Mwangi Njeru for the Defendant

Mr. V. Owuor- Court Assistant