



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 687 OF 2014

JOSEPHAT NG'ANG'A KINYANJUI.....PLAINTIFF

=VERSUS=

RAPHAEL KARIUKI KINYANJUI.....DEFENDANT

JUDGMENT

1. The plaintiff and the defendant are siblings. Through a plaint dated 30/5/2014 and filed in court on even date, the plaintiff contends that in 1976, together with the defendant, they jointly contributed money and purchased Land Parcel Number Ndarugu/Gacharage/1443, measuring one acre. The money used to purchase the land (**the suit property**) were proceeds they earned from a joint transport business. They agreed to have the land registered in the name of the defendant to hold and it in trust. They subsequently sub-divided the land between themselves, each getting 0.5 of an acre. They both settled on their respective portions and have co-existed since then. The defendant subsequently declined to convey to the plaintiff his portion of the land and instead issued a notice to the plaintiff requiring the plaintiff to vacate the land. Aggrieved, the plaintiff brought this suit and sought the following orders:

a) A mandatory injunction do issue restraining the defendant, his family, servants, agents and/ or any other person acting with the instructions of the defendant from evicting the plaintiff from the suit property.

b) The honourable court do make a determination as to how the suit property will be apportioned between the plaintiff and the defendant.

c) Costs and interests.

d) Any other relief that may seem just.

2. On 15/7/2014, M/s Chris Maina & Co Advocates filed a notice of appointment on behalf of the defendant. They did not, however, file any defence. An affidavit of service sworn by Michael Njonjo and filed on 20/5/2019 shows that on 15/8/2018 the said firm was served with a hearing notice dated 2/5/2018. On the day appointed for hearing, neither the defendant nor his advocates attended. Satisfied that the defendant's advocates had been served, the court allowed an *ex-parte* hearing of the suit.

3. The plaintiff adopted his written statement dated 30/5/2014. He testified that in 1975, he carried transportation business with the defendant who is his biological brother. They decided to utilize the accrued profits to buy the suit property. They also agreed to register the land in the name of the defendant. Subsequently, they engaged surveyor to sub-divide the suit property into two equal portions which they shared between themselves. They planted tea on their respective portions. Later, the defendant refused to transfer the plaintiff's portion. A committee of elders adjudicated the dispute and resolved that the suit property was to be shared equally. Due to his brother's refusal to transfer his portion of the suit property, he filed a land dispute case in the Gatundu South Land Dispute Tribunal. The Tribunal gave an award in his favour and the award was adopted by the Magistrate Court. The defendant subsequently filed an application in the High Court and the High Court set aside the award. He subsequently brought this suit seeking the above orders.

4. The plaintiff produced the following documents to support his case: (i) Copy of Title Deed Number Ndarugu/Gacharage/1443; (ii) Demand Letter from the defendant's Advocates dated 20/12/2012; (iii) Award of the Tribunal dated 6/6/2007; (iv) Elder's Verdict dated 2/2/2007; and (v) Consent Order quashing the Elder's Award and the Adoption Order. He urged the court to grant the prayers sought in the plaint.

5. Ms Mwadumbo, counsel for the plaintiff, filed written submissions dated 11/7/2019. She submitted that the plaintiff's evidence was uncontroverted. She argued that under Section 30(4) of the Land Registration Act, if there are more than one proprietor, the parties are allowed to elect who should hold the title to the land. She added that the defendant holds the title to the suit property in trust for the plaintiff who is his sibling as per the agreement which they had when they were purchasing the suit property. Counsel further submitted that under Section 28(b) of the Land Registration Act, a trust is an overriding interest and does not require noting in the register. She contended that the rights of a registered proprietor are subject to overriding interests. She urged the court to grant the prayers sought in the plaint.

6. I have considered the plaintiff's pleadings, evidence and submissions. The defendant did not put forth his case. Consequently, the plaintiff's pleadings, evidence and submissions are uncontroverted.

7. The plaintiff's case is that the defendant is his sibling. They jointly contributed money out of their transport business, purchased the suit property, and caused it to be registered in the name of the defendant to hold it in trust. Subsequently, the land was informally sub-divided into two equal portions measuring 0.5 acres each. They both settled on their respective portions and have co-existed since then. The defendant however declined to formalize the sub-division and transfer the plaintiff's portion to the plaintiff. The defendant instead issued a demand notice requiring the plaintiff to vacate the portion he occupies.

8. In the absence of any defence or controverting evidence, I am satisfied that the plaintiff has on a balance of probabilities proved the existence of a trust. I accordingly grant the plaintiff the following orders in tandem with the prayers sought in the plaint:

a) A mandatory injunction hereby issues restraining the defendant, his servants, agents and/or any other person acting with the instructions of the defendant, against evicting the plaintiff from the 0.5 acre portion of the suit property which the plaintiff occupies.

b) It is hereby determined that the plaintiff is entitled to the 0.5 acre portion of the suit property which he occupies, while the defendant is entitled to the other 0.5 acre portion.

c) The defendant shall execute necessary documents to effect sub-division and transfer of the 0.5 acre portion to the plaintiff. In default, the Deputy Registrar of this Court shall execute the documents.

d) Each party shall bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF DECEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Court Clerk - June Nafula