



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 49 OF 2017

GABRIEL WAWERU NG'ANG'A - 1ST PLAINTIFF

PERIS WAIRIMU NG'ANG'A - 2ND PLAINTIFF

VS

SAMUEL GITAU NG'ANG'A - 1ST DEFENDANT

BERNARD KINYORO NELSON - 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs and the Defendants are siblings and children of Ng'ang'a Ngethe who died in 1973. The deceased Nganga Ngethe had 7 Children in total to wit:

- a) Lukas Mburu Ng'ang'a – Deceased son
- b) Alice Wanjiru – Married daughter
- c) Evan Muiruri Ng'ang'a – deceased son
- d) Peris Wairimu Ng'ang'a – unmarried daughter
- e) Gabriel Waweru Ng'ang'a – Son
- f) Bernard Kinyoro Nelson – Son

2. The plaintiffs aver that the three parcels of land namely; Loc.6/Munguini/3, Loc 6/Gikarangu 292 and Loc 6/Gikarangu 1672 were part of the estate left behind by their deceased father NG'ANG'A NG'ETHE. Being family and ancestral land, they are respectively registered in the names of the defendants to hold in trust for themselves and the entire family of the deceased. That those parcels were vested in the Public Trustee vide Nairobi Succession cause no. 385 of 1979 (entry no. 3 on the green card for parcel no. Loc.6/Munguini/3) and later registered in the names of the defendants (entry no. 4 in the green card for parcel no. Loc.6/Munguini/3 made on 2/12/2013) to hold in trust. That the defendants failed to comply with the Court order that required the estate to be shared equally to all children and instead only allocated shares to the male siblings (brothers of the defendants) leaving out the 2nd plaintiff who is a daughter to the deceased. The plaintiffs claim the same was done to the other two parcels of land. The plaintiffs have further pleaded fraud against the defendants for causing the irregular entries to be entered against the properties of the estate. They have attached copies of titles for Loc 6/Munguini/3, Loc 6/Gikarangu/292 & Loc 6/Gikarangu/1692.

3. The Plaintiffs are seeking Orders as follows;

a. A declaration do issue that the Defendants herein are only registered as owners of land parcels numbers; Loc 6/Munguini/3, Loc 6/Gikarangu/292 and Loc 6/Gikarangu/1692 to hold in trust for themselves and entire children of NG'ANG'A (deceased) including the Plaintiffs.

b. The trust as binding and subsisting on land parcel numbers Loc 6/Munguini/3, Loc 6/Gikarangu/292 & Loc 6/Gikarangu/1692 be dissolved and the land be equally shared amongst the six (6) houses as per paragraph (4) of the plaint.

c. A sum of Ksh. 50,000/= costs and interest of the suit.

d. Any other or better relief this honourable Court may deem fit to grant.

4. The Plaintiffs pleaded that the Defendants have committed acts of fraud and have particularized the same in Para 7 (a) – (d) of the Plaint.

5. The Defendants have filed a joint defence in which they have denied the Plaintiffs claims and stated that indeed they succeeded Loc 6/Munguini/3 & Loc 6/Gikarangu/292 as per the Judgement in Succession Cause No. 382/79 wherein they were registered as heirs and trustees for the other children of the deceased as tenants in common in equal shares. The heirs were stated as Samuel Gitau Ng'ang'a, Lukas Mburu Ng'ang'a, Evans Muiruri Ng'ang'a, Gabriel Waweru Ng'ang'a & Bernard Kinyoro Nelson. That the list excluded the 2nd Plaintiff as well as Alice Wanjiru who is married. That the 1st Plaintiff has been uncooperative in the distribution of the properties contrary to the Court Orders.

6. The Defendants further denied any fraud in the handling of the deceased estate. The Defendants explained that Loc 6/Gikarangu/1692 is not part of the estate of the deceased as it was registered in the name of the 2nd Defendant absolutely. They aver that the Plaint does not disclose any cause of action.

7. The matter went to full hearing with both parties adducing oral evidence. The plaintiff called three witnesses while the defendant called two witnesses.

8. From the plaintiffs' case it emerged that the 2nd plaintiff was allocated some shares in the parcel of land that was registered in name of the mother of the parties herein. It was the defendants' contention that since the 2nd plaintiff already inherited from their mother she then was not entitled to inherit from their father's estate. It is worth noting that all siblings actually inherited from their mother land except their elder sister. It was also clear that the their elder sister (Alice Wanjiru) who was married had chosen not to inherit from the estate. The 1st plaintiff was already allocated shares in both their mother's estate and their father's estate. The three plaintiffs' witnesses adduced evidence to show subsistence of trust and in support of the 2nd plaintiff being accorded equal regard as a child of the deceased and be allocated equal share accordingly. That provision should have been made for her in the succession cause, she being one of the children of the deceased.

9. It was the defendants' case that the 2nd plaintiff inherited their mother's estate and therefore she was not entitled to inherit from their father as well. They maintained that the grant in Nairobi Succession cause no. 385 of 1979 excluded the 2nd plaintiff from inheriting their father's estate. They further adduced evidence to show that parcel no. LOC.6/Gikarangu/1692 did not form part of the estate of their deceased father as it was already transferred to the 2nd defendant during the lifetime of their father. They further confirmed that the remaining two parcels were indeed held in trust and they were to be distributed to all the brothers including the 1st plaintiff herein. In their submissions they contend that this matter is res judicata as the issues herein have already been adjudicated upon in the Nairobi Succession cause no. 385 of 1979 and the only relief available to the plaintiffs herein is to appeal against the same.

10. PW 2 (2nd Plaintiff) stated that though she was given land in Ichagaki that belonged to her mother, as a child of late Nelson Ng'ang'a Ngethe she is entitled to an equal share in the 3 parcels of land. Her sister

Alice Wanjiru Nganga stated that she is married and not interested in the estate, but argued that the 2nd Plaintiff should not be excluded as a beneficiary of the 3 parcels as she is not married and as a child of the late father, she should be provided for.

11. DW 1 & DW 2 on their part reiterated that they succeeded the 2 parcels Loc 6/Munguini/3 & Loc 6/Gikarangu/292 vide Succession No 385 of 1917 and have been willing to distribute the same as directed by the Court. That the 2nd Plaintiff is not in the list of the beneficiaries. Their explanation is that she was given land at Ichagaki and that may be the reason why she was not included. Further that the 2nd Plaintiff had expressed no interest in the land. They however denied any trust in the Loc 6/Gikarangu/1692 instead reiterating that it was registered in the name of the 2nd Defendant absolutely.

12. Both parties have filed written submissions which I have carefully considered. The issues for determination are whether the Defendants are registered as trustees of the 3 parcels of land to hold for themselves and that of the plaintiffs; whether the Plaintiffs have proved fraud on the part of the Defendants; whether the Plaintiffs have proved any trust in land parcel Loc 6/Gikarangu/1692; whether the case is Resjudicata and who meets the costs of the suit.

13. It is not in dispute that the Defendants are registered as heirs and trustees for themselves and their siblings. I have examined the titles for Loc 6/Munguini/3 & Loc 6/Gikarangu/292 and on the proprietorship section, reads; -

“Samuel Gitau Ngenye, Bernard Kinyoru Nelson as heirs and trustees for Samuel Gitau Nganga, Lukas Mburu Nganga, Evans Muiruri Ng’ang’a, Patrick Waweru Nganga and Bernard Kinyoru Nelson”.

The certified copy of the green card dated 29/5/14 for Loc 6/Munguini/3 reads under entry No. 4 as follows;

“Samuel Gitau Nganga and Bernard Kinyoru Nelson - heirs and trustee for other children of the deceased as tenants in common in equal shares- Samuel Gitau Nganga, Lukas Mburu Nganga, Evans Muiruri Ng’ang’a, Gabriel Waweru Nganga and Bernard Kinyoru Nelson”

From the above it shows that the Defendants are indeed registered as heirs and trustees for Loc 6/Munguini/3 & Loc 6/Gikarangu/292 pursuant to Succession Cause No. 385/79. It is noteworthy that the final confirmed grant for the above estate was not produced in Court for the Court’s scrutiny. The above fact of ownership has been admitted by the Defendants as well. There is on record a transfer form of Loc 6/Munguini/3 & Loc 6/Gikarangu/292 from the Public Trustee to the Defendants which contains a schedule of heirs as;

- a) Samuel Gitau Nganga -Son
- b) Lukas Mburu Nganga-Son (deceased)
- c) Evans Muiruri Nganga-Son (deceased)
- d) Gabriel Waweru Nganga-Son
- e) Bernard Kinyoru Nelson-Son

In the circumstances and based on the evidence adduced in Court I find and hold that the Defendants are heirs and trustees of land parcel No Loc 6/Munguini/3 & Loc 6/Gikarangu/292 on behalf of the heirs listed on the schedule. Nothing has been provided by the Plaintiffs to challenge the list of the heirs. Needless to say they did not produce the certified confirmed grant to support their claim notwithstanding their allegations that the estate has been distributed contrary to the trust set up by the Court.

14. In respect to LR Loc 6/Gikarangu/1692 I have examined the copy of certificate of search dated 23/5/14 which states on the proprietorship section as follows:-

“ 2.13.10.81 Bernard Kinyoru Nelson

4.6.7.06 Title issued”.

The registration of the 2nd Defendant is entered as entry No. 2 one wonders what entry No. 1 was. It is not lost on me that the same was registered on 13/10/81.

15. Have the Plaintiffs proved fraud on the part of the Defendants? **Black’s Law Dictionary** defines fraud as follows;

“Fraud consists of some deceitful practice or willful 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”.

16. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427**:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (**Wallingford v Mutual Society (1880) 5 App. Cas. 685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308**).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (**see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (**Davy V Garrett (1878) 7 ch.D. 473 at 489**). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

see **Insurance Company of East Africa vs. The Attorney General & 3 Others HCCC No 135/1998** it was held that whether there was fraud is, however, a matter of evidence.

17. The said registration of the two parcels have not been challenged and pursuant to S. 26(1) of the Land Registration Act, the Plaintiffs have not established any grounds to warrant this Court to disturb the title of the 2nd Defendant. Section 26 (1) is very clear. The Plaintiffs must prove fraud or misrepresentation to which the person is proved to be a party. In this case neither fraud has been proved nor that the defendants were part of it in respect to the Defendants relation to the 3 properties. Fraud must not only be pleaded but must be proved by the person alleging or wishing to rely on. There is no material that has been placed before the Court to support the allegations of fraud as itemized in the plaint. There is no evidence that the lands are being subdivided illegally nor that the Defendants proved the registration was irregular or through misrepresentation as no challenge has been raised on the authenticity of the titles. The onus of proving the allegations rests on the Plaintiffs. The same is dismissed.

18. Further it is noted that the Plaintiffs have not laid a foundation on the basis of proving trust, which is a question of evidence to the indefeasibility of the title registered in the name of the 2nd Defendant. Trust is a matter for evidence. This Court expresses its doubt whether there was indeed a trust as envisaged under section 28(b) in respect to Plot No Loc 6/Gikarangu/1692 in the absence of evidence to the contrary.

19. Is this case Resjudicata. The Defendants have opined that this case is resjudicata on the ground that the matter of ownership was determined by the Succession Cause. Nothing can be far from the truth. The succession cause determined the beneficiaries of the estate of the deceased. This Court is determining the ownership rights of the 3 suit lands. It is not Resjudicata. In that regard I opine that this suit as far as relates to LR Loc 6/Munguini/3 & Loc 6/Gikarangu/292 does not offend the provisions of section 7 of the Civil Procedure Act.

20. The matter for LR No. Loc 6/Munguini/3 & Loc 6/Gikarangu/292 in respect to the beneficial interest was determined by the family Court in Succession Cause No.385/79. The contention of the Plaintiffs is that the distribution excludes the 2nd Plaintiff who is entitled as a child of the deceased. They appear to blame the Defendants for this exclusion. It is the law in Kenya that matters of succession are the preserve of the family Court which is clothed with jurisdiction. The 2nd Plaintiff may as well have had a genuine grievance but in my view the same is being ventilated in the wrong forum. There is no evidence that the grant has been challenged or set aside and however much the Court may be sympathetic to the 2nd Plaintiff's case, its hands are tied. It is upto the 2nd plaintiff to challenge the same in the right forum. It is the view of this Court that the relief being sought for the 2nd Plaintiff vests in an appeal in the Succession Cause where she is expected to assert her right to be provided for in the estate of her late father.

21. In the end the Plaintiffs claim must fail and the same is dismissed with costs to the Defendants.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF FEBRUARY, 2018

J G KEMEI

JUDGE