



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 293 OF 2017

FRANCIS WAIRACHU GITAU.....PLAINTIFF

VS

JULIUS MBURU GITAU.....DEFENDANT

JUDGMENT

1. The Plaintiff's claim is that he is entitled to 0.3 acres out of the Defendants land parcel No. LOC 4 KIRANGA/793 herein referred to as the suit land, subdivided from the original parcel land No. LOC 4 KIRANGA/ 227 which belonged to the deceased mother of both the Plaintiff and Defendant. The Plaintiff contends that they had a family agreement with the Defendant that their mother's land would be divided amongst themselves and their sister Margaret Njeri in the proportions of 3.3:3.3:1.1 acres respectively. The Plaintiff further claims that the Defendant being their elder brother dishonored the said agreement and allocated himself an extra 0.3 acres and seeks the Court to compel the Defendant to transfer to him the 0.3 acres.

2. The Defendant filed his defence denying the allegations made by the Plaintiff. The Defendant states that their late mother's land was subdivided way back in the year 1976 while their mother was still alive. That after the said subdivision the Defendant became the absolute registered owner of Parcel No. LOC 4 KIRANGA /793 measuring 4.6 acres while that of the Plaintiff was LOC 4 KIRANGA /794 measuring 3.3 acres which were registered in their names in the year 1978. That the said distribution, subdivision and registration of the titles happened while their mother was still alive therefore their mother's wish was fully implemented.

3. At the hearing the Plaintiff called two witnesses. PW1 the Plaintiff herein produced various exhibits including the green cards for LOC 4 KIRANGA/870 and LOC 4 KIRANGA /793, a letter dated 18/3/98 in kikuyu translated to English which he claims was the family agreement for the distribution of their mother's land, a search certificate for LOC 4 KIRANGA /793 to confirm the acreage and his witness statement dated 17.2.2017. He confirmed that the subdivision and registration of the land was done in 1978 when their mother was still alive. He further confirmed that he had filed a case before the elders in regard to the distribution of their mother's land while his mother was still alive. He also confirmed that their sister had filed a case against the Defendant in Thika CMCC No. 257 of 1992 in which he was a witness but he did not know the outcome. He also admitted that the Defendant had filed two criminal cases against him for boundary encroachment. He also admitted that he was gifted with two different parcels of land by his mother being LOC 4 KIRANGA /794 (3 acres) and LOC 4 KIRANGA /351.

4. PW 2 testified that both the Plaintiff and Defendant were his cousins and known to him. That he was aware that after the death of their mother the Plaintiff and Defendant's family members held a meeting to discuss the distribution of their mother's land. That he did not attend the meeting but he read the letter dated 18.3.98 towards distribution of the land between the Plaintiff, the Defendant and their sister.

5. During the defence case the Defendant called two witnesses. DW1 being the Defendant adopted his witness statement filed on 6.6.2017 and list of documents Nos. 1-6 filed on 10.5.2017 as his evidence in chief. In his statement he states that his mother's land was distributed, subdivided and registered in his name and that of his brother the Plaintiff herein during the lifetime of his mother as per her wishes. The registration of the land was done in 1978 while their mother died in 1988. That both cases filed against him by the Plaintiff and their sister Margaret in regard to the distribution of their mother's land were ruled in his favour and has produced the said rulings. That in the two cases he filed against the Plaintiff and their sister for boundary encroachment they were convicted. That the Plaintiff was gifted by their mother with an extra parcel of land measuring 3.2 acres and he never contested to it.

6. DW 2 – testified that he was one of the elders of Munuka location and both parties to this suit were known to him. They are brothers. That he has never seen the agreement dated 18.3.98 despite having been put in the list of witnesses and had no idea that such meeting ever took place. That he was present during the elders award of 1989 which ruled that all the parties to the suit to retain their own parcels of land as they are.

7. The Plaintiff filed his submissions on 10.11.2017 mainly reiterating the contents of the alleged family agreement dated 18.3.98 in support of the Plaintiff's claim over a portion of 0.3 acres of the Defendant's portion of land which he allegedly allocated to himself in excess as per the agreement. He prays for his claim to be allowed.

8. The Defendant filed his submissions in opposition to the Plaintiff's claim reiterating the facts as already proved in documentary evidence on record. That the Plaintiff and the Defendant were gifted with the parcels of land now registered in their names by their mother and the distribution, subdivision and registration of the titles was done during the lifetime of their mother therefore the distribution was as per their mother's wishes. Further that the distribution of the land has been subject to other cases where the Plaintiff and the Defendant have been parties and have been resolved in favour of the Defendant. He categorically denies the existence of any family agreement in respect to the redistribution of their mother's land which is consistent with the evidence adduced by DW 2.

Determination

9. It is not in dispute that the Plaintiff and the Defendant are registered as proprietors of LR Nos. Loc. 4 Kiranga /794 and Loc. 4/Kiranga/793 respectively. It is commonly admitted by the parties that the two parcels are resultant subdivisions of LR No. Loc. 4/ Kiranga /227 which was inherited and registered in the name of their mother Njoki Gitau. Njoki Gitau succeeded the suit property from her father.

10. It is also on record that the registration of the suit property LR No. Loc. 4 /Kiranga /793 in the name of the Defendant was done in 1978 and title issued on 10/7/06. LR No. Loc. 4/ Kiranga /794 was registered in the name of the Plaintiff in 1988. It is the Defendants evidence that the said land LR No. Loc. 4/ Kiranga /227 was demarcated in 1976 and given to the parties in 1978, a fact that is admitted by the Plaintiff in his evidence in chief. The Plaintiff states that he was dissatisfied by the fact that his brother got 0.3 acres more than him and hence this suit to recover the same.

11. It is also on record that the suit property has been a subject of litigation to wit; LDT in 1983 where the Plaintiff claimed 0.8 acres from LR No. Loc. 4/ Kiranga /793; 1992 – CMCC No. 257 of 1992 where Margaret Njeri Gitau, the sister of the Plaintiff and Defendant claimed 2 acres from the Defendant's Loc. 4 Kiranga /793. Incidentally the Plaintiff was a witness for the Defendant in this case against their sister. It is noteworthy to note that he did not join the suit filed by the sister to demand his 0.3 acres then; various Criminal cases in Criminal Case No. 75 of 2011 and 186 of 2013 in Kandara where the Plaintiff was charged and found guilty of maliciously destroying /interfering with the boundary of LR No. Loc. 4/ Kiranga /793.

12. It is also admitted by the parties that the Plaintiff was given another land LR No. Loc/Gakarara/351 measuring 0.2 acres which the Defendant has not contested.

13. The Plaintiff has placed reliance on a letter christened a “family agreement” dated 18/3/1998 which was allegedly entered into after the burial of the mother in 1998, purportedly agreed by the parties to divide the land into 3 portions.

3.3 acres – Julius Mburu Gitau

3.3 acres – Francis Wairachu Gitau

1.1 acres – Njeri Gitau

The details of the land in reference in that letter has not been disclosed. The original letter does not include the signatures of the parties whilst the translated version contains the name of the parties. The PW2 – Pancras Wairachi Kimani testified that he was the master of ceremony in the burial of Njoki Gitau and that he was not present in the meeting and he only read the contents of the letter/agreement later and therefore could not vouch for the same. The said agreement has been disowned by DW 2 and DW 3. The Defendant has denied the same in his evidence. From the above it follows that the evidential value of the said agreement is in doubt. There is nothing in the said agreement that can be said to have effectively conveyed an interest in the suit land, least of all 0.3 acres in LR No. Loc. 4 Kiranga /793 to the Plaintiff.

14. Section 24 (a) of Land Registration Act states as follows;

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

Section 26 (1) of Land Registration Act states as follows;-

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

“(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

15. For the Plaintiff to successfully challenge the Defendant’s land on account of 0.3 acres, he must show that the same was acquired by way of fraud, misrepresentation, illegally or through an unprocedural and a corrupt scheme.

16. It is on record that the suit land was given to the Defendant by his mother at the same time that the Plaintiff was also given land. The Defendant did nothing wrong to acquire the land in this instance. The land was given during the life time of their mother. It is on record that the dispute had arisen when the mother was alive but she never heeded to the Plaintiffs demands. Nothing would have been so difficult for the mother to so grant equal shares of the land to both the Defendant and the Plaintiff, if that seemed the right thing to do. She did not.

17. The Defendant is the registered owner of Parcel No. LOC 4 KIRANGA/793 as the absolute owner and that title cannot be impeached unless on grounds of fraud or misrepresentation. Those two grounds have not been proved by the Plaintiff. The Court therefore finds no sufficient ground to interfere with the proprietary rights belonging to the Defendant.

18. From the foregoing the Court finds no justifiable reason to disturb the title being held by the Defendant. In the end the Plaintiff has not proved his case and the same fails entirely. The suit is

dismissed with costs to the Defendant.

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

J G KEMEI

JUDGE.