



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 28 OF 2014

JANE JEMELI KIPNGENY.....PLAINTIFF

VERSUS

ROTICH CHESUM.....DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit vide a plaint dated 10th February 2014 seeking the following orders:

(a) That the defendant do transfer the 2.5 acres part of Title Number Cherangany /Kapcherop /1248 to the plaintiff herein and in default the deputy registrar to execute all the necessary documents to facilitate transfer in favour of the plaintiff herein as per the agreement of 16/7/2013.

(b) Costs

(c) Any other relief this honourable court may deem fit and just to grant.

2. The defendant filed his defence dated 10th March, 2014 on the same date and the plaintiff's reply to this defence was filed on 25th March, 2014.

3. The main suit herein proceeded to hearing on the 30th January, 2018 the plaintiff then filed his submissions on the 6th March, 2018 and the defendant his on 28th February 2018.

The plaintiff's case

4. The plaintiff's case is that in the year 1995 the defendant agreed to give the plaintiff two acres and a heifer equivalent in value to half an acre and the plaintiff took possession of the land immediately and she has been uninterruptedly utilizing the same to date. The same agreement was renewed on 16/7/2013 before the chief but to date the defendant has failed to transfer the suit land to the plaintiff despite demands.

The Defendant's Defence

5. The defendant denies the plaintiff's claim and avers that he executed the agreement under duress in the presence of the Chief and that he never understood what the import of the document he signed was. Further he avers that notwithstanding that, the agreement is unenforceable for want of the Land Control Board's consent. He admits that the defendant was allowed to occupy one acre of the land as a licensee and no consideration was provided to make the contract enforceable in law. He avers that the suit does not disclose a reasonable cause of action and is an abuse of the court process.

EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

6. The plaintiff adopted her witness statement dated 10/2/2014 as her evidence in chief. She produced the alleged agreements dated 1/2/1995 and 16/7/2013. She averred that she has lived on the land since 1980 and that the land was previously owned by her father-in-law who allowed her to live thereon before the defendant transferred it into his name. She averred that the defendant's brothers were present when the agreements were made. When the defendant failed to transfer the land she took her complaint to the District Officer who advised her to

institute court proceedings on the dispute. In cross examination she admitted that the defendant is her brother-in-law who was older than her late husband and that her other brothers in law are still alive. Three of them live on a parcel of land measuring 12 acres. When she got married to the defendant's brother she came to live on the land. She complained to the Chief about the land hence the meetings before the Chief in 1995 and 2013. She averred that the defendant had disturbed her till she lodged her complaint with the administration. Her evidence is that she is not buying the land but claiming it as it belonged to her late husband's parents. Under cross examination by the counsel for the defendant she denied that she had been housed just temporarily by the defendant that she had been chased away by the plaintiff's brothers. Her husband died in the year 1988 and prior to his death the couple had lived on the land. Her husband was buried on the same land and she has never paid anything for the land but she had been there on the basis that the land was owned by her parents.

7. PW2 is the brother to the defendant. He adopted his statement filed in the court record dated 10/2/2014. He corroborated the plaintiff's evidence that the plaintiff's deceased husband was buried on the suit land, where he and all his brothers had been born, the plaintiff's husband being the fifth born. According to the witness the land was owned by his uncles who gave it to PW2's mother and when it became small, PW2's father went and bought additional land a short distance away. The witness testified that women then did not have identity cards so the defendant was asked and agreed to hold the land. The witness was not present at the 1995 meeting but he had heard of it.

8. PW 3 adopted his statement filed in the court record as his evidence-in-chief. His evidence is that the family had agreed that the defendant was to give to the plaintiff two and a half acres out of the suit land. However the defendant persuaded the family to allow him to give the plaintiff two acres and one heifer. He then carved two acres out of the land and the plaintiff took immediate possession but he has failed to transfer the same to the plaintiff. The plaintiff was also not given a calf as promised by the defendant.

The Defendant's Evidence

9. The defendant adopted his statement as his evidence in chief. His further evidence was that he acknowledged the plaintiff as his sister in law and that she and her husband lived on his father's land together with the defendant's two other brothers. They quarreled and the plaintiff sought from the defendant and obtained a temporary refuge with the plaintiff on his land. He avers that the plaintiff should be given land on his father's land alongside his other brothers and not on the land that he occupies. He denied promising to give her 2 acres and avers that he was forced by the Chief to sign the agreement in 2013. He avers that they never went to the Land Control Board for a consent. However he admitted that the plaintiff's husband's remains were buried on the suit land. He also never bought the land he lives on.

DETERMINATION

Issues for Determination

10. The issues that arise from the pleadings in this suit are as follows:

(a) Is the agreement executed by the defendant enforceable?

(b) Is the agreement void for want of consent of the Land Control Board?

(a) Is the contract agreement executed by the defendant enforceable?

11. The evidence showing that the defendant signed the agreement is overwhelming. Three witnesses have corroborated each other on this issue. This court observed the defendant's demeanour when he was asked a straight question to whether he ever agreed to give the plaintiff land. He did not answer verbally. He only shook his head silently. His evidence was uncorroborated by any independent evidence.

12. The defendant's conduct casts doubt on the truthfulness of his claim that he did not sign the agreement voluntarily. The defendant must have executed the agreement and willingly so. That explains why he allowed the plaintiff to live on his land for thirty seven years.

13. The plaintiff's occupation of the land was rooted in her familial relations with the defendant and his family- she was married to the defendant's brother who died in the year 1988. His remains were buried on the land and the plaintiff continued living on the land which measures 11 acres.

14. The other land that was bought by the plaintiff's father was 12 acres and is already shared among the defendant's brothers. It is to this land that the defendant directs the plaintiff to go and seek a share of.

15. I find the agreement between the parties to be more of a family arrangement regarding the family property rather than an agreement for sale. It was not a commercial transaction. By that agreement I find that the defendant acknowledged the plaintiff's entitlement to a small portion of land from the land which had been registered in his name but which before that registration belonged to his parents.

16. I find that by that agreement a constructive trust was created in 1995 and reaffirmed in the year 2013. By that constructive trust the plaintiff held the title to the two acres he had agreed to transfer to the defendant in trust for the latter. Both agreements are a fact that the defendant cannot run away from now. I find that the agreements alleged by the plaintiff existed and that they are enforceable.

(b) Is the agreement void for want of consent of the Land Control Board?

17. I have ruled out any duress or coercion and found that the agreement was more of a family arrangement on the sharing out of the suit land between the plaintiff and the defendant.

18. The plaintiff has lived on the suit land not as a stranger but as a member of the family whose husband died long ago. As noted by this court the agreement between the plaintiff and the defendant was not a commercial transaction.

19. I have also found that there exists a constructive trust in which the defendant holds two acres out of the eleven acres comprising the suit land on behalf of the plaintiff herein the absence of a Land Control Board Consent does not render the agreement void for it is not rooted in a commercial transaction but in a family arrangement that could have also otherwise formed a basis for a succession claim by the plaintiff.

CONCLUSION

20. The upshot of the above is that the plaintiff's claim has merit. I hereby enter judgment in favour of the plaintiff against the defendant in terms of the prayers **(a)** and **(b)** of the plaint dated **10th February, 2014**.

It is so ordered.

Dated, signed and delivered at Kitale on this **30th** day of **May, 2018**.

MWANGI NJOROGI

JUDGE

30/5/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Bett holding brief for Samba for defendant

N/A for the petitioner

COURT

Judgment read in open court.

MWANGI NJOROGI

JUDGE

30/5/2018