



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 136 OF 2017

BETH WAIYEGO SAMSON.....PLAINTIFF

VS

JEMIMMAH WANJIRU KARANJA.....DEFENDANT

JUDGMENT

1. The Plaintiff sued the Defendant on 10/2/2017 seeking orders as follows;-

a) Land Parcel No. Loc.11/Muchungucha/782 be divided into two equal portions with separate titles one of them containing the area if any occupied by the Plaintiff and the other containing the area if any occupied by the Defendant.

b) In default, the Deputy Registrar of this Honourable Court to execute all the relevant subdivision documents.

c) Costs of the suit.

2. It is the Plaintiff's claim that she and the Defendant own the suit land as tenants in common having inherited the land from their father upon his demise. That both have built houses on either of their 1 acre portions out of the suit land measuring 2.0 acres. That the Defendant has encroached on 0.5 acres of the entitlement of the Plaintiff, thus depriving her of her rights/interests in the suit land.

3. The Defendant filed a Defence and Counter Claim in which he denied the Plaintiff's claim and states that the Plaintiff sold to her 0.5 acres of her entitlement. The Defendant prays that the suit land be apportioned into 2 portions: 1.5:0.5 acres and in the alternative the Court to order the Plaintiff to pay her 276,000/= as refunds of the purchase price and interest in favour of the Defendant and the Plaintiff respectively.

4. At the trial the Plaintiff gave evidence and stated that the Defendant is her younger sister and own the land together. She attached a copy of certificate of search dated 18/5/16 to support their ownership: That she lived on the said land with her daughter one Grace Wahito Maina until 1989 when she relocated to Gilgil where she does small scale business. That the Defendant has taken over 0.5 acres of her entitlement and started farming thereon and cutting down her trees without her express permission.

5. The Plaintiff avers that she has made efforts to have the suit land subdivided into 2 equal parts but the Defendant has been uncooperative.

6. The Plaintiff averred that earlier she had borrowed Kshs. 150,000/= from the Defendant to boost her working capital requirements for her start up business in Gilgil. That she refunded Ksh. 50,000/= leaving a balance of 100,000/=. That on 9/11/15 she was summoned to the Assistant Chief Gacheru Sub location. That she went there to refund Kshs 100,000/= that the Defendant had lent her which she was refusing to accept. That the Defendant came with 3 witnesses Peter Gachuhi Mwangi, Timothy Thiongo and John Macharia Kabue. The Plaintiff was with her daughter Grace Wahuro Maina.

7. That after deliberations the parties (Plaintiff, Defendant & Daughter) were asked to step out and on being called back the Chief asked them to sign a letter that indicated the Plaintiff was to refund Kshs. 276,000/= to the Defendant. It is her case that she declined to sign the document. She produced an unsigned version of the agreement and when showed a version produced by the Defendant dated 9/11/15 bearing her alleged signature she denied ever signing the same and reiterated she did not sign because she was not in agreement with the contents of the letter.

8. She stated that the letter dated 9/11/15 was written by the Assistant Chief Gacheru now deceased. That the witness who signed the letter belonged to the Defendants. That her mission in going to the Chief was to refund Kshs 100,000/= in presence of the local administration.

9. That at no time did she sell her portion of 0.5 acre of the suit land to the Defendant. That she allowed the Defendant to till the land whilst the soft loan remained unpaid. In respect to the loan aforesaid, she testified that there was no agreement on the interest if any on the loan. That the loan was based on a verbal agreement between the parties. She denied that the cash was for purchase of land. She reiterated that she

owes the Defendant Kshs. 100,000/=.

10. PW 2 Grace Wahuro Maina testified that she lodged a caution on the land to protect the land from being taken over by the Defendant/being sold by their mother the Plaintiff to third parties before making provision for her on account of her having been in occupation of the land with her children. That she occupied 0.5 acres of her mother's 1.0 acre entitlement. She confirmed that they went to the Assistant Chief to refund the money to the Defendant. That the letter was written in their absence but in the presence of the Assistant Chief and the 3 witnesses of the Defendant. That PW1 did not sign the letter.

11. The Defendant testified that sometimes in 2007 the Defendant and the Plaintiff agreed that the whole suit land should be registered in the name of the Defendant since the Plaintiff did not require it as she was settled in Gilgil. However the Plaintiff's daughter filed a caution claiming a licensee's interest thus stopping the transaction.

12. That in 2008 she fenced the whole of 1.5 acres after a surveyor subdivided the land into 1.5 and 0.5 acres respectively. That she denied cutting down trees and encroaching on the 0.5 acre belonging to the Plaintiff.

13. In respect to the Assistant Chief's letter dated 9/11/15, she states that the Plaintiff is to refund Kshs. 276,000/= to her so that she hands over possession of 0.5 acres to the Plaintiff. That the money was consideration for the purchase of the land in the sum of Kshs. 100,000/= plus interest less the rent for usage of land. She states that she signed the letter which was in 3 copies and kept her copy. The Plaintiff and the chief each kept their copies. That she saw the Plaintiff sign the letter as well in their presence.

14. On Cross-examination she admitted that there was no agreement of sale of the 0.5 acres of land to her by the Plaintiff. She however, confirmed that she had lent her sister Kshs. 150,000/= who refunded 50,000/= leaving a balance of 100,000/=. Further she stated that the letter dated 9/11/15 was written by the Assistant Chief in the presence of the Plaintiff, herself, and her 3 witnesses.

15. DW 2 – Peter Gachuhi Mwangi confirmed that he accompanied the Defendant to the office of the Assistant Chief on 9/11/15 and was present when the letter was written by the Assistant Chief. That he was one of the 3 witnesses who signed the letter. He stated that the Plaintiff wanted to refund to the Defendant Kshs 100,000/= and when interest was added the amount came to 276,000/=. He testified that he witnessed the Plaintiff sign the letter.

16. When showed the copy of letter produced by the Plaintiff, he indicated that he had not seen it. As regards the agreement produced by the Defendant the witness stated that the same was the decision of the Assistant Chief and 3 elders (witnesses, himself included). That it was written when the Plaintiff and Defendant were sent out of the office. That no agreement of sale was produced in respect to the sale of the 0.5 acres of land before them. Nevertheless he clarified that the letter was for refund of the monies lent between the parties and not purchase of land.

17. Parties have filed written submission which I have reviewed. I shall refer to them as necessary in the judgement.

18. Having considered the pleadings, evidence adduced by their parties, rival submissions, legal authorities were applicable and the applicable law, the issues for determination were: whether there is a valid Sale Agreement to sell 0.5 acres by the Plaintiff to the Defendant; whether the Defendant is entitled to a refund of Kshs. 276,000/; whether the Defendant should vacate 0.5 acres of land ; whether the land should be divided into 2 equal portions with separate titles between the Defendant and the Plaintiff; who pays the cost.

19. It is not in doubt that the Plaintiff and Defendant are registered as owners of the suit property having succeeded their father upon his death. The land measures 2.0 acres and it is their understanding that each owns 1.0 acres of the suit land. The Plaintiff has produced a copy of the official search of the suit property which indicates that both the Plaintiff and Defendant are registered owners. The Plaintiff has averred that they are registered as tenants in common. Though no evidence has been adduced as to the nature of the ownership, whether joint or tenancy in common, the Defendant has not controverted the evidence of the Plaintiff that the suit land is owned as tenants in common. It will be noted that both terms; joint ownership and tenancy in common would denote different meanings especially with regard to the Plaintiff's prayers in the plaint. Section 94 of the Land Registration Act provides the process of partitioning a parcel of land under tenancy in common. The law on joint tenancy does not permit partitioning of the land owned jointly. The same has a right of survivorship. The land is owned jointly; i.e. indivisible. The scenario in tenancy in common is different. The interest is separable depending on the number of tenants in common. I will proceed on the basis that the title is under tenancy in common. In this case the Plaintiff and the Defendant would own the land in 2 equal parts; 1: 1 acre. This is not in dispute.

20. Is there a valid agreement of sale of 0.5 acres of land by the Plaintiff to the Defendant?

The Defendant has claimed that she was sold a portion of 0.5 acres by the Plaintiff in 2007. She has not produced any agreement of sale which would ordinarily contain the terms of the agreement such as the consideration, completion, default, etc. It is her evidence that it was a mutual agreement, that is to say a verbal Agreement. The Plaintiff has denied ever selling her land and she has explained that she borrowed her sister Kshs. 150,000/= which she refunded 50,000/= leaving a balance of 100,000/=. That she allowed her to utilize 0.5 acres of land while the loan subsisted as the other 0.5 acre was being utilized by her daughter Grace Wahuro. That when she wanted to refund the money Kshs 100,000/= the Defendant refused and that led to the letter dated 9/11/15 where she based her claim that she was refunding the purchase price of the land. The Defendant has contradicted herself in evidence when she admitted that indeed her sister borrowed Kshs. 150,000/= from her leaving a balance of 100,000/=. She admitted in evidence under oath that there was no agreement between the parties in respect to the sale of land.

21. Section 3(3) of the Law of Contract Act cap 16 provides that all transactions for disposition of an interest in land to be in writing and signed by the parties. The Defendant has relied on the Chief's letter dated 9/11/15 as an agreement between the parties. At the hearing it became clear that the said letter was written by the Chief in the presence of the 3 witnesses and in the absence of the Plaintiff and the Defendant. There was therefore, no meeting of minds of the parties in respect to this particular letter and its contents. I have analyzed the letter and it is consistent to a refund of funds and not an agreement of sale of land. This was confirmed by the Defendant's witness DW 2

when he stated under oath as follows;

“The agreement, read letter dated 9/11/15 was for refunds of the money and not to purchase land.”

22. The Court has also reviewed the proceedings at a hearing by the District Land Registrar in respect to removal caution lodged on 3/12/2007 by the Plaintiffs daughter PW 2. In the proceedings the Plaintiff stated that she wanted to sell her portion of her interest in the land and was stopped by the caution lodged by the PW 2. She did not state that she had entered into an agreement to sell to the Defendant land who stated that “I have paid money for her so that she can leave the whole land to me”. Having noted the above, no evidence of Sale Agreement was produced by the Defendant. The Plaintiff has categorically denied selling the land to the Defendant. The Defendant alleged this in the Counter Claim. It is for her to prove that indeed there was a Sale Agreement.

23. The above analysis draws the Court to the only conclusion that there was no agreement of sale between the Plaintiff and the Defendant. The onus of proof rested with the Defendant which she has not discharged.

24. Further the suit land being an agricultural land is subject to section 6 of the Land Control Board Act and therefore there being no consent there could not have any valid transaction. The parties have admitted as much. The Court finds that there was no Land Control Board consent obtained. That there was no sale of the land.

25. As to whether the Defendant is entitled to a refund of 276,000/=, according to the above analysis the Court is of the considered view that there is no legal basis for this claim. The parties may have lent each other monies. However no nexus was established between the so called friendly loan and the sale or otherwise of 0.5 acres to the Defendant. This claim fails.

26. Having held that there was no valid agreement of sale between the parties, it is this Courts determination that any occupation of the Plaintiff's 0.5 acre portion of the land is without any legal basis and the Defendant is ordered to vacate the same forthwith.

27. Going by the above finding the Court is of the view that the justice of this matter lies in subdividing the land into two equal portions among the parties.

28. Consequently, the prayers of the Defendant in the Counter Claim fail for the reasons given above.

29. In the upshot the orders are as follows;

a) Land Parcel No. Loc.11/Muchungucha/782 be divided into two equal portions of one acre each with separate titles one of them containing the area occupied by the Plaintiff and the other containing the area occupied by the Defendant.

b) In default, the Deputy Registrar of this Honourable Court to execute all the relevant documents to effect order a) above.

c) Costs of the suit are payable by the Defendant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 3RD DAY OF MAY, 2018.

J G KEMEI

JUDGE