



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 26 OF 2016

JOSEPH KARUTI M'MBATARUPLAINTIFF

VERSUS

GIDEON GITONGA KIRATHI..... 1ST DEFENDANT

CHARLES MBAABU GERALD2ND DEFENDANT

TIRISIA MUTHAICHU KABERIA 3RD DEFENDANT

JUDGMENT

Pleadings

1. Vide a plaint filed on 19.4.2016, the plaintiff is seeking for an order compelling the 1st and 2nd defendants to transfer 1 acre of land Reference No. Njia/Kiegoi/872 to the plaintiff. He is also seeking for an order of permanent injunction against 1st, 2nd and 3rd defendants restraining them and their agents, or anybody whatsoever claiming under their names from grabbing, taking or interfering with the plaintiff's ownership of the 1.00 acre of the suit land, the one he rightly bought from the 2nd defendant. He also desires to be compensated for the damaged crops and property as well as costs and interest of the suit.

2. The 1st and 3rd defendant filed a statement of amended defence on 15.6.2016 where they have denied plaintiff's claim. In particular, they have stated that the second defendant sold his entire share of land to other people including to one Isaiah Mburunga Mwambia after finalization of Meru High Court succession cause no. 119 of 1991. The 1st and 3rd defendants contend that the parcel of land L.R No. Njia/Kiegoi/872 belongs to the 1st defendant absolutely and the plaintiff has no legal rights over the same.

3. The 1st and 3rd defendant contend that the 2nd defendant died on 5.5.2016 and therefore the plaintiff's suit is bad in law and the same ought to be struck out with costs.

4. The 1st and 3rd defendants further state that they were not privy to the plaintiff's transaction with the second defendant and accordingly, the plaintiff has no locus standi to sue them and has no cause of action against them.

5. The 1st and 3rd defendants deny holding any land in trust for the plaintiff. These two defendants are seeking for the dismissal of plaintiff's claim with costs.

PLAINTIFF'S CASE

6. Plaintiff gave oral evidence and also adopted his statement dated 11.3.2016 as his evidence. His case is that he bought land from one Charles Mbaabu who then had sold it to someone else. He avers that 1st defendant was appointed the administrator of the Estate of Kirathi Barimba who is now deceased and the estate was distributed among the heirs whereby, 2nd defendant was to get 2.5 acres.

7. Plaintiff claims that the 2nd defendant sold to him 1.00 acres of his share through 3 agreements and that he paid all the purchase price and he was put in possession of the land as he awaited the first defendant to transfer the land reference no. Njia/Kiegoi/872 to the 2nd defendant.

8. Plaintiff testified that after he bought land from Charles Mbaabu, he used the same from 2013 to 2016 and that 1st defendant had seen him taking possession of the land and he never raised issues until 2016.

9. He avers that he did developments on the land which included digging benches and planting Napier grass, bananas and trees and also grew

seasonal crops like maize and beans. The one acre of land which plaintiff was utilizing was apparently sub divided by a surveyor and hence, plaintiff had proceeded to fence the same.

10. Plaintiff states that on or about 9th April 2016, the 1st and 2nd defendants brought in the 3rd defendant with a group of goons and they demolished his fence as they put their own fence. Since he did not want a fight to ensue, he reported the matter to the chief and to the police who advised him to go to court.

11. In support of his case, plaintiff produced the documents in his list dated 15.4.2016 as P exhibit 1 – 5:

i. An order of the High Court of Kenya at Meru dated 21.7.1992 confirming the appointment of Gideon Gitonga Kirathi (1st defendant) as the administrator of the Estate of Kirathi Barimba (deceased).

ii. Certificate of confirmation of grant dated 8th October, 1992.

iii. Sale agreement dated 18th November, 2013.

iv. Sale agreement dated 11th May, 2012.

v. Sale agreement dated 21st April 2012.

12. The plaintiff avers that a problem arose when Gideon Gitonga who is a brother to Charles Mbaabu went ahead and sold his land. He claims that he has suffered a lot and that he only got one acre from land's office which was sold by Gideon to Tirisia Muthaichu.

13. On cross examination, plaintiff stated that he was aware of the succession cause no. 119 of 1991 whereby Charles Mbaabu got his share. However, plaintiff did not know that Charles had sold his share to one Jacob Karumani and Isaya Murunga.

14. Further, plaintiff stated that he had gone to the lands office and found that the land was the way it had been distributed during subdivision. He however confirmed that item 2 in defence list filed on 30.3.2017 is a search which shows that since 1996 Gideon Gitonga Kirathi (1st defendant) has been the registered owner of land parcel no. NJIA /KIEGOI/872 and that the name of Mbaabu is not in the document (Item No. 2). He also said that all along he knew that Mbaabu was the owner of the land no. Njia/Kiegoi/872, but the land was initially no. 113 before subdivision.

15. Plaintiff stated that the one acre which was sold to 3rd defendant is the same portion of land he was using, but this year, it is defendants who are using the land in defiance of a court order. The land is currently being utilized by Gideon and Tirisia.

16. Plaintiff contends that 1st defendant held the land in trust for late brother Charles Mbaabu who was an adult when the succession case was going on. He also stated that Mbaabu had sued Gideon wanting the transfer to be effected. He also testified that he was not aware that the 3rd defendant wrote an agreement with 1st defendant.

17. The plaintiff testified that the 1st and 3rd defendants did not sell the land to him and that it was Charles Mbaabu the 2nd defendant who sold to him the suitland and that Gideon, the first defendant was the administrator of the family. He also stated that 2nd defendant died while the case was ongoing and the plaintiff could not substitute him.

18. PW 2, Patrick Mithika M'Barithi testified and he also adopted his statement of 7.3.2017 as his evidence is that he knew that plaintiff had bought land from Charles Mbaabu and he even witnessed plaintiff paying for the land which is number 872.

19. On cross examination, PW 2 stated that he knew the family very well since he was a neighbor and that his home was about 20 metres apart. He knew that 1st and 2nd defendants were brothers and their father was known as Gerald Kirathi who is now deceased. The family had their father's property distributed and even Charles had his share. PW 2 testified that he did not know about the titles of the land but he knew that Charles had no title to the land.

20. PW2 knew that Charles sold one acre of land to the plaintiff. However, he didn't know that Jacob Karumani bought the land from that family and specifically from Charles. He also does not know a person known as Isaaya Murunga.

21. PW2 identified the search (item 2 in defence list) and he confirmed that this land was in the name of 1st defendant by 1996 and he noted that it did not have the names of the 2nd defendant (Charles Mbaabu). He also said that he never went to the lands office so he did not know about the records in the lands office.

22. He averred that the land of Gerald Kirathi no. 113 was large and was given to;

i. Stephen Ngiri a purchaser

ii. Charles Mbaabu Gerald

iii. Gideon Gitonga Kirathi

iv. Samuel Kirathi (a brother of Gideon).

23. PW2 further stated that on 2016 Gideon Gitonga brought Tirisia Muthaichu, the 3rd defendant who is currently occupying the land.

24. PW 3 Henry Ntongai M'Lintari testified and also adopted his statement of 7.3.2017 as his evidence. He stated that he knew the 1st defendant as a brother of 2nd defendant. He however did not know whether 1st defendant was aware when 2nd defendant was selling land to the plaintiff. PW3 is a neighbor to the suit land staying about 80 metres apart. He was a witness when the agreement was made between plaintiff and 2nd defendant but he did not sign anywhere.

25. Pw3 stated that he did not know of any document from the lands office showing that the 2nd defendant was the owner of the land. At some point PW3 stated that plaintiff was the one utilizing the land, only to change and state that 3rd defendant was actually the one utilizing the land currently. Pw3 further clarified that he was not present when the agreement was being drafted and signed.

Defendant's case

26. DW1, Gideon Gitonga Kirathi, is the 1st defendant. He testified and he also adopted his statement of 29th March 2017 as his evidence. Dw1 informed the court that he is the legal representative and administrator of the estate of his late father Kirathi Barimba. The estate was distributed in 1993 upon finalization of Meru High court succession cause 119 of 1991 where all the beneficiaries were given their respective shares. The 2nd defendant the late Charles Mbaabu Gerald who died on 5.5.2016 was among the beneficiaries who received his share but Charles had sold his respective share. He further stated that they were 4 brothers Gideon Gitonga, Samwel Kobia, Charles Mbaabu and Joshua Meme and that during the confirmation he cannot recall the land he got.

27. DW1 stated that land parcel no. 872 was his and it never belonged to Charles. He also said that he does not recall when the land changed from his father's name to his name and whether Charles changed the land. He further stated that the plaintiff had never entered that land and that the person using that land was the 3rd defendant since 2016.

28. DW1 produced the following documents as defence exhibits;

- i. Certificate of confirmation in Meru High court succession cause No. 119 of 1991.
- ii. Certificate of search for L.R No. Njia/Kiegoi/872
- iii. Order in Meru high court succession cause no. 119 of 1991
- iv. Photographs for the suit land
- v. Agreement for sale of land dated 4.3.2016
- vi. Acknowledgement receipt dated 19.4.2016 and 23.6.2016.

Determination

29. I have considered all the arguments raised herein as well as the rival submissions of the parties. It is not in dispute that the 1st and 2nd defendant are brothers. It has also emerged that 2nd defendant passed on during the course of the trial but was not substituted. Further, it has emerged that the suit land is parcel no NJIA /KIEGOI/ 872 and that this land is currently being utilized by 3rd defendant.

30. The issue to determine is whether plaintiff has any kind of entitlement to this land to the tune of one acre.

31. It has been submitted by plaintiff that 1st defendant (Gideon) having been the administrator of the estate of his father had a duty to ensure that distribution of the estate was concluded within a reasonable time. It is further submitted that the grant was confirmed in 1993 and there was no clear subdivision of the estate by the time 2nd defendant was selling his share in year 2012.

32. However, no evidence has been adduced to support these submissions. What is on record is that the grant was issued on 8.10.1993 in which land parcel no. NJIA/KIEGOI/113 was to be shared amongst 4 beneficiaries including Charles Mbaabu. A search certificate availed by defence side indicates that 1st defendant became the registered owner of land no. NJIA/KIEGOI/872 on 3.9.1996. This can only mean that distribution of the estate had been done by then.

33. The 1st agreement made on 21.4.2012 indicates that the land which was being sold was Njia/Kiegoi/113. Certainly this land was no longer in existence by then. As for the other agreements, they refer to land no. 872. However, this land did not belong to 2nd defendant. It was the property of 1st defendant. It is quite clear that plaintiff did not carry out due diligence by the time he was entering into these agreements with the 2nd defendant. A simple search at the lands office would have revealed to the plaintiff as to who was the owner of the land.

34. All in all, I find that plaintiff's claim is unmerited. The same is dismissed with costs to 1st and 3rd defendants. Any orders of injunction and inhibition that may be in force are hereby discharged.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 11TH DAY OF JULY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Kiogora A. for defendant

Plaintiff

1st & 3rd defendants

HON. LUCY. N. MBUGUA

ELC JUDGE