



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 91 OF 2016

(Formerly Nyeri HCC No. 70 of 2010(O.S))

IN THE MATTER OF

L.R NO. KIRIMUKUYU/GACHUIRO/256

AND

IN THE MATTER OF ORDER XXXVI RULE 1

OF THE CIVIL PROCEDURE RULES

BETWEEN

WACHIRA GITHINJI1ST PLAINTIFF

GATAHI GITHINJI.....2ND PLAINTIFF

VERSUS

KANOTHI GITHINJIDEFENDANT

JUDGMENT

1. The plaintiffs herein, Wachira Githinji and Gatahi Githinji, took up the summons dated **11th June, 2010** for determination of the issue raised therein to wit whether the defendant, Kanothi Githinji, who is the registered proprietor of the parcel of land known as **LR No.Kirimukuyu/Gachuiro/256** (hereinafter referred to as the suit property) holds the suit property in trust for them. The plaintiffs also prayed for determination of the pleaded trust if found to exist.

2. In support of their claim, the plaintiffs deposed that the defendant who is their elder brother, was registered as the proprietor of the suit property during land consolidation as their trustee (to hold the suit property for their benefit); that the suit property was a result of consolidation of several parcels which belonged to their late mother (Wangechi Githinji); that the defendant's registration as proprietor of the suit property was effected with the consent and at the insistence of their mother because their father was dead at the time; that the suit property was subdivided in 1962 into three equal portions; that since 1962 when the property was subdivided, they have been living in their respective portions of the suit property and that their efforts to have the pleaded trust determined and the portions they occupy registered in their names have been strongly resisted by the defendant.

3. In reply and opposition to the plaintiffs' claim, the defendant filed the affidavit (replying) he swore on **12th July, 2010** in which he admits that the plaintiffs' are his younger siblings but terms their contention that the suit property belonged to their mother and that he holds it in trust for them untrue.

4. According to the defendant, neither his mother nor his father had land. He bought the portions comprised in the suit property from the persons listed in his affidavit without the contribution of either the plaintiffs or their mother.

5. After he got registered as the proprietor of the suit property, out of love and affection and on humanitarian grounds, he allowed the plaintiffs who are his brothers to occupy part of the suit property pending acquisition of their own land.

6. The defendant avers that there have been numerous cases between the plaintiffs and him over the suit property.
7. Based on the decision in Nyeri Civil Appeal No.66 of 2008 where the awards that had been made in favour of the defendants were set aside for having been made ultra vires the Tribunals' jurisdiction, the defendant urges the court to dismiss the plaintiffs' suit with costs to him and to declare that he is the exclusive owner of the suit property. He also prays for eviction of the plaintiffs from the suit property.
8. On 29th February 2012, directions were taken to the effect that the Originating Summons (O.S) be treated as a plaint and the reply as a defence. Hearing was to be by way of oral evidence. Parties were also ordered to comply with Order 11 of the Civil Procedure Rules before the matter could be set down for hearing.
9. Apparently the parties complied with Order 11 and the matter was set down for hearing.
10. When the matter came up for hearing on 24th September 2013, counsel for the plaintiffs applied for adjournment on grounds that he had lost touch with his clients. Because the application for adjournment was opposed by counsel for the defendant, the court dismissed the plaintiffs' suit for want of prosecution.
11. Following dismissal of the plaintiffs' suit, the defendant moved the court for review and amendment of the judgment delivered on 29th September, 2013 on grounds that his counter-claim contained in the replying affidavit which was adopted as his statement of defence was not considered.
12. Upon considering the issues raised in the application for review, the court had this to say:-

“This court finds that there is no need to file a fresh suit for eviction as the same was prayed for in the replying affidavit which was converted into a defence hence became a substantive prayer in the defence. This court holds that any claim made in a defence becomes a counter claim and therefore any claim and prayer in a replying affidavit in respect of the claim based on Order 37 of the Civil Procedure Rules is a counter claim. The plaintiff in the originating summons has a right to reply to the replying affidavit which reply can be treated as a defence to counter claim. I do not agree with Mr. Kingori that treating the prayer for eviction as a counter claim will deny

the plaintiffs the right to file a defence as the replying affidavit was on record but the plaintiff failed to file a supplementary or further affidavit to deny the claim.This suit was commenced by Originating Summons hence the dismissal of the suit for want of prosecution did not mean that the defendants claim for declaration of exclusive ownership and eviction of the plaintiffs was also dismissed with the suit, the same is still alive awaiting prosecution by the defendant...the applicant is at liberty to set the matter for hearing on his claim of exclusive ownership and eviction as the plaintiffs cannot be evicted without being heard.”

13. Following that determination on the defendant's counter claim, the defendant set down his counter-claim for hearing.
14. When the defendant's suit came up for hearing, counsel for the plaintiffs, Mr. Kingori, informed the court that he had since ceased acting for the plaintiffs and transferred the file to Mr. Kimunya who had taken over the matter from him.
15. Because counsel for the defendant insisted on his client being heard citing the advanced age of his client and the delay in conclusion of the matter, the court placed the file aside to give Mr. King'ori time to contact Mr. Kimunya.
16. Because neither Mr. King'ori, Mr. Kimunya or their clients were in court when the matter was later called for hearing, the court allowed the defendant to prosecute his counter claim.
17. The defendant who is advanced in age (he is 90 years old) informed the court that the plaintiffs are his younger siblings; that the plaintiffs had instituted the suit herein claiming that he holds the suit property in trust for them; that he filed a replying affidavit denying the plaintiffs claim and explained how he obtained the suit property. In September, 2013 he attended court for hearing of the plaintiffs' case and because the plaintiffs did not attend court their case was dismissed. He produced the documents listed in his list of documents as **Dexbt 1 to 4** and urged the court to grant him an order for eviction of the plaintiffs and their families from the suit property.
18. The defendant, through his advocate, filed submissions which I have read and considered.

Analysis and determination

19. From the pleadings and the submissions filed, this court finds the sole issue for determination to be whether the defendant has made up a case for being granted the orders sought or any of them.
20. Concerning that issue, from the documents produced by the defendant, in particular a copy of title deed and certificate of official search, it is clear that the defendant is the registered proprietor of the suit property.
21. By dint of the provisions of **Section 24** of the Land Registration Act (hereinafter referred to as the Act), the registration of the plaintiff as the proprietor of the suit property vested in him the absolute ownership of the suit property together with all rights and privileges belonging or appurtenant thereto.

22. Under **Section 25** of the Act, the rights of the plaintiff to the suit property referred to in paragraph 21 above, whether acquired on first registration or subsequently for valuable consideration or by an order of court, are not liable to be defeated except as provided in the Act, and are to be held by the plaintiff, together with all privileges and appurtenances belonging thereto, free from all other interests claims whatsoever, but subject-

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register;
- (c) duties or obligations imposed on him as a trustee, if that be the case.

23. By dint of the provisions of **Section 26 (1)** of the Act, the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor, shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the title and the title of that proprietor shall not be subject to challenge, except-

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

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

24. In the circumstances of this case, where the plaintiff has produced a certificate of title issued by the registrar showing that he is the absolute proprietor of the suit property and where no evidence has been led to establish any of the above cited grounds upon which the title may be challenged, I find the defendants' encroachment into the suit property, for whatever reason the defendants might be having, to be inconsistent with the plaintiff's right as the absolute proprietor of the suit property.

25. For the foregoing reasons, I find and hold that the plaintiff has made up a case for being declared the exclusive owner of the suit property and for eviction of the plaintiffs from the suit property.

26. The dispute herein being between family members, I award no costs.

27. In effecting the order of eviction the plaintiff is directed to ensure strict compliance with the law regarding evictions.

28. Orders accordingly.

Dated, signed and delivered Nyeri this 26th day of September, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff

Mr. Muthigani for the defendant

Court assistant - Esther