



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 160 OF 2006

MARY WANGARE GICHUKI.....PLAINTIFF

VERSUS

JOHN KIARIE GICHUKI.....DEFENDANT

JUDGMENT

INTRODUCTION

The Pleadings

1. The plaintiff filed this suit on **11/9/2006**. He filed an amended plaint on **18/6/2015** and later filed a further amended plaint on **14/11/2017**. In the further amended plaint, she sought the following orders:

- i. A declaration that the defendant is a trespasser an order of a permanent injunction restraining the defendant his agents/servants or any other person from entering, occupying, tilling or in any way interfering with the Nyakinyua Mugumo Tree Co. Ltd formally Plot No. 1426 new Share Numbers being 677 and 678.**
- ii. An order of eviction of the defendant from Plots Nos. 1426 New Share Numbers 677 and 678 on Nyakinyua Mugumo Tree Co. Ltd Farm.**
- iii. Cost of the suit.**
- iv. Any other relief this court may deem just to grant under the circumstances.**

2. The defendant filed his initial defence on **17/10/2006** and an amended defence on the **9th July, 2015**. He filed a reply to further amended plaint on **30/11/2017**.

The Plaintiff's Case

3. According to the further amended plaint the plaintiff's case is that she is a member of the Nyakinyua Muguma Tree Co Ltd and an allottee of two shares on the company's land parcel known as Nyakinyua Mugumo Tree Co Ltd Farm. Her entitlement in that farm is approximately two acres. The plaintiff describes the defendant as a licensee whom she allowed to till the suit land in the year 2000. However the defendant built a semi-permanent house on the suit land and is in breach of the terms of the licence hence the instant suit.

The Defendant's Defence

4. The defendant denied that he is a licensee and averred that he and his mother (who also happens to be the plaintiff's mother) bought shares in the company. He further pleads that the main land parcel has not been subdivided and the plaintiff's individual acreage can not be known. The defendant's position is that he and the plaintiff have equal right to occupy the suit land. In his reply to further amended plaint the defendant states that the company only allowed women to have shares and that his mother used the plaintiff's name to get a share for herself when the plaintiff was quite young and could not pay for the shares. He avers that he has been in possession of the land while the plaintiff has never lived thereon. He contends that he can not be evicted from the land for those reasons. He terms the plaintiff's documents as forgeries.

The Plaintiff's Evidence

5. The plaintiff testified on 11/7/2018 as PW1. She identified the defendant as her brother; she stated that he occupies plots Nos. 677 and 678

which she bought from the Nyakinyua Muguma Tree Company. She produced her share certificates as P. Exh 1(a) and 1(b). Each share cost Kshs. 3,000/=; by the time she bought the shares she was caring for both her mother and the defendant who was quite young. In the year 2000 she asked the defendant to reside on a small portion of the suit land. The defendant later on sent her a letter telling her to stop farming on the suit land and this dispute began. The defendant chased the plaintiff away from the suit land. When their mother died the defendant wanted to bury her remains on the suit land but the plaintiff obtained an injunction and the burial took place elsewhere on the deceased's own land. The defendant is said to be in possession of another parcel on the same farm which still belongs to their mother. The plaintiff termed the defendant's documents as fake and indicated that the persons named therein as directors were not the true directors of the company. She testified that the proper directors are women. She testified that when she saw his documents she reported to Kachibora Police Station regarding the impostor directors and that there is a case pending in court regarding directorships. She reiterated her prayers in the further amended plaint.

6. On cross examination she stated that she used her earnings from her job when she was employed by her elder sister at the age of about 18 years. She produced two some share certificates that looked new and explained that the company kept changing certificates and that is how she got the new ones. She asserted that the defendant lives on plot number 677. This number was issued in 2016 and titles are being awaited for the plots in the farm. She testified that she has also bought himself land at **Moi's Bridge** and that though she is entitled to inherit her mother's land she does not wish to do so and he has left it to her brothers. She want her brother to go and reside on their mother's plot as in her words, he had "*lacked courtesy.*"

7. **PW2 Wanjiru Chege Waithaka** testified that she is now about **85 years old**; that she lived near **Moi's Bridge**; that she was involved in the buying of the company land using monies collected from shareholders; that she knew the plaintiff; that the plaintiff paid **Kshs. 6000/=** which was the equivalent of **2 acres**; that the certificates that the plaintiff produced were the genuine certificates and that there were no inclusion of men's names in the company register. She denied that the company had issued the defendant with any land. When shown the documents of the defendant she stated that she does not know the persons named therein as executing the documents purportedly on behalf of the company. According to her it was the plaintiff and not the defendant who was entitled to the land.

The Defendant's Evidence

8. The defendant testified on **12/7/2018** as **DW1**. He identified the plaintiff as his sister; he averred that he and the plaintiff came to the suit land in the year **1982** while quite young; that in the year 1987 her siblings left the suit land until **2009** when their mother died; that he has been on the land for **39 years**, that their mother was a member of Nyakinyua Mugumo Tree Co Ltd; that he never evicted the plaintiff from the suit land. He produced a **Share Certificate No 241** dated **14/7/77** as **D.Exh 1**; it is issued in the name of their deceased mother; he produced a certificate of postal search dated **18/8/2015**. It shows that he is the current registered proprietor of **LR No. 1803/300**. He also produced beacon certificate issued in his name for **Plot No 1803/300**. He stated that his mother was buried on **LR 1803/300**. According to him the parcel of land represented by the share certificate in his mother's name is **1.672 hectares**. He averred that he processed his ownership documents in **2015**. He admitted that he has not taken out any letters of administration to the deceased's estate and that the effecting of the change into his name in the ownership documents was done before letters of administration in respect of his late mother's estate had been issued.

The Parties' Submissions

9. I have perused the court record and I have found no submissions filed on behalf of the plaintiff. The defendant filed his submissions on 29/8/2018. I have considered those submissions.

DETERMINATION

Issues for Determination

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

- a. Whether the defendant should be declared a trespasser on the suit land.**
- b. What orders should issue?**

(a) Whether the defendant should be declared a trespasser on the suit land

11. The plaintiff produced share certificates showing that she had shares in the **Nyakinyua Mugumo Tree Co Ltd**. On the issue of newness of the documents she explained that the company kept issuing new share certificates to replace the old, and her old ones were also replaced.

12. The plaintiff also called the treasurer of the company as her witness. **PW2**, the treasurer recognized the share certificates of the plaintiff as emanating from the company and that they had been issued recently. She testified that the plaintiff came from Cherangany and joined the company. After she paid the required monies amounting to **Kshs. 6000**. She also recognized the plaintiff as the owner of the suit land. She denied that the company has given the defendant any land. She stated that the persons who signed the defendant's documents were not working for the company. She averred that only women could become leaders or be registered in the company. She also confirmed that the plaintiff's mother owned one acre, and that the land parcel owned by the plaintiff's mother was situate about 1.5 kilometres from the plaintiff's parcel. She also confirmed in her statement that the defendant has invaded the plaintiff's parcel. I have noted that she is not the only director who was lined up to testify in this case. One Muthoni Nganga was also expected to testify but she is reported to have met her demise before about three months before the hearing of this case. However her thumbprinted statement is on the record. That statement also recognized the plaintiff as the owner of the land. It corroborates evidence given by the treasurer. It corroborates the evidence of the plaintiff to the effect that the defendant had attempted to bury their late mother on the plaintiff's plot but his plan was thwarted and he ended up burying the deceased on the deceased's plot of land located elsewhere. The defendant has had occasion to examine the witness statements of

the plaintiff's witnesses since they were filed in the year 2011. In response thereto he filed only his own statement 6 years later on 28/4/2017 in which he does not address the issues raised by the witness statements of the plaintiff's witnesses. The evidence of the company directors is therefore not controverted.

13. The defendant produced an old certificate issued by **Nyakinyua Mugumo Tree Society** to his mother and in her name and averred that this is the certificate from which allegedly came the entitlement to the land on which he was residing, which the plaintiff now claim to be his. Though the defendant admitted that his mother had other land she had acquired from the company, he never produced any other share certificate in respect of that land. In his oral evidence he admitted that **D.Exh 1** shows on its face that it is in respect of only one share. It was the company directors' evidence that one share was equivalent to one acre. However the land the plaintiff claims to be his is more than one acre. He has not linked the documents he has to the land he occupies on the ground. In his witness statement dated **28/4/2017** he stated that the land that he is living on belonged to his mother and that her initial plan was to give it to him as the last born son. He avers that he is the registered owner of that land parcel. He also produced a transfer into his name of **LR No. 1800/300** from Nyakinyua Mugumo Tree Co Ltd dated **22/6/2015**. It is signed by persons who are said to be directors of the company, that is James Ndungu Kero, Aaron Njoroge Miare, Joseph Mwangi Gichuhi. He called none of the signatories to give evidence in his defence. He denied knowledge of any criminal case commenced against the persons who signed his documents. However the plaintiff also produced no documentary evidence of such a case.

I find the testimony of the defendant to be lacking in truth. The share certificate he produced in his mother's name is for only one share which translates to one acre on the ground. It can not be said to be in respect of the land that he is currently occupying. **CONCLUSION**

(b) What orders should issue?

14. Upon consideration of the above evidence I find that the land that was owned by the plaintiff's mother was different from the land that is owned by the plaintiff. The defendant has no share certificate in his name and he can not claim any land save under the plaintiff or her mother.

15. If the defendant claimed under his mother he had to first have letters of administration to her estate in order to have the land transferred to him if at all it had to. However he is in the process of acquiring the land and transferring it in his name without applying for a grant of letters of administration to his late mother's estate. This is irregular. It is that conduct that reveals the defendant to be a dishonest person who is out to reap where he never sowed. The land on which he is currently residing belongs to the plaintiff. He can only reside thereon with the license from the plaintiff. If the plaintiff withdraws this license he can not be deemed to have any right to reside thereon any more. The plaintiff has withdrawn this right and wants her land back. He has informed the defendant as much including by means of this suit but the defendant is still in occupation of the suit land. As the land has been found to belong to the plaintiff and she has expressly stated that she has withdrawn her licence formerly issued to the defendant to reside thereon, and the defendant has not demonstrated that he has any other right under which he can claim the land, I find that the defendant has been reduced to a trespasser by means of that withdrawal of license.

16. The defendant has acknowledged that there is other land belonging to his mother. However the plaintiff only wants the land that she had allowed the defendant to use and which she chased her from, but has renounced her interest in any other land that her mother had. She is of the opinion that the defendant and his other brothers can have her mother's land.

17. For the above mentioned reasons I find that the plaintiff has proved his claim on a balance of probabilities against the defendant and that she is entitled to own and occupy the land currently occupied by the defendant.

18. I also find that the defendant's documents of transfer to his name have been processed in a suspect manner and should be investigated by the proper authorities and the appropriate action taken if he is found to have committed any offence.

19. In view of the foregoing, I therefore enter judgment in favour of the plaintiff against the defendant. I issue the following orders:

i. An order of declaration, declaring that the plaintiff is the owner of Nyakinyua Mugumo Tree Co. Ltd formerly Plot No. 1426 new Share Numbers being 677 and 678.

ii. An order of declaration, declaring that the defendant is a trespasser on Nyakinyua Mugumo Tree Co. Ltd formerly Plot No. 1426 new Share Numbers being 677 and 678.

iii. An order of a permanent injunction restraining the defendant his agents/servants or any other person claiming under him from entering, occupying, tilling on or in any way interfering with the Nyakinyua Mugumo Tree Co. Ltd formerly Plot No. 1426 new Share Numbers being 677 and 678.

iv. An order of eviction of the defendant from Plots Nos. 1426 New Share Numbers 677 and 678 on Nyakinyua Mugumo Tree Co. Ltd Farm.

v. An order that the defendant shall bear the costs of the suit.

It is so ordered.

Dated, signed and delivered at Kitale on this 24th day of **September, 2018.**

MWANGI NJOROGE

JUDGE

24/9/2018

Coram: Before Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Munialo for the defendant

Ms. Mangutusi holding brief for Kraido for plaintiff

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

24/9/2018