



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L NO. 306 OF 2017

ROSE KIPRONO.....PLAINTIFF

VERSUS

KIPKULEI CHANGWONY.....1ST DEFENDANT

JOSEPH KULEI.....2ND DEFENDANT

JUDGMENT

By a plaint dated 13th September 2017, the plaintiff herein sued the defendants seeking for the following orders:

- 1) An order compelling the 1st defendant to withdraw the caution lodged on 22nd March, 2016.
- 2) Eviction order against the 2nd defendant.
- 3) An order of permanent injunction restraining the defendants and their agents from interfering with the plaintiff's rights to land parcel NO.BARINGO/KEWAMOI 'B' /69.
- 4) Costs.

This matter came up for hearing on 11th June 2018 when the plaintiff and the defendant gave evidence. It was the plaintiff's evidence that she is the registered owner of all that parcel of land known as BARINGO/KEWAMOI 'B' /69 of which she produced a title deed as an exhibit before the court. She stated that she was registered as such on 11/3/16 and that the land measures 10 hectares.

It was further the plaintiff's evidence that before 2016 the title deed was in the name of her late husband who died in 2005. She also stated that she filed a succession cause and got the title deed in her name vide transmission.

The plaintiff stated in her evidence that she has sued the defendants because they lodged a caution on the land which she ascertained by conducting a search at the land's registry. She produced demand letters that she had written to the defendants through her advocate but they neither removed the caution nor moved out of the land. It was further her testimony that the defendants are not entitled to the land as the husband was a younger brother and that the assertion that he was holding the land in trust for them is not true.

The plaintiff also stated that the land was given to her late husband by his father and when she filed a Succession Cause, nobody filed an objection to claim the land.

On cross examination by Counsel for the defendant, the plaintiff confirmed that the land belonged to her late husband and that the defendant came to the suit land in 2016 without her permission. She also stated that the brother in-laws wanted the land divided into two portions of which she did not agree to prompting her to seek legal redress in court. The plaintiff therefore closed her case and urged the court to enter judgment in her favour.

Defence Case

The 1st defendant testified and stated that the plaintiff is his younger brother's wife who is deceased. He stated that it is his deceased father who was staying on the suit land but cannot remember whether he had a title to the land.

It was further his evidence that he was not aware that the plaintiff had already been issued with a title and that the plaintiff does not reside on the suit land. He stated that it is his son the 2nd defendant who resides on the land.

The defendant testified that he thought the title was in his father's name and that he lodged a caution on 22/3/16 because the plaintiff wanted to sell the land. He further stated that he instructed his Counsel to file a defence and counterclaim to demand half the land that is registered in the plaintiff's name on the basis that she is holding it in trust for him.

The defendant produced some minutes which he stated that the family had met and agreed that the land be divided into half. He admitted that the plaintiff neither agreed to the resolution nor signed the minutes. He therefore urged the court to order that the suit land be divided into two equal parts.

On cross examination the defendant admitted that everyone was given land by their late father and that he has his title deeds. He further admitted that it is the plaintiff's husband who built a house for their father. The defendant stated that he did not know when the plaintiff's husband was registered as an owner and that he did not have any evidence that the plaintiff was holding the land in trust for them. It was also his evidence that he did not sign the family meeting minutes and that the plaintiff did not agree with the verdict. He finally stated that there were no elders in the meeting, the only people who were there were his children and his wife.

The defendant therefore closed his case.

Counsel for the parties therefore filed submissions and reiterated the evidence of their clients. Counsel for the plaintiff listed the following issues for determination by the court.

- 1) Whether the Plaintiff holds the title of the suit land in trust for the Defendant.
- 2) Whether the Defendants are entitled to an equal share of the land.
- 3) Whether the Plaintiff is entitled to the prayers sought.
- 4) Who will pay costs of the suit.

Counsel submitted on the issues above and came to the conclusion that the plaintiff does not hold the title to the suit land in trust for the defendants as there is no trust relationship. The Plaintiff inherited her husband's land parcel BARINGO/KEWAMOI 'B'/69 vide transmission. Her deceased husband CHARLES CHANGWONY inherited the suit land from his deceased father just like his other siblings including the Defendant.

None of the Defendants siblings raised an issue of ownership of the land parcels registered in individual names of each of the brothers while their father was alive. The 1st Defendant never raised an issue of ownership of the suit land while the Plaintiff's husband was alive.

Counsel submitted that the plaintiff having proved that she is the absolute registered owner of the suit land and not holding the land in trust for anybody, is entitled to the orders sought. That the defendant alleged fraud but did not plead specifically or prove as required by law.

He urged the court to enter judgment in favour of the plaintiff as prayed in the plaint.

Defendant's Submission

Counsel for the defendant filed submissions and stated that the plaintiff's husband was fraudulently registered as an owner of the suit parcel of land and therefore the same should be subdivided into half. He urged the court to dismiss the plaintiff's claim and order for the subdivision of the suit land into two.

Analysis and Determination

The issues for determination in this case are as to whether the plaintiff holds the suit land in trust for the defendant and whether the defendants are entitled to half share of the land.

From the evidence on record there was no indication that the plaintiff held this land in trust for the defendants. The defendant gave evidence and did not seem to have any clue that the land was registered in the plaintiff's late husband's name. He also did not know whether the land was registered in their late father's name. He admitted that they were 8 sons and all were given land by their father of which they hold titles. He further admitted that the other brothers were not claiming the suit land from the plaintiff. How come he is the one claiming to be a beneficiary of the land and his son and not the other brothers?

This is a case of greed and an attempt to disinherit a widow who has a right to inherit her spouse's property. Why is the 1st defendant pushing the son who is the 2nd defendant to occupy the plaintiff's land? It should be noted that the 2nd defendant did not even give evidence to claim the right as a person who claims to be in occupation.

The plaintiff produced a copy of her title deed registered in her name and this is prima facie evidence that she is the absolute registered owner of the suit land. There was no proof that the title was procured fraudulently or through misrepresentation. If that was the case then the title can be cancelled as provided for under section 24, 25, and 26 of the land Registration Act 2012.

The defendant tried to allege fraud which was unfounded and not supported by any evidence. It was neither pleaded nor proved by the defendant. The defendant was on a wild goose chase which did not end anywhere. Further the defendant urged the court to order that the land be subdivided into half to be given to them but did not give the basis of such finding.

The plaintiff got registered as an owner after filing a Succession Cause of which the defendants did not file an objection to. If they had a claim then they should have filed an objection or a revocation of the grant if they felt that it had been fraudulently obtained.

On the issue that the defendant lodged a caution on the suit land because the plaintiff wanted to sell the land, the plaintiff being a registered owner has all rights to do whatever she wishes with the land without seeking for any consent from the defendant. She has a right to property as enshrined in the Constitution. I find that the plaintiff has proved her case on a balance of probabilities and therefore enter judgment as prayed in the plaint and dismiss the defendant's counterclaim with costs.

I therefore make the following orders.

- 1) An order is hereby issued compelling the 1st defendant to withdraw the caution lodged on 22nd March, 2016 within 30 days failure of which the Land Registrar is hereby directed to remove it accordingly.
- 2) The 2nd defendant to vacate the suit premises within the next 30 days failure of which an eviction order to issue.
- 3) An order is hereby issued for a permanent injunction restraining the defendants and their agents from interfering with the plaintiff's rights to land on parcel NO.BARINGO/KEWAMOI 'B' /69.
- 4) Defendant's counterclaim is dismissed with costs to the plaintiff.
- 5) The defendants to pay costs of the suit.

Dated and delivered at Eldoret this 20th day of September, 2018

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. Kipnyekwei for Plaintiff and Miss Kibichy Holding brief for Mr. Okara for Defendant.

Mr. Koech: Court Assistant.