REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 137 OF 2014

(FORMERLY EMBU ELC NO. 51 OF 2007)

VINCENT NTHIGA.....1ST PLAINTIFF

GRACE WAWIRA NJAGI.....2ND PLAINTIFF

VERSUS

TIMOTHY MWANIKI NJAGI.....DEFENDANT

JUDGEMENT

1. By a plaint dated 14th April 2007 and filed on 16th April 2007, the 1st and 2nd Plaintiffs sought the following reliefs against the Defendant;

    a. An order vesting ¾ of an acre out of Title No. Kagaari/Kanja/5921 upon the Plaintiffs.

    b. Costs of the suit.

2. The Plaintiffs pleaded that at "one material time" their late mother, Loise Rwamba Njeru, was the registered owner of *Title No. Kagaari/Kanja/5921* (hereinafter called the *suit property*) measuring approximately 1½ acres. It was further pleaded that their said mother was misled into transferring the suit property to the Defendant.

3. It was the Plaintiffs' case that upon their mother discovering that she had been so misled, she made a written will on 12th August 2006 declaring that upon her death, the suit property should be shared amongst the Plaintiffs and the Defendants in the manner particularized in paragraph 5 of the plaint.

4. It was the Plaintiffs' case that the Defendant, who was their brother, had refused or neglected to honour the said will hence the suit.

5. The Defendant filed a written statement of defence dated 4th May 2007 which denied the Plaintiffs' claim in its entirety. The Defendant pleaded that their late mother had transferred the suit property to him as absolute owner for consideration. It was further pleaded that the Plaintiffs had received their respective share of property from their parents hence they had no legitimate claim against him.

6. The Defendant also contended that the suit was misconceived, ill-advised, fatally defective and an abuse of the court process. He threatened to raise a preliminary objection to the suit at the first hearing thereof.

7. At the hearing hereof, the 1st Plaintiff testified on behalf of both Plaintiffs and called two more witnesses after which the Plaintiffs' case was closed. The summary of the Plaintiffs' case was that the suit property initially belonged to their late mother and that when she was nearing her death, she convened a family meeting at which she gave directions on the sharing of the suit property. The Defendant was said to have attended the said meeting which resulted into an agreement which was signed by all the concerned parties and 3 additional witnesses. That is the meeting which resulted in the agreement dated 12th August 2006 which was produced as exhibit P 1.

8. It was the Plaintiffs' case that since the title deed was already in the name of the Defendant, it was recalled by their mother who then handed it to PW 2 who was present in that meeting as a witness. The evidence of PW 2 was to that effect and he is the one who produced the original title deed for the suit property in court.

9. On the other hand, the Defendant testified on his own behalf as the sole witness and closed his case. The gist of his evidence was that the

suit property was given to him by his late mother because he used to take care of her during old age. He had built a house for her and he was the one who was footing her medical expenses. In his view, it was a token of appreciation from her mother. He relied upon a letter dated 16th February 2006 by which her late mother gifted the suit property to him.

10. The Defendant denied having signed the family agreement dated 12th August 2006. He claimed that his signature had been forged and that it was the Plaintiffs who had forced him to surrender the original title deed which was in the custody of PW 2. He, therefore, asked the court to dismiss the 1st and 2nd Plaintiffs' suit.

11. The court has considered the pleadings, the evidence on record as well as the parties' respective submissions. The court has noted from the record that the parties did not file an agreed statement of issues for determination. The Defendant's advocate filed his version of issues dated 3rd August 2010 but there is no indication of any such statement having been filed by the Plaintiffs.

12. The court shall, therefore, proceed to frame the issues for determination in this suit. In the opinion of the court, the following issues arise for determination;

a. Whether the late Loise Rwamba Njeru was misled into transferring the suit property to the Defendant.

b. Whether the late Loise Rwamba Njeru left behind a valid will with respect to the disposal of the suit property.

c. Whether the Defendant is the absolute proprietor of the suit property or whether he is holding it on his own behalf and in trust for the Plaintiffs.

d. Whether the Plaintiffs are entitled to the reliefs sought in the plaint.

e. Who shall bear the costs of the suit.

13. The court has considered the pleadings and the evidence on record on the 1st issue. The court notes that even though the Plaintiff had pleaded in para 5 of the plaint that their late mother was *misled* into transferring the suit property to the Defendant, no particulars were given as to how, when and by whom she was misled. No particulars of fraud, mistake or misrepresentation were provided. The court has also noted that none of the Plaintiffs' witnesses led any evidence on the issue either in their witness statements or oral testimony in court. The evidence on record indicates that the Plaintiffs are relying on the written agreement dated 12th September 2006 in which the wishes of their deceased mother were said to be contained. The court, therefore, finds no evidence on record to establish that the deceased was misled into transferring the suit property to the Defendant.

14. The 2nd issue is whether the late Loise Rwamba left behind a valid will with respect to the disposal of the suit property. The Plaintiffs' case was that the deceased made a valid will on the disposal of the suit property upon her death. It was contended that the agreement dated 12th August 2006 which was produced as exhibit P 1 was the will.

15. The court has looked at the said exhibit carefully. It is styled as an *agreement* and it is signed by the family members of the deceased as well as 3 other witnesses. DW 2 and DW 3 are amongst the witnesses who signed it. The court has no doubt that the said agreement was signed by the parties whose names and signatures appear therein. The court does not accept the Defendant's contention that he did not sign it and that his signature thereon was forged. The court is satisfied that such a family meeting was held as stated by the Plaintiffs and their witnesses. The court also accepts that the original title deed was handed over to PW 2 by the deceased.

16. The court is, however, unable to accede to the Plaintiffs' plea for a share of the suit property for three reasons. Firstly, even though there is no particular formality to be followed in the drafting of a will, the fact that it was signed by the intended beneficiaries invalidates the purported will. A valid will is one which is duly executed by the testator and attested to by witnesses who are not beneficiaries under the will. Where the beneficiaries sign such a will then their signatures must be further attested by other competent and independent witnesses. See **section 13 (2) of the Law of Succession Act (Cap 160).**

17. Secondly, the testator can only make what he or she legally owns the subject of a will i.e. the free property of the testator. A testator cannot legitimately make landed property the subject of a will where it is registered in the name of a different person. There is no doubt that the suit property had been transferred by the deceased to the Defendant before the said will was made. It was an *inter vivos* transfer. It is quite different from a testamentary instrument which takes effect only upon the death of the maker.

18. In the absence of evidence of fraud in the Defendant's acquisition of the suit property all the rights of a registered proprietor under the applicable law i.e. the **Registered Land Act** (now repealed) attached immediately upon the registration of the Defendant as proprietor in 2006. The title deed which was produced by PW 2 indicated that it was issued to the Defendant on 28th June 2006 long before the purported will dated 12th August 2006 was made. It was like trying to close the stable after the horse had bolted.

19. Thirdly, even if the court were to find that there was a valid will made by the deceased, the issue of proof and execution of that will would fall within the jurisdiction of the succession court under the **Law of Succession Act (Cap 160).** The Environment and Land Court would have no jurisdiction to undertake distribution of the estate of a deceased person who died testate.

20. In view of the court's findings and holdings on the preceding two issues, it would follow that the Defendant is the absolute proprietor of the suit property. The suit property was transferred to him by the deceased during her lifetime. There is evidence on record that the deceased had initially subdivided her 6 acre parcel of land and distributed it among her children. Each child was given 1 ½ acres whereas the deceased retained the suit property which also measured 1 ½ acres. So, when the deceased transferred it to the Defendant during her lifetime, her

interest in the suit property terminated at that point. In the opinion of the court, she could not at some future date change her mind and dispose of the suit property through a will.

21. The 4th issue is whether the Plaintiffs are entitled to the reliefs sought in the plaint. Since the Plaintiffs have failed to prove their case on a balance of probabilities as required by law, it would follow that they are not entitled to the reliefs sought in the plaint.

22. The 5th and final issue is on costs. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court is, however, aware that all the parties to the suit are siblings. The court is of the opinion that the appropriate order to make is for each party to bear his own costs.

23. The upshot of the foregoing is that the court finds that the Plaintiffs have failed to prove their case on a balance of probabilities as required by law. The same is consequently dismissed. Each party shall bear his/her own costs.

24. It is so decided.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **11th** day of **OCTOBER, 2018.**

In the presence Mr. P.N. Mugo for the Defendant and the 1st and 2nd Plaintiffs in person.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

11.10.18