



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI LAW COURTS

ELC CASE NO. 138 OF 2015

AGNES WAMBUI MURIGI & 3 OTHERS.....PLAINTIFFS

=VERSUS=

NELSON KAGARI ALIAS NELSON KAGARI MWAURA.....DEFENDANTS

JUDGEMENT

Introduction.

1. This case was initially filed by four plaintiffs namely *Agnes Wambui Murigi, Racheal Nyambura Mbugua, Jane Nyambura Muchene and Serah Njambi Mwaura* as the 1st, 2nd, 3rd and 4th plaintiffs respectively. The 1st, 2nd and 3rd plaintiffs are sisters to the defendant whereas the 4th plaintiff is the mother to the 1st, 2nd and 3rd plaintiffs and the defendant. The 2nd and 4th plaintiffs have since the filing of the suit died and their names were struck out of the suit.

2. The subject matter of this suit is *LR No.Kiambaa/Kihara/360* which has since been closed on subdivision and it resulted into seven titles namely *LR No.Kiambaa/Kihara/5911,5912,5913,5914,5915,5916* and *5917*. *LR No.Kiambaa/Kihara 360* had been registered in the name of Sospeter Mwaura on 10th June 1958. Sospeter Mwaura was husband to the 4th plaintiff and father to 1st, 2nd and 3rd plaintiffs as well as the defendants. Sospeter Mwaura died in or around 1959 before he could obtain a title deed in respect of *LR No.Kiambaa/Kahara/360*. In or around 1979, the 4th plaintiff carried out succession process in the respect of the estate of Sospeter Mwaura and had *LR No .Kimabaa/Kihara/360* registered jointly in her name and that of the defendant in equal shares. *LR Kiambaa/Kihara/360* was registered in the name of the 4th plaintiff and defendant on 17th April 1980 and a certificate of title issued on 23rd April 1980. On 18th September 2013, the 4th plaintiff transferred her share to the defendant who became the owner of *LR No.Kiambaa/Kihara/360* which he thereafter subdivided into the seven portions referred to hereinabove.

First and third plaintiffs' case

3. The 1st and 3rd plaintiffs' case is that the defendant misled their aged mother into carrying out a succession in respect of their late father's estate without including them and that as a result of that they have lost their fathers' inheritance. It is on this basis that they want the titles which came out of *LR No.Kiambaa/Kihara/360* cancelled so that the title could revert to *LR No.Kiambaa/Kihara/360* which can then be shared amongst all the beneficiaries.

Defendant's case

4. It is the defendant's case that the process of succession was carried out by his mother who then had *LR No.Kimbab/Kihara/360* registered in her name with him jointly in equal shares. The defendant states that the plaintiffs were aware of the succession and had no issues with it as the plaintiffs are now all married. He denies that there was anything done fraudulently and that the transfer of his mother's half share to him was done with the plaintiff's knowledge. The defendant contends that it is the plaintiffs who were misleading their mother into re-opening a matter which had been settled.

Analysis

5. I have carefully gone through the statements recorded by the plaintiffs which were adopted as their evidence as well as the statement of the defendant. I have also gone through the submissions by the parties herein. The issues which emerge for determination are firstly whether the alleged succession cause was fraudulently filed at the instigation of the defendant and whether an order for cancellation of titles should be given and finally whether the plaintiffs are entitled to general damages and mesne profits.

6. There is no doubt that *LR No.Kiambaa/Kihara/360* had been registered in the name of the plaintiffs and defendant's father. A copy of the

green card filed in the case shows that the first title was processed in the name of the 4th plaintiff and the defendant. This was pursuant to a process of succession. The plaintiffs did not provide the succession cause number. The succession cause appears to have been carried out in 1979. The 1st plaintiff while under cross examination stated that she had no problem with the succession cause and the transfer which occurred in 1979. The 3rd plaintiff also stated while under cross examination that she had no problem with the succession cause.

7. As at the time the succession process was going on, the 1st plaintiff had not been married. She was married in 1986. The third defendant had been married in 1976. It is therefore clear that when the process of succession was going on, she was not at home. The plaintiffs did not provide the succession cause number. The details of that succession cause are not known. There was no proof that the process was fraudulently undertaken. A look at the plaintiff's claim shows that their intention is to have the land shared amongst all beneficiaries of the estate of their father. If this be the case as it is even from the particulars of the alleged fraud, then this is a matter they should have raised in the Family Division of the High Court. Their contention is that they were denied their lawful inheritance. The proper court to address their grievances should have been the Family Division of the High Court. As the plaintiffs have not proved that the succession cause was fraudulently carried out, there is no basis upon which the subdivision arising from *LR No. Kimbaa/Kihara/360* can be cancelled.

8. The Plaintiffs stated that they are all married and do not live on the land in issue. They have always known that it is their mother and the defendant who were residing on the suit property. There is no basis upon which they can claim either general damages or mesne profits. Their respective rights to the suit property have not been ascertained yet. If their rights had been ascertained, then the issue of general damages and mesne profits would have been considered.

Conclusion.

9. It is clear from the pleadings and the evidence that the plaintiffs' claim is on sharing of property which was subject to succession. The proper court which should have addressed the issue is the Family Division of the High Court. The plaintiffs should first have started from the Family Division of the High Court before moving to the Environment & Land Court. I therefore find that the plaintiffs have failed to prove a case for cancellation or a case for general damages and mesne profits. The plaintiffs' case is hereby dismissed with no order as to costs as this is a case involving family members.

Dated, Signed and Delivered at Nairobi on this 26th day of November 2018.

E.O.OBAGA

JUDGE

In the presence of;-

Mr Kihara for Plaintiff

Court Clerk : Hilda

E.O.OBAGA

JUDGE