



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC CASE NO. 376 OF 2014
(Formerly NYERI HCC 36 OF 2009)

JAMES GITHUA KARONGO.....PLAINTIFF

-VERSUS-

MARGARET KIRIGO KAROGO.....DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated **25th February, 2009** the plaintiff claims that he is entitled to half share of the parcel of the parcel of land known as **Naromoru/Block 1/Ragati/7** (hereinafter referred to as the suit property) measuring 4.8 hectares.
2. The plaintiff contends that the suit property was registered in the name of the defendant to hold on his behalf and on her own behalf.
3. According to the plaintiff, it was expected that the defendant would, on demand from him, transfer to him his share of the suit property.
4. Explaining that he has extensively improved the suit property by planting food crops therein, the plaintiff claims that the defendant, in breach of the pleaded trust, has refused to transfer to him his share of the suit property and instead threatened to evict him therefrom.
5. The plaintiff further blames the defendant for having caused the suit property to be sub-divided and the sub- divisions registered in her name.
6. The plaintiff therefore, prays for cancellation of the new titles and restoration of the original title, costs of the suit and any other relief that the court may deem fit to grant.
7. Vide her statement of defence dated **10th December, 2013**, the defendant denies the allegations levelled against her and contends that she is the one who bought the suit property through her mother.
8. It is the defendant's case that in recognition of the fact that she was the actual owner of the suit property, her mother transferred it (the suit property) to her.

9. Contrary to the plaintiff's contention that he has been the one in use and occupation of the suit property, the defendant contends that the plaintiff has never occupied or developed the suit property.

10. Concerning the sub-division of the suit property, the defendant contends that as the absolute owner of the suit property, she had the right to sub-divide and transfer it.

EVIDENCE

The plaintiff's case

11. When the matter came up for hearing, the plaintiff who testified as P.W.1 informed the court that his mother called him in 1991 and informed him that she had bought the suit property from Ragati Society at Kshs. 4000/= . He claimed that his mother paid Kshs.1200/= towards the purchase price and that he paid the balance plus Kshs.500/= as surveyors fees.

12. He admitted that their mother bought land for the defendant but contended that the parcel his mother bought for the defendant was different from the suit property.

13. He further contended that he entered into an agreement with his mother for transfer of 9 acres from the suit property to him, being his contribution in acquisition of the property.

14. Arguing that the suit property was transferred to the defendant by mistake or fraudulently, he urged the court to order that he gets 9 acres out of the suit property on account of the role he played in its acquisition and the care he gave to his mother.

15. Upon cross examination, he admitted that there was a case between the defendant and his brother's wife but contended that the case was in respect of another parcel of land.

16. Concerning his contention that the transfer in favour of the defendant was effected fraudulently, he admitted that he did not report the alleged fraud to authorities for investigation.

The defence case

17. On her part, the defendant who testified as D.W.1 informed the court that she purchased the suit property through her mother and that the plaintiff was a party to the process of transfer of the suit property to her.

18. Concerning the allegation that the suit property was fraudulently transferred to her, she informed the court that the relevant laws and procedures were complied with in transferring the suit property to her.

Analysis and determination

19. From the pleadings filed in this matter and the testimonies of the respective parties, the issues for the court's determination are found to be as follows:

(i) Departure from pleadings;

(ii) Proof of trust

20. On the issue of departure from pleadings, it is noteworthy that the plaintiff who premised his claim on the allegation that the property belonged to his mother resiled from that position and urged his claim on the allegation that he contributed to the acquisition of the suit property; that he entered into an agreement with his mother for transfer of the portion he claims and that he is the one who took care of his mother. He also urged his case based on alleged fraud in transfer of the suit property when he had not raised any issues of fraud in his pleading. Consequently, he violated **Order 2 Rule 6** of the Civil Procedure Rules which prohibits parties to suits from urging cases different from those contained in their pleadings. In this

regard see the said provision of the law which provides as follows:

“No party may in any pleading make an allegation of fact or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.”

21. Whilst the plaintiff set out to prove that the defendant’s registration is subject to his pleaded trust, he changed his case and urged a different case altogether, based on the role he played in the acquisition of the suit property and the allegations that registration of the suit property in favour of the defendant was effected fraudulently.

22. Since the plaintiff had not pleaded fraud, he is by law estopped from relying on it. Be that as it may, other than raising allegations of fraud against the defendant, the plaintiff led no evidence capable of proving the alleged fraud.

23. The plaintiff also failed to produce any evidence capable of showing that registration of the suit property in the name of the defendant is subject to any trust in his favour and/or that the registration of the suit property in favour of the defendant was effected by mistake.

24. The upshot of the foregoing is that the plaintiff has failed to prove his case against the defendant. Consequently, I dismiss the case with costs to the defendant.

Dated, signed and delivered in open court at Nyeri this 27th day of February, 2017

L. N. WAITHAKA

JUDGE

In the presence of:

Mrs. Kainga for the defendants

James Githua Karongo – plaintiff

Court clerk - Esther