



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 160 OF 2013

SAMUEL KARURI GITONGA.....1ST PLAINTIFF

CYRUS GITONGA.....2ND PLAINTIFF

VERSUS

PETER KAMAU.....1ST DEFENDANT

JOHN MACHARIA GICHURU.....2ND DEFENDANT

JOYCE MUTHONI NJAMURU.....3RD DEFENDANT

PETER KAMAU GITONGA.....4TH DEFENDANT

JUDGMENT

Introduction

1. The following facts of this case are either common ground or uncontroveted:

- a) That the parcel of land known as **Othaya Kiahungu/320** (hereinafter referred to as the suit property) was registered in the name of the 1st defendant to hold on his own behalf and on behalf of his brothers namely Gitonga Karuri and Njamuru Kariri (both of whom are deceased).
- b) That the 1st plaintiff's mother, Ruth Wangechi Gitonga (deceased) and the 2nd plaintiff lived in the suit property.
- c) That the suit property has since been sub-divided into three parcels namely **Othaya/Kiahugu/3284; Othaya/Kiahugu/2385** and **Othaya/Kiahugu/2386**.

2. The dispute relates to:

- (i) Ownership of the tea bushes in the suit property;
- (ii) Legality or otherwise of sub-division of the suit property and transfer of the sub-divisions thereof to the 2nd and 3rd defendants herein;
- (iii) Threatened eviction of the 2nd plaintiff from the suit property and destruction of the tea bushes thereon;

(iv) Mode of division and sharing of the suit property;

(v) Compensation for the developments in the suit property.

3. Claiming that the defendants have refused to transfer a third share of the suit property to the 1st plaintiff and to compensate the 2nd plaintiff for the tea bushes he lost, the plaintiff urges the court to enter judgment in their favour for:

a) A declaration that the 1st defendant held the suit property in trust of himself and his two deceased brothers and/or their heirs/beneficiaries;

b) An order revoking the new titles issued from the suit property and restoring the original title of the suit property and an order for sub-division of the original parcel into three equal parcels;

c) Compensation of the plaintiffs for the tea bushes in the suit property in accordance with the assessment done by the Othaya Agricultural Officer.

d) Costs of the suit

e) Any further relief that the court may deem fit to grant.

EVIDENCE

The plaintiffs case

4. When the matter came up for hearing, the 1st plaintiff informed the court that the 1st defendant who has since passed on (he died on 10th August, 2015), held the suit property in trust for himself and his brothers.

5. He blamed the 1st defendant for having caused the suit property to be sub-divided and transferred without involving him yet he is the first born in his father's house (his father, Gitonga Karuru is one of the persons the 1st defendant held the suit property in trust of).

6. He informed the court that it is his mother and brother, the 2nd plaintiff, who lived in the suit property and that his mother had planted about 5000 tea bushes in the suit property. His son, the 2nd plaintiff, had also planted some of the tea bushes in the suit property.

7. He further informed the court that after subdividing the suit property, the defendants sold a portion thereof to the 2nd defendant and the 2nd defendant was the one currently picking the tea planted by his mother.

8. Arguing that his mother had bought one acre out of the suit property, he urged the court to excise it from the suit property and then distribute the remainder of the suit property to the three houses of his father.

9. Upon being cross examined, he admitted that his brothers and uncles are not complaining about the sub-division and transfer of the suit property and that in 2006, the family resolved to sell the suit property and he (1st plaintiff) offered to buy it. He admitted that he was unable to buy the suit property because at that time he was paying fees for his daughter who was at the university and that he had sought time to enable him raise the money but the family did not give him a time limit within which to make the payment.

10. He admitted that his other brothers have accepted their share of 0.35 acres allocated to them and explained that he could not accept such share because it does not include the one acre allegedly belonging to his mother.

11. Maintaining that the tea bushes in the suit property belonged to his mother, the 1st plaintiff contended that the proceeds therefrom ought to have been shared amongst his mother's children.

12. **P.W.2 Cyrus Gitonga Karuri** (the 2nd plaintiff herein), stated that he is not claiming land but compensation for the tea bushes he planted in his grandfather's land. He basis his claim on a verification certificate issued to him in 2006.

13. He admitted that the document he relies on is not a tea planter's certificate and futher admitted that another verification certificate and tea planters certificate had been issued to his grandmother, Ruth Wangechi Gitonga, on 21st May, 1993 and 2nd June, 1993 respectively showing she had planted 3000 tea bushes.

14. He admitted that her grandmother did not authorise him to plant tea on the suit property but contended that he did not need any authorisation from his grandfather to plant the tea bushes he allegedly planted in the suit property.

15. Concerning the family meeting held in 2006 where it was agreed that the suit property be sold, he stated that he is not aware of that meeting.

16. I find P.W.3 and P.W.4's testimonies irrelevant. They testified that they did not know the history of the suit property, or if any family meeting took place where it was agreed that the suit property be sold and neither were they aware that a caution meeting was held by the Land Registrar.

17. **P.W.5 Benson Githui Kangeri**, the District Agricultural Officer testified that he visited the suit property and conducted a crop assessment on instruction of the plaintiffs. He assessed the value of the tea bushes, (2970) as Kshs. 330,400 (at the rate of Kshs. 140 per plant). He did so by physically counting the tea bushes. He also relied on an agreement allegedly entered into between the 2nd plaintiff and the 2nd defendant. He produced the assessment as **Pexbt-4**.

18. He further testified that payment of the assessed amount was to be borne by the 2nd and 3rd defendants but the two never confirmed their willingness to pay the amount.

19. He stated that according to the tea verification certificate availed to him by the 2nd plaintiff, the tea bushes were 1800 as of the year 2000 although out of the 1800 tea bushes there is a likelihood that his assessment included tea bushes belonging to other people.

The defence case

20. **D.W.1 John Macharia Gichuru**, informed the court that he bought land parcels Othaya/Kiahugu/2385 and Othaya/ Kiahugu/2386. He purchased the latter parcel from Peter Karuri, Susan Wanjiru Njenga and Peter Kamundi after they consolidated their parcels.

21. He pointed out that the requisite legal procedures before transfer of the parcel to him were complied with; that is, the sellers obtained consent from the land control board to sub-divide and transfer the parcel to him.

22. With regard to land parcl Othaya/Kiahugu/2385, he informed the court that he bought it from Joyce Muthoni Njamuru (wife to first defendant's brother) and that the requisite legal processes were followed before that parcel was transferred to him. In support of his case he produced the letters of consent from the Land Control Board issued in respect of the impugned transactions and the title deeds issued to him.

23. Explaining that the concerned families were involved in the process that culminated in the sub-division and transfer of the portions of the suit properties to him, he contended that the sale included the developments therein (the tea bushes) and he is not aware that the sale agreement stated that the sale did not include the developments therein and the tea.

24. **D.W.2 Peter Kamau Gitonga**, a brother to the 1st defendant, confirmed that the 2nd defendant (who is the 1st defendant's son bought his share of the suit property.

25. He explained that the suit property was sub-divided into three portions after removing 1 acre that belonged to his mother and each beneficiary got 0.35 acres.

27. He denied having sold his parcel irregularly.

28. Concerning the tea on the suit property, he stated that it was planted by his mother, Ruth Wangechi Gitonga and that in the family meeting held in 2006, it was agreed that he could sell his share of the suit property with all the developments therein.

29. According to D.W.2, the 1st plaintiff was present during the family deliberations and signed the agreement which he produced as **Dexbt-5(a)** and its translated version as **Dexbt-5(b)**.

30. He pointed out that the caution lodged by the 1st plaintiff to restrain dealings with the suit property was removed by the Registrar after giving all parties involved a chance to be heard. He produced the proceedings for removal of caution as **Dexbt-6**.

31. According to him, the suit property was divided in accordance with the wishes of his grandfather, father and mother and the 1st plaintiff was given his own share of the suit property being parcel No.2384.

32. He explained that although the parcel allocated to the 1st plaintiff is still in the name of the 1st defendant, it is the plaintiff and his family who use it.

33. At the close of hearing of the suit, parties filed submissions which I had read and considered.

34. From the pleadings and submissions, I find the issues for determination to be:

(i) Whether the plaintiffs have capacity to bring the suit?

(ii) Whether sub-division of the suit property and transfer of the sub-divisions therefrom was done illegally or fraudulently?

(iii) Whether the plaintiffs are entitled to compensation in respect of the tea bushes in the suit property?

Analysis and determination

35. On whether the plaintiffs have *locus standi* to bring the suit my answer is yes. This is so because their claim is premised on pleaded trust relationship between them and the 1st defendant. In my considered view, the plaintiffs as beneficiaries of the pleaded trust do not need letters of administration to pursue that claim.

36. It is also noteworthy that the issue of lack of capacity to bring the claim is not pleaded. It is admitted that the 1st defendant held the suit property in trust for himself and his brothers, one of whom is the 1st plaintiff's father.

37. It is also not indispute that the 1st plaintiff is a beneficiary of the pleaded trust.

38. On whether sub-division of the suit property and transfer of the sub-divisions therefrom was done illegally or fraudulently, I find nothing from the evidence adduced in this case that can support that claim. The evidence on record shows that the beneficiaries of the suit property agreed to sell it and share the proceeds therefrom. In this regard see **Dexbt-5b**.

39. There is also evidence on record that shows that the 1st plaintiff who wanted to be given priority in

disposal of the land, lodged a caution and unsuccessfully sought to restrain dealings with the suit property. In this regard see the proceedings for removal of the caution marked **Dexbt 6**.

40. Whilst the 1st plaintiff claims that the suit property was not shared among its beneficiaries, the evidence on record shows that the property was sub-divided amongst the beneficiaries, himself included but the 1st plaintiff was not satisfied with his share. In this regard, he claims that before sharing the property, the 1st defendant ought to have set apart one acre therefrom for his mother and then shared the remainder thereof amongst the three houses of his father. That contention, amounted to a departure from his pleadings in that, in his plaint he prayed for equal distribution of the suit property.

41. It is clear from the foregoing, that the 1st plaintiff departed from his pleadings, something that is forbidden by law. In this regard see **Order 2 Rule 6** of the Civil Procedure Rules 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.”

42. There is also evidence that the relevant legal processes were complied with in getting the suit property sub-divided and the sub-divisions thereof transferred to the beneficiaries.

43. In view of the foregoing, I find the 1st plaintiff's claim that the suit property was illegally sub-divided and the sub- divisions transferred to the 2nd defendant to be unsubstantiated or unsupported by the evidence on record.

44. With regard to the claim for compensation, the evidence on record to wit the agreement for sale of the land shows that the tea on the suit property belonged to the 1st plaintiff's mother and that she was the one to sell it. That evidence alongside the other pieces of evidence showing that the 1st plaintiff's mother, Ruth Wangechi, was the owner of the tea negates the claim by the 1st and the 2nd plaintiffs' of ownership of the tea bushes in the suit property.

45. Whereas the 1st plaintiff and the 2nd plaintiff are entitled to claim the benefit that accrued to their mother and grandmother respectively on account of the tea bushes, I hold the view that they can only do so as administrators of the estate of Ruth Wangechi and not as owners of the developments on the suit property.

46. Because the plaintiffs did not bring the claim as administrators of the estate of Ruth Wangechi, I find and hold that they lack *locus standi* to pursue that claim.

47. The upshot of the foregoing is that the plaintiffs' claim lacks merit. I, consequently dismiss it with costs to the defendants.

Dated, Signed and Delivered in open court at Nyeri this 20th day of February, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Ms Wanjira for the plaintiff

N/A for the defendants

Court clerk - Esther