



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 674 OF 2014

MOSES MAINA KIMONDO PLAINTIFF

-VERSUS-

ELIJAH WAWERU KIMONDO DEFENDANT

JUDGMENT

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

- a) That the parcel of land known as Ruguru/ Kiamanga/11/29 (hereinafter referred to as the suit property) was family land before it was registered in the name of the plaintiff;
- b) That the suit property was registered in the name of the plaintiff pursuant to succession proceedings to wit Nyeri High Court Succession Cause No.184 of 2005;
- c) That the defendant did not raise any objection to the succession proceedings;
- d) That the defendant has his own parcel of land in Laikipia/Salama Muruku Block 4/13 (PESI);
- e) The defendant lives on a portion of the suit property;
- f) That the defendant was invited to the suit property because of misunderstandings with his neighbours in Laikipia.
- g) That after the misunderstandings with his neighbours ended, the defendant refused to vacate the suit property.

2. Whereas according to the plaintiff the distribution of their father's estate was conceded by all family members, the defendant contends that the succession proceedings pursuant to which the plaintiff got registered as the properietor of the suit property were improper.

3. Arguing that the plaintiff holds the suit property in trust for him and that on account of the many years he has been in use and occupation of the suit property he has become entitled to the suit property by adverse possession, the defendant urged the court to cancel the title issued to the plaintiff and revert the matter to administration.

4. The plaintiff's case was supported by the parties' mother while that of the defendant was supported by the parties' brother, Wilson Mureithi Kimondo.

5. I have carefully read and considered the rival arguments by the parties to this suit.

6. Whilst the defendant claims that the registration of the suit property in favour of the plaintiff was effected illegally, no evidence was led capable of proving any illegality in the transfer of the suit property to the plaintiff. The evidence on record shows that the plaintiff got registered as the proprietor of the suit property pursuant to a court sanctioned process, that is to say the estate in question was succeeded to as by law required.

7. Whilst the defendant claims that the succession proceedings were improper, he took no measures to set aside the court process through which the grant pursuant to which the estate devolved to the plaintiff was made.

8. In the absence of any evidence of nullification of the grant pursuant to which the estate was devolved to the plaintiff, this court has no basis of interfering with the title issued to the plaintiff. If the defendant was dissatisfied with the succession, he ought to have applied for revocation as contemplated by the Law of Succession Act, Cap 160 Laws of Kenya. Having failed to do so, he cannot be heard to say that he is entitled to challenge the title held by the plaintiff on account of the alleged irregular succession proceedings.

9. With regard to the contention that registration of the suit property in the name of the plaintiff is subject to trust in favour of the defendant or any of his other siblings, no evidence capable of establishing the pleaded trust was led either by the defendant or his witness. That being the case and cognisance of the fact that trust must be proved by way of evidence, I find that claim to be unsupported by the evidence on record and dismiss it.

10. On whether the defendant has become entitled to the property by adverse possession, noting that his entry into the suit property was permitted by the plaintiff, I find and hold that he cannot sustain his case against the title held by the plaintiff on account of the alleged long stay in the suit property.

11. Under **Section 26** of the Land Registration Act, 2012, the defendant is not entitled to challenge the title issued to the plaintiff unless he is able to demonstrate that it was unlawfully obtained.

12. The said section of the law also obligates this court on account of the certificate of title issued to the plaintiff to take him as the absolute and indefeasible owner of the suit property.

13. As pointed out herein above, the defendant has not demonstrated that registration of the plaintiff as the absolute proprietor of the suit property is unlawful or subject to his interest as a person in occupation thereof.

14. Being of the view that the defendant's continued occupation of the suit property against the wishes of the plaintiff is unlawful, I find and hold that the plaintiff has made up a case for being granted the orders sought. Consequently, I allow the plaintiff's claim against the defendant and order the defendant to vacate the suit property within 90 days from the date of delivery of this judgment, failing which eviction orders would ensue without further reference to the court.

15. This being a family dispute, parties shall bear their own costs of the suit.

Dated, signed and delivered in open court at Nyeri this 28th day of March, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Moses Maina Kimondo – plaintiff

Mr. Elijah Waweru Kimondo – defendant

Court clerk - Esther