



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCC NO. 139 OF 2009

MARY WAITHERA MUIRURI.....PLAINTIFF

VERSUS

KURIA NGANGA.....DEFENDANT

JUDGMENT

(Suit by the plaintiff seeking to have the defendant permanently restrained from land registered in the plaintiff's name; counterclaim by defendant that the suit properties are held in trust; suit properties having been purchased by a land buying company; defendant pleading that he contributed towards purchase of shares later translated into the land parcels in dispute; in evidence defendant stating that he was employed by the land buying company and salary deducted to purchase the land; no proof of such claim; contradictions and inconsistencies in evidence of defendant; defendant's counterclaim dismissed; judgment entered for the plaintiff).

PART A: INTRODUCTION AND PLEADINGS

1. This is an old case commenced by way of plaint on 24 May 2002. It was originally filed in the High Court at Nairobi, as Nairobi HCCC No. 886 of 2002. It was later transferred to the High Court at Nakuru and registered as Nakuru HCCC No. 139 of 2009. With the creation of the Environment and Land Court in the year 2012, the case was transferred to this court for determination.

2. The plaintiff is the registered proprietor of the land parcel Nyandarua/Tumaini Ngorika Block 1 (Nyandarua)/57 measuring 2.33 Ha and Nyandarua/Tumaini Ngorika Block 1 (Nyandarua)/67 measuring 0.610 Ha. The plaintiff is the wife of the late Daniel Muiruri Ng'ang'a (the deceased), who was the brother of the defendant. It is pleaded in the plaint that prior to the demise of the deceased, the defendant was allowed to stay on the suit premises as a licensee and allowed to cultivate on part of the suit premises for his own subsistence. The plaintiff pleaded that in violation of her rights as proprietor, the defendant had embarked on cultivating the land for his commercial gain to the exclusion of the plaintiff. It was also pleaded that the defendant had filed a suit before the Land Disputes Tribunal which he failed to prosecute. In the suit, the plaintiff sought orders of permanent injunction to have the defendant restrained from the suit properties, general damages, and costs of the suit.

3. In his statement of defence, the defendant admitted that the plaintiff is the registered proprietor of the suit properties, but contended that she got herself registered by way of fraud. The following particulars of fraud are pleaded:-

(i) *That the plaintiff got herself registered as owner of the suit properties secretly without*

involving the defendant knowing well that the defendant had substantially contributed in purchasing the same.

(ii) The plaintiff got herself registered as owner of the suit land with full knowledge that his late husband Daniel Muiruri, only paid the registration fees and the balance was paid by the defendant.

(iii) The plaintiff got herself registered as the owner of the suit land knowing quite well that the defendant had relinquished his interest over the land in Gatanga/Thika in exchange of the interest over the suit premises.

(iv) The plaintiff got herself registered as owner of the suit premises knowing quite well that she had no colour of right over the same since her late husband had transferred his interest over the suit premises to the defendant.

4. He denied that he was only allowed on the suit premises as a licensee and claimed to be the legal owner of the suit properties on the basis that the same had been transferred to him by his late brother. He pleaded that the deceased only paid the registration fee of Kshs. 2,800/= and he paid the rest of the purchase price until the year 1988 when he completed payment. He pleaded that they had agreed that he would relinquish his interest over the family land in Gatanga/Thika to the plaintiff's husband so that he can settle on the suit premises. He has averred that if the orders sought in the plaint are granted, he will have no other land. He pleaded that he has occupied the suit land since the year 1970.

5. The defendant later amended his defence so as to include a counterclaim. In the counterclaim, he has sought to be declared the rightful owner of the suit properties and for an order of cancellation of the titles held by the plaintiff.

PART B: EVIDENCE OF THE PARTIES

6. In her evidence, the plaintiff testified that she lives in Gatanga and that she is the registered owner of the two suit properties situated in Nyandarua. She adopted her written statement as her evidence. I note that in it, she has averred that she is the wife of the late Daniel Muiruri. She stated that her husband died in a road traffic accident on 5 May 2000. She averred that before his demise, he had allowed the defendant to stay in a section of the land parcel No. 67 as a licensee and allowed to cultivate a portion for his subsistence. Immediately her husband died, the defendant started laying claim to the suit properties. She stated that before he died, her husband had wanted to give a portion to the defendant on humanitarian grounds but not as a co-purchaser. She stated that her late husband purchased the suit land and at no time did the defendant contribute towards its purchase. She stated that the land she occupies in Gatanga is not ancestral land as it is her late husband who purchased it. She stated that her husband was a generous man who also allowed his sister, one Rachel Wambui, to occupy another adjacent portion of land next to the suit premises and had also expressed his wish to give his sister a portion of this land as a gift. As exhibits, she produced the title deeds to the suit properties, letters of administration for the estate of the deceased, a letter dated 16 April 1967 for transfer of shares, payment receipt to Nyandarua Cooperative dated 22 August 1991 for Kshs. 150/= for survey, payment receipt to Nyandarua Cooperative dated 24 October 1992 for Kshs. 450/= being demarcation fees, and a receipt dated 20 December 1992 being council rates.

7. In cross-examination, she denied that the defendant is the owner of the suit properties. She stated that he did not contribute towards the purchase of the properties. She stated that she used a letter given to her by the cooperative to go to the lands office to process her titles. She got title before the grant of letters of administration. She stated that once a member finished paying, they would get a letter from the cooperative to take to the Lands office to process title and this is what she did. She stated that her husband was not able to process title in his name as he was a busy man. She testified that the properties were purchased by her husband in the 1960s from one Ndirangu who was a member of the Co-operative. She explained that although there are two parcels of land in the suit, the land parcel No. 67 has no controversy because it is one of her sisters in law, Rachel Wambui, who lives there and her parents and husband are buried here. She stated that they had agreed with her husband that this land will be transferred to Rachel

and in as much as she has title in her name, she will transfer the land to her. She stated that it is the land parcel No. 57 which is in issue, which is land measuring about 6 acres. She testified that after her husband died, the defendant started giving her problems over this land. She admitted that the defendant has been living on this land for a long time and may be holding some payment receipts since her late husband used to give him money to make payments. She testified that before the demise of her husband, they had agreed that this land be subdivided into two portions of 3 acres each, with herself and the defendant each retaining one portion. She stated that she has no problem giving out 3 acres to the defendant.

8. PW- 2 was Gakeri Wambui Nganga. She is sister to the late Daniel Muiruri hence sister in law to the plaintiff. She is the younger sister to the defendant. She testified that she lives in the land measuring 1.5 acres and the defendant lives in the land measuring 5.5 acres presumably the land parcels No. 67 and 57 respectively, which are in issue in this case. She testified that it is Daniel who purchased the land. Before that, they used to live in Endebess, Kitale area, where their father was employed. They moved to Endebess in the year 1960 when they were still young. Their original home was Thika in Chania Freji. She testified that this land was a white settler farm where they were raised. She stated that before Daniel died in the year 2000, he called them and informed them that they could live on the land now in dispute and give them a portion of it, not the whole of it, since he also had children. At the meeting, he told the defendant to give her one acre to plough before he could come and formally apportion the land. The defendant however did not give her the one acre but only a small portion to cultivate. She was however threatened and she left this portion and went back to the land measuring 1.5 acres. She testified that the land in Gatanga was purchased by her late brother.

9. In cross-examination, she stated that she did not know how the plaintiff got title to the suit properties. She stated that her parents, and one of her sisters are buried in the land measuring 1.5 acres.

10. With the above evidence, the plaintiff closed her case.

11. In his evidence, the defendant testified that he is the younger brother of the deceased. He lives in the land parcel No. 57. He stated that he moved into this land in the year 1970. He testified that he used to work at the Society as a driver and his salary was being deducted to pay for his share in the Society. He testified that his late brother had no share but that it is him (the defendant) who held one share. He stated that out of his share, he was allocated 7 acres of land. He stated that he set apart 1.5 acres (the parcel No. 67) for burying his parents. He testified that this is where PW-2 lives and that one of his late sisters is also buried here. He explained that it is out of pity that he allowed PW-2 to live on this parcel No. 67. He stated that she should either pay for the land or vacate the same. He testified that he has receipts to show the payments that he made for the land. He produced a total of 11 receipts. When he went to take title to the parcels of land, he found that the plaintiff had taken them and he placed a caution.

12. In cross-examination, he testified that his brother paid Kshs. 2,520/= to the Society. He stated that he also paid money. The receipts that he produced as evidencing payments were put to him. There was a receipt for Kshs. 200/= in the name of Ndirangu Kamau, which he stated that it was him (the defendant) who paid. There were also receipts dated 9 March 1976 and 24 October 1980 in the name of Muiruri Nganga (the deceased) which he also stated that he paid. There was also a receipt dated 10th June, which he stated was issued in 1960 in the name of Ndirangu Kamau. He stated that originally, it was Ndirangu Kamau who took the shares and then sold the same to his late brother. He testified that his late brother then transferred the share to him and in return, he gave him the land where the plaintiff now lives, which is land measuring 2.2 acres in Gatanga. He stated that this land was owned by their parents but he had no document to show this. He averred that it was the wish of their parents that they should not be buried here but in land owned by their sons. He was not aware of the payments made by his late brother which were produced by the defendant. He explained that he did not process the title deeds while his brother was still alive because they were in discussion with him. He admitted that he has not brought the company records to show that there was a transfer of the share from the plaintiff's deceased husband to him.

13. In re-examination, he asserted that his late brother transferred his share to him. He pointed at one receipt showing "transfer". He stated that his late brother and his immediate family never lived on this land.

14. With the above evidence, the defendant closed his case.

PART C: SUBMISSIONS OF COUNSEL

15. I invited both counsels to file submissions but only counsel for the plaintiff filed. Counsel for the defendant did not wish to make any submissions. In his submissions, Mr. Oyugi for the plaintiff, submitted inter alia that the properties in issue belonged to the plaintiff's late husband and the plaintiff acted within the law when she obtained title deeds to them. He asserted that the defendant has failed to prove his contribution towards purchase of the suit properties. He asserted that the defendant was a mere licensee. He submitted that the defendant lied that he was a driver with the Society and lied that he was deducted his salary to pay for the land. He pointed out that the defendant did not produce any document to support his alleged employment. He averred that he also failed to avail the land parcel number which he alleged to have exchanged with the deceased. He averred that the defendant did not explain why he did not effect transfer of the suit properties into his name after he completed paying the Society loan. He further submitted that the receipts produced by the defendant showed the names of the deceased and Ndirangu Kamau, the original allottee. He asked that the plaintiff's suit be allowed and the counterclaim be dismissed.

PART D: ANALYSIS AND DECISION

16. I have considered the pleadings, the evidence of the parties, and the above submissions.

17. There is no question that the plaintiff is the current registered proprietor of the land parcels Nyandarua/Tumaini Ngorika 1 (Nyandarua)/ 57 and 67. In her plaint, she wishes to have the defendant permanently restrained from these two land parcels. The defendant has a counterclaim for the two land parcels which he contends are held in trust for him and wants the title of the plaintiff cancelled. I opt to start with the counterclaim, for if I am to deny it, then I would have no reason to dismiss the case of the plaintiff.

18. It is apparent to me that the parcels of land in issue were under a land buying company known as Nyandarua Cooperative Society. As is usual with land buying companies, persons purchase shares and when the land is subdivided, they get plots of land equivalent to their shares. In our case, the defendant in his defence and counterclaim, pleaded that the defendant only paid the registration fees of Kshs. 2, 800/= and nothing else and that he (the defendant) paid the balance of the purchase price until the year 1988 when he completed payment. He further pleaded that his late brother transferred his shares to him and that it was mutually agreed that the defendant would relinquish his interest over their family land in Gatanga.

19. However, in his evidence in chief, the defendant testified that he worked as a driver in the Society and that his salary was being deducted to pay for his share. He stated that the deceased had no share in the Society and that once the shares were distributed, he got 7 acres which are comprised in the two suit properties. During cross-examination, the defendant testified that his deceased brother paid Kshs. 2, 520/= . He also conceded in cross-examination, that the share was originally owned by Ndirangu Kamau and that he is the one who sold his share to his late brother.

20. Now, if I pause here, it is apparent that there are various discrepancies in the pleadings and evidence of the defendant. First, it will be observed that in his pleadings, the defendant claimed that his brother only paid registration fees of Kshs. 2,800/= which is different from the sum of Kshs. 2,520/= that he gave during cross-examination. It will be observed further, that nowhere in his pleadings did he mention that he was employed as a driver, or indeed in any capacity, by the Society, and nowhere did he plead that he was allocated shares which he paid through salary deductions. He in fact did not produce any document to show that he was employed by the Society or any salary slips to show any salary deductions. I am not persuaded that the defendant was ever employed by the Society and I am not persuaded that he was issued with a share which he paid for out of any salary deductions. I think there is ample evidence, and indeed the defendant did concede under the pressure of cross-examination, that the original share was held by one Ndirangu who then sold it to the deceased.

21. The question that now arises is whether the deceased transferred this share to the defendant and whether the defendant contributed towards its payment. I have no evidence from the defendant of any transfer of shares. The defendant could easily have called an official of the Society to produce evidence that the share of the deceased was transferred to him which he did not do. I am not persuaded that the receipts bearing the name of the defendant are sufficient enough to enable me come to the conclusion that there was a transfer of shares from the deceased to the defendant. More is required on top of the mere production of receipts. I say so because there are also receipts bearing the name of the deceased which were produced by the plaintiff and which show that the deceased was making payment for survey in 1991, demarcation and rates in the year 1992.

22. The defendant claimed that he had agreed with his late brother that he would cede his interest in the family land in Gatanga, and in return the deceased would cede interest over the suit properties. I am not persuaded that there was any swap of parcels of land. I wonder why the defendant would cede interest over the alleged Gatanga land, if at all he paid fully for the shares in the suit properties. It doesn't make any sense to me. Why would the defendant fully pay for the suit properties and then cede interest in another land that he owns? You would probably only cede interest in what is your entitlement if the other pays for the other land so that you can swap the two. Apart from the above, I have no evidence before me that there is any family land in Gatanga. No evidence of any title was placed before me to demonstrate that the land in Gatanga was owned by the parents of the defendant and that he had a share in it. In fact, the evidence of PW-2 is that the family never owned any ancestral land and that they were only accommodated in a white settler farm in Gatanga when they used to work there. Their parents later moved to Endebess and it would seem that they were later accommodated in the suit properties herein. Given the evidence of PW- 2, the defendant needed to table cogent evidence to rebut that position and demonstrate that the land where the plaintiff lives in Gatanga, is actually family land. As I have stated, nothing whatsoever was tendered by the defendant to prove that the land in Gatanga was family land and that he was entitled to a share of it.

23. I am afraid that there are too many inconsistencies, contradictions, and gaps in the pleadings and evidence of the defendant to lead me to the conclusion that he was entitled to any share of the two suit properties. I find the defendant had not proved his counterclaim on a balance of probabilities and I therefore dismiss the counterclaim with costs to the plaintiff.

24. Let me now come to the case of the plaintiff. She is the registered owner of the two suit properties. I am not too sure how she came to be registered as proprietor for it is conceded that the properties were owned by her late husband, but there is no dispute raised by the estate of the deceased, and they appear comfortable with her ownership of the suit properties. As proprietor, she is entitled to hold the two suit properties and exercise all proprietary rights to the exclusion of all others. I have already held that the defendant has failed to prove that he is entitled to the two suit properties in issue and given that position, I am unable to deny the plaintiff the prayers that she has sought in her suit. I am persuaded from the evidence, that the defendant was only permitted to be on the suit properties as licensee. Indeed, I do note that the deceased did allow other members of his family, use of his properties. For example, PW-2 did concede that she is on the land parcel No. 67 courtesy of the generosity of the deceased. He himself lived in Gatanga, not on the suit properties, and it is not unusual in our society for one to let his/her relatives utilize land that the person owns but is not using it. That to me appears to have been what happened in this case. Indeed, if the defendant rightfully owned the two parcels of land in issue, I wonder why he never took any steps to take possession and control of the land parcel No. 67. I believe that he was aware that the deceased had let his other family members use this parcel of land, just as he had allowed the defendant use of the land parcel No. 57.

25. Given my above analysis, I have no reason why I should not allow the plaintiff's case. I do allow it. I do note that the defendant has been on the land parcel No. 57 for a while and the only accommodation I can give him is to permit him a period of 6 months for him to move out. If he does not move out within this period of time, an order of eviction do issue. In any event, the order of permanent injunction against the defendant in respect of both the land parcels No. 67 and 57 is allowed, and on expiry of the 6 month window, he should not enter, be upon, utilize or in any other way interfere with these two parcels of land.

26. There was a claim for general damages. In recognition of the plaintiff's right over the suit properties, I award the plaintiff a sum of Kshs. 100,000/= in general damages, as the defendant failed to vacate the land that he is in occupation of despite being given notice that his licence has been revoked.

27. The plaintiff shall also have the costs of the suit and of the counterclaim.

28. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 29th day of June 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr. Ikuu instructed by M/s Ikuu, Mwangi & Co. Advocates for the defendant

No appearance on the part of M/s Oyugi & Co. advocates for the plaintiff

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU