



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 369 OF 2012

PETER MUNYUA GATARA.....PLAINTIFF

VERSUS

MARY WAMBUI MUNYUA.....DEFENDANT

JUDGMENT

This suit was filed by way of a Plaint dated 22nd June 2012 and filed on 25th June 2015 in which the Plaintiff prayed for judgment to be entered against the Defendant ordering her to re-transfer the parcel of land known as Lari/Kambaa/683 (hereinafter referred to as the “suit property”) to the Plaintiff.

The Pleadings

In the Plaint, the Plaintiff stated that the Defendant was his wife but their marriage was dissolved by the court. He further stated that he became very ill and intended to transfer the suit property to both himself and the Defendant jointly in case something bad happens to him. He stated further that to his dismay, the suit property was transferred in the sole name of the Defendant. He further stated that he is now well and wishes to have the suit property transferred back to him bearing in mind that his marriage to the Defendant is now dissolved.

The Defendant filed her Defence and Counterclaim dated 5th July 2012 and filed on 18th July 2012 in which she stated that the averments in the Plaint by the Plaintiff were all false for the reason that the Plaintiff voluntarily transferred the suit property to her as a gift and therefore he is estopped from claiming it back. She further stated that by reclaiming the suit property, the Plaintiff wishes to render her and their children destitute. She stated that she is the current registered owner of the suit property and prayed for judgment be entered in her favour in her Counterclaim as follows:

- a. The Plaintiff’s suit be dismissed with costs
- b. an order evicting the Plaintiff from the suit property
- c. an order of permanent injunction restraining the Plaintiff from entering into the suit property
- d. mesne profit at such rate and for such period of time as the court may deem fit to grant.

The Plaintiff filed a Reply to Defence and Defence to Counterclaim dated 25th July 2012 in which he denied the averments in the Counterclaim and stated that the Defendant acquired the suit property fraudulently and the same was never hers.

The Evidence

The hearing of this suit proceeded on 30th May 2016 when the Plaintiff testified before court stating that the Defendant was his second wife, his first wife having died in the year 1981. It was his testimony that he had two children with his first wife and that his second wife came with two children when he married her. It was his further testimony that his marriage to the Defendant was blessed with two children. He stated that both he and the Defendant used to live on the suit property as their matrimonial home. He confirmed having signed the transfer forms that were used to transfer the suit property into the Defendant's name but stated that the Defendant did not acquire the suit property by the proper method. It was his testimony that at the time of signing those transfer forms, he was very sick suffering from diabetes, high blood pressure, arthritis and anaemia. He also stated that he also had a problem in his mind. His evidence was that he was not in the right state of mind when he signed the transfer forms. He also informed the court that he is the one in possession of the suit property where his agent is carrying on cultivation.

The Defendant testified in court confirming that she was divorced from the Plaintiff and had been his second wife. Her testimony was that it is true as stated by the Plaintiff that their matrimonial home was the suit property. It was her testimony that initially the Plaintiff had inherited a 4 acre parcel of land from his father in Gatundu but because the Plaintiff did not get along well with his parents, the family moved to Lari where the Plaintiff was working. She further testified that the Plaintiff wanted to sell the 4 acres of land in Gatundu and they agreed between the two of them that if the Plaintiff did so, then he would transfer to her name the suit property located in Lari. The Defendant further testified that when the Plaintiff transferred the suit property to her, he was not insane or sick but was in his right mind. It was her further testimony that the transfer of the suit property to her went through the Land Control Board and the Plaintiff filled and signed all the application forms. She stated that there was no coercion or fight. She also stated that at no time did the Plaintiff report to the police that she had stolen his land. She also informed the court that from the year 2008, she left the suit property and has never returned there. She testified that she holds the suit property in trust for the two children she bore for the Plaintiff. She told the court that the Plaintiff does not hold her children and that she wanted the court to return the suit property back to her.

Issues and Determination

The issues for determination in this suit are whether to invalidate the transfer of the suit property from the Plaintiff to the Defendant and if not, whether to issue an order of eviction, permanent injunction and mesne profits to the Defendant as prayed in the Counterclaim. It is conceded by both the Plaintiff and the Defendant that the current registered proprietor of the suit property is the Defendant though the Plaintiff is the one who is in possession thereof. It is common ground that the Defendant was the second wife of the Plaintiff at the time the suit property was transferred by the Plaintiff to the Defendant. The point of departure between the Plaintiff and the Defendant is the method of transfer of the suit property. The Plaintiff claims that he was suffering from diabetes, high blood pressure, arthritis and anaemia at the time of signing the transfer form. He also stated that he also had a problem in his mind at the time of signing the transfer forms to the extent that he was not capable of knowing the full effect of what he was doing. To that extent therefore, he asked this court to invalidate the transfer of the suit property to the Defendant and also seeks for this court to order the Defendant to transfer back the suit property to him. To that assertion, I will be guided by Section 107 of the Evidence Act Cap 80 which provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Apart from making oral statements on his alleged insanity and sickness at the time of signing the transfer of the suit property to the Defendant, the Plaintiff has not led any evidence to support this assertion. The

Defendant challenged this assertion by stating that the Plaintiff was in fact in his right mind at the time of signing those transfer forms including application forms for Land Control Board consent, in the absence of which the transfer could not have been effected. It is further true that the Plaintiff did not attach or provide any medical evidence as to his state of mind at that time neither did he call any medical practitioner to testify to this fact. The statement that the Plaintiff was insane at the time of signing the transfer form remains an allegation which has not been proved. The court on the other hand believes the testimony of the Defendant that the Plaintiff transferred to her the suit property as a gift. This court finds that the Defendant is the duly registered proprietor of the suit property. With this finding, it follows that the Defendant has the rights over the suit property as set out in section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Possession is one of the rights belonging to a registered proprietor of land. The Plaintiff is currently in possession of the suit property. The suit property belongs to the Defendant and she is entitled to possession of the same. Accordingly, judgment is entered in favour of the Defendant and against the Plaintiff as prayed in the Counterclaim in prayer a), b), c) and e). The prayer for mesne profits is declined as no specific amount has been claimed and supported. The court is guided by the Court of Appeal case Peter Mwangi Mbuthia vs. Samow Edin Osman & Naftali Ruth Kinyua Civil Application No.NAI No.38 of 2004 which stated the law on mesne profit as follows,

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded..... That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”

Orders accordingly.

DELIVERED, SIGNED AND DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE