



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 239 OF 2016

ESTHER NGINA NJENGA.....PLAINTIFF

VERSUS

JOSEPH NJENGA TURITU.....1ST DEFENDANT

LUCY WAHU TURITU.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff is the daughter of the 1st Defendant. The 2nd Defendant is a sister to the 1st Defendant. The 1st Defendant transferred L.R. Number Dagoretti/Waithaka/T155 (the Suit Property”) measuring $\frac{1}{4}$ of an acre to the Plaintiff and the 2nd Defendant. The 2nd Defendant occupies her portion of the Suit property and has erected dwelling houses on it. The 1st Defendant built dwelling houses on the portion of the Suit Property intended for the Plaintiff and earns rent from those houses.

2. In the plaint filed in court on 10/3/2016, the Plaintiff seeks the following orders:

- a) The Defendants to avail the title over the suit property for purposes of subdivision;
- b) The 1st Defendant to allocate the Plaintiff one eighth of an acre from the ancestral land;
- c) Alternatively, an order for the Land Registrar to issue a certificate of title over half of the Suit Property that belongs to the Plaintiff.
- d) Costs and any other relief the court may deem fit to grant.

3. The Plaintiff claims in the plaint that her mother and the 1st Defendant acquired several properties together over and above the ancestral land the 1st Defendant inherited and that the parents decided to allocate some children some property for their own use. The Plaintiff averred that her siblings were allocated properties. Her mother died and the 1st Defendant remarried.

4. The Plaintiff does not seek orders against the 2nd Defendant except for the claim for the Defendants to avail the title over the Suit Property for purposes of a subdivision.

5. The Defendants filed one defence. The 1st Defendant claimed that the suit was bad for misjoinder and that he would apply for the 2nd Defendant’s name to be expunged from the record.

6. The 1st Defendant denied that he acquired any property with his deceased 1st wife. He also averred that the transfer of the Suit Property to the Plaintiff was conditional upon the fact that he would continue to collect rent from the houses he had constructed for his own upkeep and to educate the Plaintiff's children, which he had done.

7. Parties filed separate issues. They can be summarised as follows:

- a) Was the Suit Property jointly acquired by the 1st Defendant and his deceased 1st wife?
- b) Did the 1st Defendant discriminate against the Plaintiff? Did he give his other children property?
- c) Who is in possession of the title over the Suit Property?
- d) Who is in possession of the Suit Property?
- e) Was the transfer of the Suit Property to the Plaintiff subject to any conditions?
- f) Is the Plaintiff entitled to the Suit Property?
- g) Who should bear the costs of this suit?

8. Both the Plaintiff and the 1st Defendant gave evidence in court. The 1st Defendant produced an official search showing that as at 6/12/1977 he was registered as the owner of the Suit Property. He stated that he bought the land from Marion Wangari and produced copies of rates demand for the Suit Property one of which is dated 22/5/1968. He also produced copies of documents showing he took a loan to develop the Suit Property as well as a discharge of charge over the Suit Property. No evidence was tendered to show that the Plaintiff's deceased mother contributed to the acquisition of the Suit Property. The court finds that the 1st Defendant acquired the Suit Property.

9. The 1st Defendant stated that he could give his land to whoever he wished. He stated that he had not given land to some of his children but that he gave his other daughter a plot when she got married. He stated that he gave the Plaintiff the Suit Property with her aunt on the understanding that he would continue to collect rent from it and upon his demise a portion of the Suit Property would go to the Plaintiff.

10. The 1st Defendant confirmed that he has the title over the Suit Property in his possession. The 1st Defendant is in possession of the Plaintiff's portion of the Suit Property.

11. The Plaintiff did not lead any evidence on the ancestral land that she claims an eighth of. The court dismisses that claim.

12. The question to be determined is whether the Plaintiff is entitled to the Suit Property. The 1st Defendant acquired the Suit Property and transferred it to the Plaintiff and the 2nd Defendant. A copy of the title deed over the Suit Property dated 18/6/1998 bears the names of the Plaintiff and the 2nd Defendant.

13. The 1st Defendant also produced copies of receipts issued on payment of school fees for the Plaintiff's children from various schools, colleges and universities including one in USA.

14. The photographs the 1st Defendant produced in evidence show that the houses from which he collects rent were built a long time ago. He transferred the title over the Suit property to the Plaintiff and 2nd Defendant to own jointly in 1998. The 1st Defendant continues to collect rent which he told the court he uses for his upkeep and medication. He also told the court that he had given the Plaintiff another house to reside in with her four children but that the Plaintiff chose to move out of that house. The 1st Defendant

stated that the Plaintiff was free to go and live in that house but that he will continue collecting rent from the houses on the Plaintiff's portion of the Suit Property which the Plaintiff will have upon his demise.

15. The Plaintiff submits that the 1st Defendant's contention that he requires the rent from the Suit Property for his upkeep and medication is untrue. The Plaintiff did not place evidence before the court of the 1st Defendant's other sources of income. The 1st Defendant is 83 years old. At this age one is prone to spend more money on healthcare due to declined good health and other medical conditions that set in as one advances in age.

16. The 1st Defendant's counsel urged the court to consider the conditions for a gift *inter vivos* set out **In the Matter of the Estate of Waitathu Kagwai alias Waitathu Kagwai** Succession Cause no. 475 of 2013. These are that the donor intended to make a gift; the donee accepts the gift; the property is delivered or transferred and lastly, the donor divests himself of the property by giving possession to the donee. The 1st Defendant submits that the condition for the donor to divest himself of the property and give possession to the Plaintiff had not been met and hence the 1st Defendant is entitled to retain a life interest in the Suit Property. This court is of the humble view that these conditions apply where the property of a deceased person who had made gifts to his dependants during his lifetime is being distributed. In such cases the court has to take into consideration the gifts made when determining the shares to be given to each child.

17. The 1st Defendant also relied on **Gruen v Gruen** 68 N.Y. 2d 48, 505 N.Y.S. 2d 849, 496 N.E. 2d 869 (1986) in which the Supreme Court in New York found that a donor can retain a life estate in a gift and constructive delivery will be acceptable in such a situation as it would be nonsensical to deliver the gift to the donee then take it back for the life of the donor. This dispute was in relation to a painting which the Plaintiff's father had informed him in a letter that he was giving him for his birthday but that he wished to retain possession of it during his lifetime. The Plaintiff sued his stepmother seeking a declaration that he was the rightful owner of the painting. The court held that an *inter vivos* gift was made but that actual delivery would have defeated the donor's intent to retain a life interest in the estate.

18. The case of **Gruen v Gruen** can be distinguished from the present case in which the 1st Defendant transferred the Suit Property to the Plaintiff and 2nd Defendant as co-owners. That case involved the transfer of a painting, which is a movable asset through a letter and not immovable property which the 1st Defendant transferred and obtained a title in the names of the donees.

19. Under Section 7 of the Land Act, title to land may be acquired through transfers such as the one the 1st Defendant effected in favour of the Plaintiff. Transfer is defined by the Land Act as a means of passing of land from one party to another by an act of the parties and not by operation of law.

20. The Plaintiff did not pay any consideration for the transfer, a situation that is contemplated by Section 43 of the Land Act. The transfer was completed when the Plaintiff and 2nd Defendant were registered as proprietors of the land on 18/6/1998.

21. Under Section 44 of the Land Act, the transfer took effect immediately. It could not be expressed to take effect on the happening of an event or the fulfillment of a condition or any future time as the 1st Defendant contemplated. Section 40 of the Land Registration Act replicates this provision.

22. Section 41 of the Land Registration Act terms as void conditions which purport to restrain a transferee from disposing of the interest transferred. It further states that no transfer of land shall contain a direction that the land shall be used or enjoyed by the transferee in a particular manner.

23. The court finds that the transfer of the Suit Property to the Plaintiff and the 2nd Defendant could not be made with directions by the 1st Defendant. The transfer took effect immediately on 18/6/1998 when the Plaintiff and 2nd Defendant were registered as proprietors of the Suit Property. Each one of them owns half a share in the Suit Property.

24. The Plaintiff prays that the Defendants avail the title over the suit property for purposes of subdivision. The Plaintiff is at liberty to apply to the Land Registrar for an order for the partition of the Suit Property under Section 94 of the Land Registration Act. Of course this is subject to the laws on subdivision and other covenants affecting the land.

25. The Plaintiff seeks an alternative order for the Land Registrar to issue a certificate of title over half of the Suit Property that belongs to her. The Plaintiff is at liberty to apply to the Land Registrar for a copy of the certificate of co-ownership of the Suit Property pursuant to Section 92 of the Land Registration Act. Each co-tenant is entitled to receive a copy of the certificate of title of the land they own.

26. The upshot of these is that the court declines to grant the reliefs sought in the plaint. Each party will bear its costs.

Dated and delivered at Nairobi this 18th day of September 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Muriungi holding brief for Mr. Oonge for the Plaintiff

Mr. Kalove holding brief for Mrs. Wambugu for the Defendants

Mr. V. Owuor- Court Assistant