



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 143 OF 2013 (O.S)**

**IN THE MATTER OF L.R NO. LOC.8/NGERERE-THOMBOTHO/565**

**AND**

**IN THE MATTER OF DECLARATION OF TRUST**

**AND**

**IN THE MATTER OF ORDER 37 RULES 1, 2 AND 7 OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**SOSPETER KIRATU MITHIORI.....APPLICANT**

**-VERSUS-**

**BENSON MWANGI MITHIORI.....RESPONDENT**

**JUDGMENT**

1. The applicant herein, Sospeter Kiratu Mithiori, took up the summons dated 23rd July, 2013 for determination of the following questions:-

**(i) Whether the respondent, who is the registered proprietor, of the parcel of land known as L.R No. LOC.8/Ngerere-Thombotho/565 holds the said property in trust for him to the extent of half share;**

**(ii) Whether the pleaded trust, if found to exist, should be determined by excision of half share of the suit property (L.R No. LOC.8/Ngerere-Thombotho/565) and registration of the excised portion in his name?**

**(iii) Who should bear the costs of the application?**

2. In support, the application has through the supporting affidavit sworn on 23rd July, 2013 deposed as follows:

**(a) That the suit property was originally registered in their father's name, Mithiori Thurunja (deceased);**

(b) That his father held the suit property on his behalf and on behalf of the respondent in equal shares;

(c) That in observance of the pleaded trust, their father had subdivided the suit property between the respondent and him and put them in possession of their respective shares;

(d) That he leased his portion to the respondent at Kshs. 9000/- annually which amount the respondent paid once but continued occupying his portion without paying rent in respect thereof as agreed;

(e) That recently he discovered that the respondent had transferred the suit property to himself without recourse to him or his father.

3. Terming the transfer of the suit property to the respondent irregular and fraudulent, the applicant contends that the applicant's registration as the proprietor of the suit property is subject to a trust in his favour to the extent of half share of the suit property.

4. It is the applicant's case that upon discovery of the fraudulent conduct of the respondent, he asked him to give him his share of the suit property.

5. The applicant contends that the respondent offered to buy his share of the suit property and consequently they entered into an agreement for sale of the suit property which the respondent, later on, refused to honour causing him to repudiate the agreement.

6. In reply and opposition to the application/suit, the respondent, through the affidavit he swore on 28th August, 2013 has deposed that:

(a) The suit property was transferred to him by his father without any indication of any interest in favour of the applicant;

(b) That the applicant sold his interest in the suit property to him long before the property was transferred to him and

(c) That the applicant's claim is time barred.

## **EVIDENCE**

### **The plaintiff's case**

7. When the matter came up for hearing, the plaintiff reiterated his averment that he had leased the suit land to the respondent for Kshs. 9000/- per year which amount the respondent paid only once.

8. The applicant informed the court that instead of writing an agreement in respect of the lease, the respondent wrote one for sale of the suit property.

9. Without saying whether or not he signed the agreement written by the respondent, the applicant informed the court that despite the fact that the respondent did not honour his part of the bargain, he never demanded rent from him.

10. The applicant admitted that the property was transferred to the respondent when his father was still alive but contended that his father was not party to the transfer (did not know what was going on).

11. Maintaining that he never sold the suit property to the respondent, the applicant told the court that the sale agreement allegedly executed between respondent and himself on 8th March, 1982 was a forgery.

12. The applicant further informed the court that when he learnt that the suit property had been irregularly

and fraudulently transferred to the respondent, he claimed his share from the respondent who acknowledged his entitlement and offered to buy it as Kshs. 240,000/-.

13. Because the respondent failed to honour his obligation under the agreement, he rescinded the agreement and instead asked the respondent to give him his share of the suit property. The respondent refused to heed to his demand forcing him to file this suit.

14. The foregoing was the evidence that the plaintiff adduced in support of his case.

15. Despite having filed responses to the case, the respondent did not attend court for hearing of his defence.

### **Submissions**

16. At the close of hearing, the applicant filed submissions which I have read and considered.

### **Analysis and consideration**

17. From the pleadings filed in this matter and the submissions filed on behalf of the applicant, I find the issues for determination to be:

**(a) Whether the applicant's claim is time barred?**

**(b) Whether transfer of the suit property in favour of the respondent was irregular or fraudulent?**

**(c) Whether the applicant sold/leased his interest in the suit property to the respondent?**

**(d) Whether registration of the respondent as proprietor of the suit property was subject to a trust in favour of the applicant to the extent of half share of the suit property?**

**(e) What orders should the court make?**

### **Whether the applicant's claim is time barred?**

18. As pointed out above, the respondent challenges the applicant's claim on among other grounds the ground that it is time barred.

19. Although the applicant had not expounded that ground, from the evidence adduced in this case I gather that the contention is premised on the fact that it took the applicant more than thirty years from the time the respondent got registered as the proprietor of the suit property to lodge his claim.

20. Whilst it is true that there was inordinate delay in bringing the claim, this being a claim based on trust by a beneficiary, I am unable to agree with the respondent that the claim is time barred. In this regard see the case of **Stephens and six others v. Stephens and another 1987 K.L.R 125** where the Court of Appeal held that the period of limitation prescribed in the *Limitation of Actions Act Section 20 (1) (b)* does not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust property or proceeds thereof converted by the trustee for his own use.

### **Whether transfer of the suit property in favour of the respondent was irregular or fraudulent?**

21. With regard to this issue, I begin by pointing out that the applicant did not provide the particulars of the alleged irregularity or fraud. For that reason the averment offends the provisions of **Order 2 Rule 10** of the Civil Procedure Rules on particulars of pleadings, which provides as follows:

**“Subject to subrule (2), every pleading shall containing the necessary particulars of any**

**claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing:-**

**a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and**

**b) Where a party alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which he relies.”**

22. In the circumstances of this case the applicant not only failed to plead the particulars of irregularity and fraud in the transfer of the suit property to the respondent but also failed to lead any evidence capable of proving the alleged irregularity and/or fraud in the transfer of the suit property to the respondent. I say this because the only evidence led in support of the alleged irregularity is the allegation that the applicant and his father were not involved in the transfer. That allegation is, in my view, far too short of establishing the alleged irregularity in the transfer of the suit property.

23. Bearing in mind that the standard of proof in cases where fraud is pleaded is higher than prove on a balance of probability, in the absence of any evidence of malpractice or breaches of law in the transfer of the suit property to the respondent, I find the alleged irregularity in the transfer of the suit property to the respondent to be unproven.

**Whether the applicant sold or leased his interest in the suit property to the respondent?**

24. With regard to this claim, from the evidence adduced in this case, to wit, the agreement alleged executed between the parties to this suit on 8th March, 1982 and the conduct of the parties concerning the subject matter of this dispute, I am not convinced that the applicant merely leased the suit property to the respondent. I say so because the conduct of the applicant speaks volumes about his relationship with the respondent. In my view, had the applicant merely let his share of the suit property as alleged, he would not have waited for more than thirty years to claim his interest in the suit property.

25. In my view, the applicant case appears to have been prompted by the proceedings conducted before the area chief on or about 7th May, 2013.

26. The respondent has, vide the affidavit he swore on 28th August, 2013 deposed that he was tricked to sign that agreement.

27. Having read and considered the peculiar circumstances of this case, I am not persuaded that the contract entered into between the applicant and respondent in 1982 was for lease and not for sale of the applicant's share of the suit property.

28. On whether the applicant has made up a case for issuance of the orders sought, there being no evidence that the registration of the respondent was subject to the pleaded trust in favour of the applicant, I find and hold that the applicant has not made up a case for being granted the orders sought.

29. The upshot of the foregoing is that the applicant's case has no merit. Consequently, I dismiss it with costs to the respondent.

**Dated, signed and delivered in open court at Nyeri this 3rd day of October, 2017.**

**L. N. WAITHAKA**

**JUDGE**

In the presence of:

Sospeter Kiratu Muthiori – plaintiff

N/A for the defendant

Court assistant - Esther