



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 288 OF 2016

NAOMI MWARI STANLEY.....1ST PLAINTIFF

ZIPPORAH KINANU MUGAMBI.....2ND PLAINTIFF

NKATHA MUGAMBI STANLEY.....3RD PLAINTIFF

KARIMI MBOCHA MUNGE.....4TH PLAINTIFF

VERSUS

STANLEY M'MUGAMBI.....DEFENDANT

J U D G M E N T

BACKGROUND

1. All the Plaintiffs are siblings, they are children of Defendant. They are claiming entitlement to land parcels numbers Abothuguchi/ Kithirune/1890 and 671 on the basis that Defendant holds the land in Trust for the Plaintiffs.

PLAINTIFF'S CASE

2. The suit was filed on 21:12:16. Plaintiffs aver therein that their father inherited the parcel of land title No. 240 and 671. (Abothuguchi /Kithirune) from his father to hold in trust for the benefit of himself and his descendants.

3. Plaintiffs have further pleaded that defendant divided the parcel No. Abothuguchi/ Kithirune 240 into 4 parcels and gave 3 parcels thereof to his 3 sons leaving Parcel No. 1890.

4. Plaintiffs also contend that Defendant intends to transfer the remaining parcel of land during his life time and this will deny the Plaintiff's their right to property which is being held in trust for them.

5. Naomi Mwari Stanley, the first Plaintiff (PWI) is the one who testified on behalf of the other Plaintiffs. She told the court that they had peacefully lived with their father until 2013 when their mother died.

6. On 01:06:15, defendant apparently called his family and announced that he no longer wanted the Plaintiffs there.

7. PWI further testified that their father owns 2 parcels of land. For the Parcel No. 240, he (Defendant) divided it into 4 portions in the following manner. –

- 1890 went to Defendant.
- 1891 was for John Muthuri.
- 1892 for Wilfred Kaaria
- 1893 for Patrick Mwirigi

8. For Parcel No. 671, PW1 averred that the land is not subdivided but that Defendant just leases the land. PW 1 contends that the land belonged to their grandfather when it was parcel No. 240 and hence they (Plaintiffs) are entitled to this land.

9. Plaintiffs aver that their father has not given them any land and this is contrary to what the Constitution stipulates.

10. PW 2, one Mbijiwe Kiramiti testified that Defendant's father who was known as M'Itirithia Kamwira alias Kiranga is the one who had gathered Parcels No's 240 and 671 and that he transferred this land to Defendant as ancestral land.

11. In support of their case, Plaintiffs relied on the following documents:-

- 1) Certificate of official search for the parcels of Land Title Numbers Abothuguchi/Kithirune/1890, 1891, 1892, and 671.
- 2) Copy of Ruling from the Land Registrar delivered on 28th September, 2016.
- 3) Authority to plead.
- 4) Demand notice to the Defendant.

DEFENCE CASE

12. Defendant admits that land parcel number 1890, 1891, 1892, and 671 are all subdivision of his original title No. 240. He avers that he acquired parcel Nos. 240 and 671 on his own and he was the first registered owner.

13. Defendant further states that his daughters are married and he wonders what interest they have on his land.

14. In support of his case Defendant produced the following document as exhibits.

- 1) Copy of the official search for land parcels LR. NO. Abothuguchi/Kithirune/671.
- 2) Copy of the official search certificate for land parcel LR.NO. Abothuguchi/Kithirune/1890.
- 3) Copy of the official search certificate for land parcel LR.NO. Abothuguchi/Kithirune/1891.
- 4) Copy of the official search certificate for land parcel L.R NO. Abothuguchi/Kithirune/1892.
- 5) Copy of the proceeding and ruling on objection to removal of caution dated 28th September, 2016.
- 6) Copy of the discharge summary and treatment notes.

DETERMINATION:-

15. I have weighed all the arguments and submissions advanced herein. I frame the issues for determination as follows:-

- 1) Whether the Plaintiffs are entitled to the suit land parcels on the basis of trust.
- 2) Whether Defendant has subdivided and transferred the suit land.
- 3) Whether Plaintiffs have been discriminated on basis of gender by Defendant

16. Entitlement to the Suitland on Basis of Trust.

17. For the Land Parcel No. 671, the Search Certificate shows that defendant became the registered owner of the land in 1963. A copy of the Green Card on record also shows that defendant became the registered owner of parcel No. 240 on 03:04:1963. The registered Lands Act (Cap 300) now repealed came into force on 16:09:1963. It follows that Defendant was the first registered owner of the suit land in so far as the original titles are concerned.

18. PW1 claims that the suit land belonged to their father's father called Kiranga. She has no knowledge of where Kiranga lived. She had no documents to show that the land belonged to their grandfather.

19. PW2 states that Defendant's father is the one who gathered parcels No. 240 and 671 and then transferred the land to Defendant. He further states that Kiranga, whom he knew died in 1951. The question is when did Defendant's father gather this land and then leave it for Defendant before his death in 1951.

20. It is not lost to this Court that the Registered Lands Act, Cap 300 came into force against a backdrop of the process of gathering land for purposes of registration. The applicable law in the process of gathering the land is the land Consolidation Act of 1959 and the Land Adjudication Act of 1968. When PW 2 states that he was a Committee member in 1957, one is left to wonder as to what kind of a Committee he was referring to when there was no law in place for such committees.. In any event, Kiranga was long dead by then.

21. I have seen Defendant in Court. He is a very old man. He says that he is 90 or so years old. I am inclined to believe that he was capable of acquiring the land for himself. I am therefore inclined to believe that Plaintiffs have not proved their claim to the land on the basis of Trust.

22. I must add that in her own words PW1 has stated that "None of my sisters stay at Katheri. None of my sisters stay at our father's home...." In essence, Plaintiffs are not in possession of these parcels of land. They don't utilize the same and as such, they can't also claim possessory interest on the suit land.

23. Whether defendant has subdivided the land and transferred the same.

24. For the land No. 671, the same is intact, it has never been subdivided, and it is in Defendants name.

25. For the land No. 240 the same has been subdivided into 3 portions 1890, 1891 and 1892. There is no evidence that this land was subdivided into 4 positions. The Search Certificate availed by Defendant and Plaintiffs indicate that the parcels of land are in the name of Defendant. There is no evidence that the land has been transferred to other persons.

26. Have Plaintiff's been discriminated on the basis of gender

27. It has been submitted for the Plaintiffs that under article 27 and 60 of the Constitution Plaintiffs, should not be discriminated and it matters not whether they are married or not. To this end, Plaintiffs have cited the cases of:-

- 1) Priscilla Kamau in 2005

2) HCCC, Nairobi Family Division Succ. Cause No. 1263 of 2000 in the matter of the estate of Lerionka Ole Ntutu (deceased).

3) Court of Appeal ,CA No. 66 of 2002, Eldoret,Mary Rono Vs. Jane Rono

4) Samson Kiogora Rukunga v Zipporah Gaiti Rukungu[2011] e KLR, Consolata Ntibuka.

28. I am in agreement with these submission in so far as they state that daughters whether married or not should have an equal footing with the male children when it comes to inheritance. However, this is only applicable in so far as an estate of a deceased person is concerned. In all the cases cited by the Plaintiff, the Courts were dealing with a situation where the subject matter was the property of a deceased person.

29. This is not so in the instant case. The father of Plaintiffs is alive. Defendant has stated that:-

“I am over 90 years old with deteriorating health and my daughter’s action of bringing me to Court is very disrespectful ...”

30. I am in agreement with him because the Plaintiffs are dealing with their father as if he is already gone.

31. **The law of inheritance is anchored under the law of Succession Act and applies to the property of a deceased person and not one who is alive.** As such, whereas the principle of none discrimination on inheritance is applicable as expounded in Plaintiffs Submissions, it is nevertheless not applicable in this case.

32. Pursuant to the provisions of Section 24 of the land Registration Act;

(a) “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”.

33. While Section 26 provides that;

“The certificate of title issued by the Registrar upon registration, shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.

34. It follows that Plaintiffs have no basis of challenging the titles held by their father. The defendant is the absolute owner of the land. It is upon him to deal with his land as he wishes.

35. Final orders;

1) Plaintiff’s case is hereby dismissed.

2) Any orders of Injunction given herein or any restrictions or cautions lodged on the land are hereby lifted.

3) Ordinarily, it is preferable for parties to bear their own costs in cases where litigants are family members. However, Plaintiffs here in have dragged their aged and ailing father to court. They do not deserve a reprieve on costs. They are hereby condemned to pay costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 13TH DAY OF DECEMBER, 2017 IN THE PRESENCE OF:-

Court Assistant: Janet

Kimathi J.M. H/B for Mbaabu for Plaintiff Present

Kithinji for Defendant Present

HON. L. N. MBUGUA

ELC JUDGE