



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 105 OF 2014

PETER MURIITHI GICHOHI PLAINTIFF

-VERSUS-

RICHARD WAMBUGU GICHOHI DEFENDANT

JUDGMENT

1. The suit herein is in respect of the parcel of land known as **Daiga/Umande/Block 2/2139** registered in the name of the defendant (Richard Wambugu Gichohi). Both the plaintiff and the defendant claim to have bought the said parcel of land (hereinafter called the suit property) from a land buying company known as Mwireri Estate Ltd (hereinafter referred to as “the land buying company”).

Pleadings

2. Vide the plaint dated **19th May, 2014** and filed on **20th May, 2014** the plaintiff contends that he trusted the defendant, who is his real brother, to pay for him the charges for one acre of the suit property from the directors of the land buying company herein. The plaintiff has averred that pursuant to the said trust, the defendant paid the charges on his behalf, a fact which is borne out by records held by the land buying company.

3. The plaintiff contends that in breach of the trust, the defendant illegally got himself registered as the proprietor of the suit property.

4. Maintaining that the plaintiff’s registration as the absolute proprietor of the suit property was illegally procured, the plaintiff prays for judgment against the defendant for:-

- a) **An order compelling the defendant to surrender the title deed issued to him by the District Land Registrar, Laikipia, in respect of the suit property for cancellation.**
- b) **A caution prohibiting dealing or sell of the parcel of the land by the Agricultural Finance Corporation;**
- c) **Costs of the suit and interest.**

5. Upon being served with the suit papers, the defendant filed the statement of defence dated **3rd July, 2014** and filed on **4th July, 2014** in which he denies the allegations leveled against him and contends that his registration as the proprietor of the suit property was legal, terms the plaintiff claim bad in law (statute barred) and his registration as the proprietor of the suit property indefeasible.

6. The defendant explains that he bought the suit property from the land buying company herein in 1977 and that in 1989, the plaintiff offered to purchase the suit property but was unable to meet his part of the bargain. In 2001, he got registered as proprietor of the suit property.

7. The defendant alleges that on 8th June, 2001 the plaintiff ordered his wife, Jacinta Wairimu, who was leaving in the suit property to vacate the suit property because he (the defendant) had taken it back.

EVIDENCE

8. When the matter came up for hearing both the plaintiff and the defendant maintained that they bought the suit property from the land buying company herein.

The plaintiff's case

9. The plaintiff who testified as P.W.1, informed the court that he bought the suit property from the land buying company herein; that despite the company being a public land buying company, one of the directors of the company, Mr. Ngacha Karema (deceased) used to give out the company's land on his own. The plaintiff explained that after the said director passed on, the company records were left with the director's daughter, Lucy Muthoni Karema (P.W.2).

10. Concerning a letter dated 24th July, 2001 purported to have been written by him, the plaintiff denied having written the letter and explained that he had lived in the suit property since 1987 and that he gave the 1st defendant the receipts in respect of the suit property for safe keeping in 2000. The plaintiff informed the court that he has certified copies of the receipts issued to him in respect of the suit property and a clearance certificate showing he had paid all the debts in respect of the suit property.

11. The plaintiff explained that he gave the 1st defendant the documents concerning ownership of the suit property to keep for him because he kept disagreeing with his wife, Jacinta Wairimu, with whom he parted ways in 1999.

12. The plaintiff further informed the court that the Land buying company kept a register showing how he made payments to the company herein and that the green card held by the land Registrar shows that the land belongs to him.

13. The plaintiff's attempts to produce certified copies of the documents he had in support of his case was thwarted by the defendant's counsel on the ground that the documents were certified in the year 2013. Following that objection, this court issued summons to the directors of the land buying company herein requiring them to attend court and produce the Company's register.

14. Pursuant to that order, **Lucy Muthoni Karema (P.W.2)** a daughter of Karega Ngecha, attended court and informed the court that her father who was the Chairman of the land buying company herein is deceased.

15. Although the testimony of P.W.2 was challenged by counsel for the defendant, I allowed her to testify with a view of gauging whether her testimony was relevant.

16. P.W.2 explained that the register was left in her custody by her deceased father and that whenever a question arises concerning the register she is the one who produces the register. P.W.2 informed the court that all the directors of the company are dead and that the company only exists by name.

17. P.W.2 informed the court that according to the register she held, it was the plaintiff, Peter Murethi Gichohi, who paid for the suit property. Because P.W.2 is not a director of the land buying company and owing to the objection by the defendant's counsel, PW2 did not produce the register as an exhibit and the same was marked for identification as M.F.I.3.

The defence case

18. The Defendant, Richard Wambugu Gichohi, who testified as D.W.1, informed the court that he was registered as proprietor of the suit property in 2001. The defendant reiterated his contention that the plaintiff had come to him with an intention of buying the suit property but was unable to meet his obligation under the agreement that they entered into in respect thereof.

19. The defendant informed the court that after the plaintiff failed to honour his part of the bargain, in 2001 he went to the chairman of the land buying company herein, Mr. Karema Ngecha, who allowed him to process the title deed on the ground that he was the one who had paid for the suit property.

20. Explaining that the plaintiff knew and even availed himself at the lands office when the defendant was processing the title, the defendant explained that after he processed the impugned title, the plaintiff wrote the letter referred to herein requiring his wife to vacate the suit property. The defendant produced the letter allegedly written by the plaintiff and the translated version in respect thereof as Dexbt (a) and (b) respectively.

21. The defendant further informed the court that he had offered the plaintiff an alternative parcel of land.

22. In cross-examination, the defendant stated that he was unable to produce receipts to confirm that he is the one who paid for the suit property because his mother had given the receipts to the plaintiff to keep for him.

23. Reiterating his contention that the plaintiff was present when the suit property was being transferred to him, the defendant stated that it is the plaintiff who told the Land Registrar to give the title deed to him.

24. The defendant further stated that the Registrar cancelled the registration effected in favour of the plaintiff and another person in respect of the suit property after he realised that the registration was effected by mistake.

25. The defendant denied the plaintiff's contention that his mother had asked him to move out of the suit property.

26. After the defendant closed his case without calling any of the directors of the land buying company, the court issued directions to the effect that summons be issued to the directors named in the official search issued by the Registrar of Companies to Muthui Kimani & Company Advocates on 17th July, 2014 to attend Court and produce the Register in respect of the suit property.

27. Despite summons having been issued in accordance with the aforementioned directions, none of the directors of the company attended court to produce the register in question.

Submissions

28. Parties to the suit filed submissions, which I have read and considered.

29. In his submissions, the defendant has reiterated his contention that the defendant is his true brother and explained that they have been in good terms since childhood.

30. Based on the pleadings filed in this suit and the testimony adduced in respect thereof, the plaintiff

maintains that the defendant's title was illegally issued.

31. On behalf of the defendant, reference is made to the averments contained in the plaintiff's plaint and submitted that the plaintiff has not proved that he is the one who paid for the suit property.

32. Concerning the testimony of P.W.2, it is submitted that it cannot be relied on in support of the plaintiff's case because P.W.2 was neither a director nor an employee of the land buying company.

33. It is reiterated that the plaintiff's suit is time barred and that the plaintiff's neither provided particulars of fraud against the defendant nor proved the alleged fraud to the standard required by law.

34. Terming the plaintiff's claim unsubstantiated, counsel for the defendant has submitted that the plaintiff has dismally failed to prove his claim to the required standard.

Analysis and determination

35. From the pleadings filed in this suit, the testimonies of the witnesses and the submissions in respect thereof, I find the issues for determination to be:-

1. Whether the plaintiff's claim is time barred?
2. If the answer to (1) above is negative, whether the title held by the defendant is indefeasible?
3. Whether the title held by the plaintiff was illegally procured?
4. What orders should the court make?

Is the plaintiff's claim time barred?

36. As pointed out herein above, the defendant has in his statement of defence and submissions contended that the plaintiff's suit is time barred. The reason given for the said contention is that a suit for recovery of land under The Limitation of Actions Act, Cap 22 should be brought within twelve years from the time the right of action accrued to the claimant.

37. However, in the circumstances of this case, it is common ground that the plaintiff's claim is based on alleged breach of trust. The question to answer, therefore, is whether the plaintiff's claim is indeed time barred.

38. In answering this question, I am persuaded by the decision in the case of **Michael Gachoki Gicheru v. Joseph Karobia Gicheru (2014) eKLR** where **Olao J.**, stated:-

“The plaintiff goes further in paragraph 6 to plead that the defendant has always been unwilling to sub-divide the land and give him two (2) acres out of the five (5) acres. From those pleadings, the plaintiff is clearly seeking to recover from the defendant trust property and is alleging that there is a breach of trust by the defendant who is converting the land subject matter of this suit for his own use. Section 20 (1) of the Limitation of Actions Act reads as follows:-

“None of the periods of Limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action.

(a) In respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use”

Sub-section 2 of the same section reads as follows:-

“Subject to Sub-section (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period or limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date of which the right of action occurred Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession”.

In my view, having looked at Section 20 (1) and (2) of the Limitation of Actions Act as well as the pleadings herein, this suit falls under Section 20 (1) of the Limitation of Actions Act for which there is no period of limitation. See also the case of STEPHENS AND SIX OTHERS VS 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 infact the plaintiff herein will be able to establish that he is the beneficiary of any trust or that the defendant has converted trust property into his own use is of course a matter for trial to be proved by the evidence that will be adduced by the parties. As for now, the Court can only go by the pleadings and it is clear to me that being a claim for breach of trust, this claim is not therefore time barred.”

39. I am also persuaded by the decision in the case of Oriental Commercial Bank Ltd v. Central Bank of Kenya (2015) eKLR where Ochieng J., stated:-

“I have no hesitation in holding that the claim founded on alleged fraudulent breach of trust was not time-barred.”

40. Since the plaintiff’s claim is premised on alleged breach of trust, I am unable to agree with the defendant’s submissions that the claim is statute barred.

41. With regard to the contention that the title held by the defendant is indefeasible, and on whether the title held by the defendant was illegally procured, I begin by pointing out that it is common ground that the property was initially registered in the name of the plaintiff. Whereas the defendant contends that the registration of the property in favour of the plaintiff was effected by mistake, the defendant did not give an explanation as to what mistake led to the registration of the property in the plaintiff’s name and why he offered to give the plaintiff another parcel of land in lieu of the suit property if the plaintiff had no interest in it.

42. In his testimony, the plaintiff was able and willing to produce documents capable of proving that he is the one who paid for the suit property but the defendant produced no document capable of showing that he is the one who paid for the suit property.

43. This being a matter that turns on the demeanor of the witnesses, I find the account given by the plaintiff concerning the acquisition of the property more persuasive compared to the account given by the defendant. Although it is the plaintiff who moved the court, in the peculiar circumstances of this case, where the plaintiff was initially the registered proprietor of the suit property, the defendant had an obligation to give an explanation of the circumstances in which the registration changed from the plaintiff to him.

44. Having read and considered the explanation offered by the defendant, I find the same unpersuasive on the following reasons:-

- i). No document was tendered to show that he was the one who bought the property and if so, he did not buy it on behalf of the plaintiff, as alleged
- ii). No document or sale agreement was produced to prove his assertion that the plaintiff

lived in the suit property pursuant to a sale agreement which aborted.

iii). No indication or explanation was offered as to what mistake led to the property being registered in the name of the plaintiff.

iv). No reason was given as to why the defendant had to offer the plaintiff an alternative parcel of land.

v). The demeanor of the defendant generally (did not appear to be truthful in his testimony).

45. Upon review of the totality of the evidence adduced in this case, I find and hold that the defendant holds the title to the suit property in trust of the plaintiff. Consequently, I enter judgment in favour of the plaintiff in terms of prayers (a) and (c) of the plaint dated 19th May, 2014.

Dated, signed and delivered at Nyeri this 26th day of April, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Ms. Wambui h/b for Mr. Muthui Kimani for the defendant

Mr. Peter Muriithi Gichohi – plaintiff

Court assistant - Lydia