



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 106 OF 2014

GACHANJA GITAU 1ST PLAINTIFF

JOSEPH GITAU MAINA 2ND PLAINTIFF

TERESIA MBERE THUKU 3RD PLAINTIFF

VERSUS

MWANGI GITAU ALIAS WAIHAKA GITAU ... DEFENDANT

JUDGMENT

Introduction

1. The suit herein is in respect of the parcel of land known as **No. Loc.11/Gikandu/372** (hereinafter “the suit property”) registered in the name of Mwangi Gitau *alias* Waithaka Gitau, the defendant herein.
2. Gachanja Gitau, Joseph Gitau and Teresia Mberu Thuku, who are the plaintiffs in this suit, claim that the defendant (who is their sibling) holds the suit property in trust for them and himself.
3. The case for the plaintiffs’ is that their father, Gitau Wagerere (deceased), who was the owner of the suit property before it was registered in the name of the defendant, before he passed on, had told them that he wanted the suit property to be shared between the defendant and themselves, in the manner indicated in paragraph 8 of the plaint.
4. In his statement of defence filed on 1st July, 2014 the defendant admits that the suit property belonged to his father, Gitau Wagerere, before it was registered in his name but denies the allegation that he holds it in trust for the plaintiffs.
5. The defendant explains that his father sub-divided his various parcels of land and shared them amongst his siblings during his lifetime and contends that no one raised any issue concerning the manner in which his father shared his properties during his life time.
6. Pointing out that the dispute concerning ownership of the suit property is still pending in other courts, the defendant terms the instant suit vexatious and an abuse of the process of the court.

7. The defendant further contends that the suit is time barred.

EVIDENCE

The plaintiffs case

8. When the matter came up for hearing, three witnesses namely, Teresia Mbere Thuku (P.W.1), Gachanja Gitau (P.W.2) and Joseph Gitau Maina (P.W.3) testified in support of the plaintiffs' case. They all stated that before he passed on, their benefactor (Gitau Wagerere) had called them and informed them how he wanted the suit property to be shared between them and the defendant.

9. In this regard, they informed the court that before their benefactor passed on, he had shown them their respective portions of the suit property. Explaining that they had been in occupation and use of the respective portions of the suit property shown to them before they were chased therefrom by the defendant, the plaintiffs urged the court to compel the defendant to share the suit property in accordance with the wishes of their benefactor.

The defence case

10. The defendant admitted that he chased the plaintiffs from the suit property but contended that he did so when their alleged benefactor was still alive. He maintained that the suit property was given to him to hold solely and not as a trustee of the plaintiffs.

11. After close of their respective cases, parties to the suit filed submissions, which I have read and considered.

Submissions on behalf of the plaintiffs

12. On behalf of the plaintiffs, it is contended that it is common ground that the parties to the dispute are members of the same family; that the defendant is the eldest son in the family and that the defendant got registered as the proprietor of the suit property during demarcation. Further, the suit property belonged to the plaintiffs' benefactor and that the plaintiffs were in use and occupation of the suit property before they were chased by the defendant. It is submitted that existence of the above cited facts is proof of a customary trust in favour of the plaintiffs and that the real intention of the parties was to create trust in favour of the plaintiffs.

13. The defendant is said to have not only failed to prove that he was the only one granted the suit property but also failed to rebut the plaintiffs' contention that the suit land was held in trust.

14. Based on the decisions in the cases of **Kanyi v. Muthiora** (1984)KLR; **Joseph Githinji Gathiba v. Charles Kingori Gathiba** (2001) eKLR and **Njuguna v.Njuguna** (2008)1 KLR 889 and **Sections 28(b)** of the Land Registration Act, 2012, it is submitted that the plaintiffs have made up a case for being granted the orders sought.

Submissions by the defendant

15. In the submissions filed on behalf of the defendant, it is submitted that the plaintiff did not discharge the burden placed on them of proving that the defendant holds the suit property on their behalf and on his own behalf. Based on the evidence adduced before the defunct Land Disputes Tribunal, it is submitted that the plaintiffs have failed to prove their case against the defendant.

16. It is further submitted that the mere fact that the plaintiffs and the defendants are relatives is not proof of trust.

Further, that the plaintiffs ought to have proved that the alleged trust was created at the time of demarcation.

Besides, it submitted that the plaintiffs were under an obligation to prove that they were in occupation in respect of the land the trust was created.

17. Reiterating that the suit property was given to him to hold in exclusion of the plaintiffs, the defendant explained that the plaintiffs have their own parcels of land transferred to them by their father.

Analysis and determination:

18. The sole issue for determination in this suit is whether the plaintiffs have proved that the defendant holds the suit property on their behalf.

19. From the evidence on record, it is clear that the plaintiffs' alleged benefactor passed on in 1983. Although it is not clear when the plaintiffs were chased away from the suit property, it is clear that they were chased there from either before their benefactor passed on or immediately after he passed on. In this regard, see the witness statements of the parties to this suit.

20. It is also clear that after the plaintiffs were thrown out of the suit property by the defendant, they waited for more than 20 years before they sought the intervention of the

Provincial Administration or the Land Disputes Tribunal when they at last preferred a dispute to the Land Disputes Tribunal, the Tribunal found in favour of the defendant.

21. Curiously, whereas the plaintiffs claim to have been entitled to the suit property, they have not given any explanation why they waited for more than 20 years before they sought help to recover their alleged interest in the suit property.

22. It is a cardinal principle of law that delay defeats equity. In my view, the prolonged delay in claiming their interest in the suit property negates their contention that the defendant held the suit property in trust for them.

23. Trust being a factual situation, the plaintiffs were under a legal obligation to prove that it existed. That factual situation cannot be implied from the fact that the parties to the disputes are relatives, parties were at some point in time in occupation of the suit property or from the fact that at some point in time the suit property belonged to a common ancestor.

24. The claimant must prove by way of credible evidence that there indeed existed trust in favour of him or her. In the circumstances of this case, no evidence whatsoever has been adduced by the plaintiffs to show that the defendant holds the suit property in their favour.

25. The upshot of the foregoing is that the plaintiffs' claim has no merit and the same is dismissed with costs to the defendant.

Dated, signed and delivered at Nyeri this 30th day of May, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Wachira Kibuka h/b for Mr. Ndegwa for the plaintiff

Mwangi Gitau alias Waithaka Gitau – defendant

Court assistant - Lydia

