



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO 129 OF 2015

JOSEPH WAITIKI NDEGWA PLAINTIFF

-VERSUS-

DUNCAN NDERITU NDEGWA DEFENDANT

JUDGMENT

1. The plaintiff filed this suit by way of complaint dated **20th April, 2015** praying for judgment against the defendant that the court orders him to release the title to **Land Reference Number 6380/8** (hereafter referred to as the suit property) to the plaintiff, costs of the suit and interest at court rates.
2. The nature of the plaintiff's claim is that pursuant to a consent order recorded in Nairobi High Court Civil Case No. 4523 of 1991, the defendant was to subdivide Land Reference Number 6380/2 measuring 18 acres into three portions as follows:
 - (i) Jane Njeri and Catherine Wangari to hold as tenants in common with equal shares of four acres.
 - (ii) Joseph Waitiki Ndegwa (the plaintiff), Mary Wanjiru Waitiki and David Kamau Waitiki as joint tenants of 3 acres.
 - (iii) Veronica Njeri, Samuel Ndegwa, Patrick Mwangi, Wilson Wahome and Pamela Muthoni as tenants in common with equal shares of 8 acres.
3. The plaintiff contends that the defendant did indeed release some of the title deeds to their respective owners after subdivision but has refused to surrender the title deed for the portion subdivided to Rose Waguthi Waitiki and Francis Ndegwa (both deceased).
4. Despite being served with summons to enter appearance, the defendant failed to enter appearance and file a defence within the time stipulated in law. Consequently, the plaintiff applied for interlocutory judgment on 28th July, 2015 which was entered on 4th August, 2015.

EVIDENCE

5. The matter came for formal proof on 27th July, 2016. During the hearing, the plaintiff reiterated his case as stated in his witness statement; that he had engaged several advocates to liaise with the defendant's counsel regarding release of the title deed; that he had also personally written to the defendant on several occasions to resolve this particular issue, but to no avail.

6. He produced the following documents as his exhibits

- a) The decree issued in Nairobi High Court Civil Case No. 4523 of 1991.
- b) Limited Grants of letters of administration *ad litem* for Rose Waguthi Waitiki issued in Succession Cause No. 1040 of 2012.
- c) Copies of title deeds to Land Reference Number 6380/9 and land Reference Number 6380/5 and 12.
- d) Correspondence between the plaintiff and the defendant and their respective advocates.

Submissions by the plaintiff

7. In the submissions filed on behalf of the plaintiff on **7th October, 2016**, it is submitted that the plaintiff's claim lies in the action of detinue under common law which may be committed either by wrongfully refusing to give goods to the persons entitled to them or by a bailee negligently losing goods in breach of his duty of care under a bailment. It is submitted that the plaintiff's case lies in the first instance.

In laying the background of the plaintiffs claim, his counsel summarised his case as recorded in paragraphs 2, 3 and 5 of this judgment. In addition, he submitted that because both Rose Waitiki and Francis Ndegwa have since died, the applicant obtained Limited Grant of Letters of Administration *ad litem* on 26th September, 2012 for the estate of Rose Waitiki.

8. He pointed out to court that the defendant having failed to file a defence despite being served and the matter having proceeded by way of formal proof, he was of the view that the plaintiff had proven his case to the required standard and prayed that the orders sought be allowed.

9. Having heard the testimony of the witness and examined the evidence, I find two issues for determination:

- a) Was the defendant properly served?
- b) Is the plaintiff entitled to the orders sought?

Was the defendant properly served?

10. As pointed out herein above, the defendant did not enter appearance within the time stipulated in law, causing the plaintiff to apply for interlocutory judgment. This being a matter for release of title to land, the plaintiff set down the suit for hearing under **Order 10 Rule 9** which provides as follows:-

“Subject to Rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

11. As regards whether the defendant was properly served, I rely on the affidavit of service sworn by Lawrence Kiarie Thuku, a licensed process server on **13th July, 2015**. He depones that on 9th July, 2015 he received the plaint and other accompanying documents, together with the summons to enter appearance from the firm of M/S Nganga Munene & Company Advocates and proceeded to Nairobi around 12.00 p.m. to serve the defendant at his offices in Hughes Building. On arrival, he did not find the defendant but found his secretary, Ann, who informed him that she had authority to accept any documents on behalf of the defendant. He proceeded and served her with the documents which she accepted but declined to sign for the same. From the aforesaid affidavit, I am satisfied that the defendant was properly served through his agent as provided for under **Order 5 Rule 8(1)** of the Civil Procedure Rules which provides as follows:

“Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient”.

Is the plaintiff entitled to the orders sought?

12. The parties in this suit are no strangers to litigation, which resulted in Nairobi High Court Civil Case No. 4523 of 1991. The above suit was settled by consent whereby the defendant agreed to subdivide the suit property among the persons listed in paragraph 2 of this judgment and issue them with title deeds.

13. All seems to have gone well until Rose Waguthi Waitiki and Francis Ndegwa (the plaintiff's wife and son) died in 2001 and 1995 respectively. The plaintiff obtained Limited Grant of Letters of Administration *ad litem* on 26th September, 2012, enabling him institute a civil case.

14. I have perused the correspondence between the plaintiff, the defendant and their respective advocates. Of particular importance are the letters by Njeri Kariuki, Advocates (counsel for the defendant) dated 29th October, 2003 and 27th September, 2005 wherein she admits that she was in possession of the title deed but had no instructions to release it.

15. In another letter dated 18th February, 2013 by Counsels for the plaintiff, (Bali-Sharma and Bali-Sharma Advocates) addressed to Njeri Kariuki Advocate,(in response to an earlier letter by the defendants counsel dated 6th February, 2013) the counsel sought answers regarding the person to whom the title deed had been released in 2005 when both owners were dead. In a letter dated 7th March, 2013 again by the plaintiff's counsels, addressed to the defendant, the plaintiff's counsel demands that the defendant releases the title to the plaintiff.

16. **Section 107** of the Evidence Act requires a person who has brought a claim before court to prove the facts to support their claim. From the testimony of the plaintiff and the documents produced, I am satisfied that the plaintiff has proved his case on a balance of probabilities and I hereby enter judgment in his favour as prayed.

17. As the suit was undefended, I award no costs.

Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 8th day of December, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Karweru h/b for Mr. Nganga for the plaintiff

N/A for the defendant

Court assistant – Esther