



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 156 OF 2013

EUNICE GATHONI WANG'OMBE PLAINTIFF

-VERSUS-

HELLEN WACERA DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated **5th August, 2013** and filed on **7th August, 2013** the plaintiff herein, **Eunice Gathoni Wang'ombe**, brought this suit seeking the following reliefs against the defendant, Hellen Wacera;

- a) **A declaration that the defendant holds a portion of the parcel of land known as Tetu Ihururu/910 (suit property) on her behalf and on her own behalf and to that extend she is entitled to a portion of the suit property measuring 0.048 hectares.**
- b) **A permanent injunction to restrain the defendant from evicting her from the suit property.**
- c) **Costs of the suit and interest**
- d) **Any other order the court may deem fit to grant.**

2. The plaintiff, who is the defendant's daughter in law, contends that the defendant, who is the registered proprietor of the suit property, holds the suit property and in particular the portion where her matrimonial home is erected, in trust for her.

3. Explaining that they have had disputes with the defendant over the portion of the suit property she claims, the plaintiff avers that her attempts to have the said portion registered in her name have been frustrated by the defendant.

4. In her statement of defence filed on **13th August, 2013**, the defendant has admitted that the plaintiff lives on the suit property but denied the plaintiff's contention that she holds a portion of the suit property in trust for her or any other person.

5. The defendant also denies the plaintiff's contention that the portion she occupies measures 0.048 hectares.

6. It is the defendant case that as the registered proprietor of the suit property, she has the right to sub-

divide the suit property in the manner she deems fit and to allow whomsoever she chooses to occupy it.

EVIDENCE

The plaintiff's case

7. When the matter came up for hearing, the plaintiff told the court that she sued the defendant because the defendant had said she is not entitled to the suit property. She informed the court that the dispute between her and the defendant was subject of arbitration in various forums like members of provincial administration and the land's office.

8. The plaintiff informed the court that she had brought a surveyor to curve out the area of the suit property she is claiming but the defendant brought another surveyor who curved her entitlement in a manner prejudicial to her interests in the suit property.

9. With regard to the contention that they have another parcel of land at Oljororok, she admitted that the parcel was transferred to them (her husband and herself) by the defendant but contended that the defendant only held it in trust for them.

10. The plaintiff further informed the court that she put up a matrimonial home on the suit property in 1986 and lived therein peacefully until her husband passed on, in 2011.

11. After her husband passed on, the defendant started asking her to leave the suit property. Arguing that the suit property is family land (was bequathed to the defendant by her husband's grandfather), the plaintiff urged the court to grant her the reliefs sought.

12. Upon being cross-examined by counsel for the defendant, she explained that she brought the suit not as a legal representative of the estate of her deceased husband but in her own capacity.

13. Concerning the proposal by the defendant on how the suit property should be sub-divided, she stated that she opposes it because it does not give her frontage.

14. Whilst admitting that the defendant has other children who live on the suit property, she contended that only 4 of the defendant's children are entitled to a share of the suit property.

15. With regard to her claim, she told the court that she needs a title because of her children.

The defence case

16. On her part, the defendant informed the court that before coming to court, she had tried to resolve the dispute between herself and the plaintiff at home.

17. The defendant told the court that it was decided that the plaintiff should vacate the suit property and go to her land in Oljororok.

18. Concerning the proposed sub-division of the suit property, she informed the court that she was going to give the plaintiff a small portion of the land, equal to the portion occupied by her house. She was, however, not going to give her title because she has already given her land elsewhere.

19. For the foregoing reasons, she urged the court to give the plaintiff a short time in the land.

20. Upon being cross-examined by counsel for the plaintiff, the defendant admitted that by the time she obtained title to the suit property her son was still on the suit property.

21. She admitted having given the land to plaintiff's husband and that she had not asked him to leave during his lifetime. That notwithstanding she contended that she had agreed with the plaintiff's husband

before he passed on that he would vacate the suit property.

22. At the close of the case, advocates for the respective parties filed submissions which I have read and considered.

Plaintiff's submissions

23. On behalf of the plaintiff, it is pointed out that the plaintiff has been living on the portion of the suit land she claims for over 30 years and submitted that it could not have been the intention of the defendant's father to transfer the suit property to the defendant to hold absolutely.

24. From the conduct of the parties to this dispute and their predecessors in entitlement to the suit property, the court is urged to infer trust in favour of the defendant's family, the plaintiff included.

25. It is submitted that having acquiesced to the plaintiff's interest in the suit property, the defendant is estopped from complaining because her complaint is prejudicial to the plaintiff.

26. It is further submitted that by allowing the plaintiff's husband to build a permanent house in the suit property, the defendant represented to the plaintiff and her husband that the portion of suit property was family land and that the portion their house stands, is theirs to keep.

Defendant's submissions

27. On behalf of the defendant, it is submitted that a registered proprietor of land cannot be compelled by children to share her land with them during her lifetime; that there is no evidence that the defendant holds the suit property in trust for the plaintiff or any other person and the issue of trust has not been properly canvassed (the plaintiff is said to have failed to demonstrate whether her claim is premised on customary trust or the contention that all parents hold their land in trust for their children).

28. Concerning the plaintiff's claim to entitlement of 0.048ha out of the suit property; it is reiterated that the defendant cannot be dictated/compelled to give the plaintiff any given portion of the suit property.

29. It is contended that acceding to the plaintiff's demands will be prejudicial to the defendant and her children.

30. The contention by the plaintiff that the defendant had another parcel of land, which she sold and the valuation of the plaintiff's house are said to be irrelevant in the circumstances of this case.

31. The foregoing notwithstanding, it is pointed out that defendant is willing to, on humanitarian grounds, allow the plaintiff to continue occupying the portion of the suit land on which her matrimonial home stands on. It is, however, reiterated that the defendant is not willing to transfer the said portion to her.

32. From the pleadings filed in this suit and the submissions, the following are the issues for the court's determination:

a. Whether the plaintiff has locus to bring the suit herein?

b. Whether the defendant holds a portion of the suit property in trust for the plaintiff?

c. Whether the defendant should be ordered to transfer a portion of the suit property to the plaintiff?

d. Whether the plaintiff has made up a case for being granted the orders sought or any of them?

33. On whether the plaintiff has *locus standi* to bring the suit herein, it is not in dispute that the plaintiff

and the defendant are related, a daughter-in-law and a mother-in-law respectively. It is also not in dispute that the plaintiff is in occupation of the portion of the suit land which she claims. In my view, by virtue of being a daughter-in-law of the defendant and given the fact that she is in occupation of a portion of the suit property she claims, the plaintiff has capacity to bring and prosecute this suit in her personal capacity.

34. On whether the defendant holds a portion of the suit property on behalf of the plaintiff, from the evidence adduced in this case and in particular, the evidence to the effect that the defendant inherited the suit property from her father, and taking into account the fact that the plaintiff's husband was a mature person when the suit property was transferred to the defendant, I am unable to find that the property was transferred to the defendant to hold on her own behalf and on behalf of her children, the plaintiff's husband included.

35. On whether the defendant should be ordered to transfer to the plaintiff the portion of the suit property her house stands on, there being no evidence that the defendant holds the suit property in trust for the plaintiff or her deceased husband, I find no legal basis in law for forcing/ compelling the defendant to transfer any portion of the suit property to the plaintiff. In support of this finding, see the case of **Jemutai Tanui v. Juliana Jeptepkeny & 5 Others Eldoret ELC Civil Case No.44 of 2013** where it was held:-

“the rights of any proprietor of land whether such proprietor has children or not, is the same. The rights of a proprietor are not affected because such proprietor has children. There is no law which says that where a parent holds land, then he holds the same as a trustee for any children that he/she has.”

See also the case of **Virginia Wanjiru Kiiru v. Prisca Waruguru Kiiru (2002)eKLR** where it was held:

“the appellant as the registered owner of the suit property is still alive. His property is not yet available for such decision and distribution among his wives and children except if he personally on his own free will decides to subdivide and distribute it among them. He may not be urged, directed or ordered to do so against his own will...”

36. On whether the plaintiff has made up a case for being granted the orders sought or any of them, I have carefully considered the special circumstances of this case to wit the plaintiff has been, and is still in occupation of the portion of the suit property where her house is erected and the fact that the defendant is willing to allow her to continue occupying this portion. That being the case, although I find that the plaintiff has not made up a case for being granted any of the orders sought, I am of the view that it is just and equitable if the defendant allowed the plaintiff to continue occupying the portion her house stands on plus the veranda.

37. The upshot of the foregoing is that the plaintiff's suit is hereby dismissed.

38. This being a family dispute parties will bear their own costs of the suit.

Dated, signed and delivered in open court at Nyeri this 1st day of December, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Ndungu holding brief for Ms Thungu for defendant

Mr. Wachira for the plaintiff

Court assistant - Esther