



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 163 OF 2014

CHARLES KIHUMBA WANG'OMBE 1ST PLAINTIFF

PETER WACHIRA WANGOMBE 2ND PLAINTIFF

-VERSUS-

PATRICK IHIGA MUGWARA 1ST DEFENDANT

DAVID GACHANGI WANGOMBE 2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiffs who are brothers to the 2nd defendant brought this suit seeking judgment against the defendants for:-

a) An order directing the 1st defendant to surrender land parcel number Thengenge/Karia/3685 to them;

b) An order directing the 2nd defendant to surrender land parcel numbers Thengenge/Karia/3685 and Laikipia/Nanyuki/Kimura Block III/Sweet Water/522 so that the plaintiff's alongside the 2nd defendant have their shares of the said parcels of land.

c) Any other or better relief that this honourable court may deem fit to grant.

2. It is the plaintiffs' case that the parcels of land herein belonged to their deceased father, Danatos Wang'ombe Gachagi. The plaintiffs contend that the defendants got themselves registered as the proprietors of the suit properties after they successfully obtained letters of administration in respect of their deceased father's estate.

3. The plaintiffs' case is that whereas the 1st defendant claims that he bought a portion of Land parcel No. Thengenge/Karia/1560 which belonged to their deceased father, it is not true that he bought it on account of a debt owed to their deceased father because he (the 1st defendant) had at one time informed the court that the amount he owed their deceased father had been repaid and that he had no claim against the deceased's estate.

4. The 2nd defendant is accused of colluding with the 1st defendant to deny the plaintiffs their rightful share of the deceased's estate. The plaintiffs contend that while according to the ruling of the court in the

succession cause filed by the defendants the two houses of the deceased were to share the deceased's estate equally, the estate was not shared as ordered by the court.

5. In his statement of defence filed on **11th August, 2014** the 2nd defendant denied all allegations levelled against him and averred that he acted according to the court ruling dated 17th September, 2009 in Nyeri Succession Cause No.67 of 2002. He explains that the entitlement of the other house of his father went to the 1st defendant. The 2nd defendant admits that he holds the title deeds for parcels meant for his mother's side of the deceased's estate. He explains that he holds the titles in trust for his brothers and is ready to have his brothers included as co-proprietors of the parcels of land, to wit, Thengenge Karia/3685 and Laikipia/Nanyuki/Marura Block III/5365.

6. In his statement of defence, the 1st defendant explains that prior to the deceased's death, he had purchased part of the deceased's parcel of land known as Thengenge/Karia/ 1560. Owing to his interest in the deceased's estate, he was made an administrator in High Court Succession Cause No. 67 of 2007. He explains that the Judge in the Succession Court, **Khamoni J.**, ordered that he was not entitled to the land but ordered the deceased's estate to refund the money which he had paid, which was done.

7. The 1st defendant further explains that he remained a party to the succession proceedings, until a ruling in respect thereof was delivered by **Makhandia J.**, (as he then was) for distribution of the deceased estate equally between the two houses of the deceased.

8. The 1st defendant further explains that he bought his parcel of land from the 2nd wife of the deceased, Agnes Wanjiru Wang'ombe.

EVIDENCE

The plaintiff's Case

9. When the matter came up for hearing, the 1st Plaintiff **Charles Kihumba Wang'ombe**, informed the court that parcel number Thengenge/Karia/1560 belonged to their deceased father before it was subdivided into Thengenge/Karia/3683 and 3685 by the defendants.

10. He stated that the defendants did not inform them when they were making changes concerning the ownership of the suit properties.

11. He informed the court that he wanted to know why the defendants decided to disinherit them and why the 1st defendant tried to evict them from the suit property without a court order.

12. He admitted that the deceased had two wives and that he had knowledge of the Succession Cause herein wherein the court ordered that the deceased estate be shared between the two houses of the deceased.

13. The court heard that he had no objection to the said determination.

14. With regard to the order issued in the Succession Cause, he explained that their house was to get a ¼ acre of Thengenge/Karia/1560 and that the other house was also to get a ¼ acre therefrom. He lamented that contrary to the court's order, the other house got a bigger share of that property.

15. Like P.W.1, **P.W.2 Peter Wachira Wang'ombe** (the 2nd plaintiff herein) informed the court that the defendants sold their land without their knowledge. He further informed the court that they have no land as their house's share of the deceased's estate is registered in the 2nd defendant's name. He blames the 2nd defendant for having compromised their interest in the suit properties because he has land elsewhere.

16. He maintained that they were not involved in the sub-division and transfer of the suit properties. Like P.W.1 he explained that the order issued in the succession cause required that plot number

Thengenge/Karia/1560 be shared between the two houses but that did not happen.

17. He contended that the 2nd defendant sold their share to the 1st defendant in 2011. He took issue with the 1st defendant because he filed the Succession Cause hereto alongside the 2nd defendant and later on bought a portion of their deceased father's land where they lived. He blames the 1st defendant for having demolished their houses and caused them to be arrested.

18. **P.W.3 Peter Ndirangu Nderitu**, informed the court that he is aware of the Succession Cause hereto and that the houses where the plaintiffs lived were demolished by people who never lived there.

19. **P.W.4 Albert Muthonga Kihara**, the former sub-chief Kamakwa sub-location, informed the court that despite the fact that in his official capacity as the area sub-chief he ought to have been involved in the Succession proceedings (by issuing the letter that introduced beneficiaries to the estate of a deceased person to the authorities), he was not involved in the succession proceedings. He informed the court that he was aware that the deceased had two houses and that the deceased had told him how he wished his two parcels of land to be distributed between his two houses. In this regard, he informed the court that the deceased had given Thengenge/Karia/1560 to the house of Hellen Njeri and Plot No. 552 in Nanyuki to Agnes wanjiru.

The Defence case

20. **D.W.1 Patrick Ihiga Mugwara**, the 1st defendant herein informed the court that he knows the plaintiffs and the 1st defendant as the children of the deceased person herein.

21. He informed the court that the deceased sold him ½ acre of plot No 1560 and that he participated in the succession proceeding hereto wherein an order for division of the deceased's estate between his two houses was made. He informed the court that he bought the share of Agnes. He was issued with a title in respect thereof being Thengenge/Karia 3683. He informed the court that the entitlement of the other house was registered in the 2nd defendant's name. He produced the documents in support of his case as **Dexbt 1 to 8**.

22. On cross examination, he stated that he bought a portion of 1560 from the deceased in 2002 and bought another portion in 2011 after succession. He admitted that the sale agreement between himself and Agnes is dated 2005.

23. He informed the Court that Agnes was selling what would be her portion after distribution of the deceased's assets. He admitted having demolished the structures on the parcel of land he purchased and that he did not involve the other family members in the transfer of the parcel he bought. He explained that he did not involve the other family members in the transfer of the parcel he bought because the parcel belonged to Agnes (did not belong to the house of the plaintiff's). He further admitted that he entered into an agreement for sale of Agnes' portion before the succession cause was concluded.

24. With regard to the contention that he illegally/unlawfully evicted the plaintiffs from the parcel of land he purchased, he explained that he issued the plaintiff's with notice to vacate the land in question before he demolished the structures thereon.

25. On his part, **D.W.2 David Gachangi Wang'ombe**, informed the court that the plaintiffs (his brothers) were dissatisfied with the outcome of the succession cause (were not satisfied with the manner the deceased's estate was to be distributed).

26. He informed the court that the Succession court ordered that the deceased's estate be shared equally between his two houses.

27. He informed the court that Agnes who was entitled to half share of the deceased's estate, sold her share to the 1st defendant.

28. With regard to his house's share of the deceased's estate, he explained that it was registered in his name so that he could later on transfer to his brothers their respective entitlements. The court heard that D.W.2 is ready to transfer to the plaintiffs their share or include their names into the titles he holds.

29. He denied having sold any land to the 1st defendant and maintained that it was Agnes who sold land to the 1st defendant.

30. Upon being cross-examined by the 1st plaintiff, D.W.1 explained that the deceased had left a huge debt owed to the 1st defendant. He explained that the 1st defendant had taken the deceased to court over the unpaid debt and that the court had given them (read the family) 14 days to pay their father's debt. As a result they borrowed money and repaid the 1st defendant's debt.

31. The court heard that when distributing the estate of the deceased, the land was divided into three parcels. Each house received one of the parcels with the extra parcel being set aside to cater for the debt owed to their deceased father. Explaining that because Agnes' house paid her share of the deceased's debt in cash, she got a bigger share of the deceased's estate.

32. The court heard that when Agnes sold her share of the deceased's estate, there were 6 rooms on the parcel of land. He explained that Agnes got three of the rooms. The 1st defendant is said to have paid Kshs. 50,000/= in respect of the three houses that belonged to the plaintiffs' house's side.

33. He denied having made any decisions affecting his family without involving the plaintiffs and maintained that he complied with the decree obtained in the succession court.

34. On a point of clarification by the court, D.W.2 stated that plot number 3685 is currently occupied by one of his brothers, Paul Wangombe. The court heard that, plot number 3685 should be shared among the four brothers of his house.

35. D.W.3 **Paul Githaiga Wang'ombe**, informed the court that he has been participating in the issues concerning the deceased's estate. He informed the court that the plaintiffs have been very hostile to the 2nd defendant.

36. Concerning the demolishing of the plaintiffs houses', he stated that the plaintiffs were summoned to attend a family meeting over the issue but because they refused to turn up, those present entered into an agreement to receive Kshs. 50,000/= from the 1st defendant as compensation for the three rooms belonging to their house.

37. Like D.W.2 he stated that he was waiting for the brothers to agree on how to share the only remaining parcel of the land of the deceased's estate among the four brothers of his mother's house.

Analysis and determination:

38. From the pleadings filed in this suit, the evidence and the submissions filed in support thereof, it is not in dispute that the properties that are the subject matter of this suit belonged to the Plaintiffs' father, Danatos Wang'ombe Gachangi (deceased). Vide Nyeri High Court Succession Cause No.67 of 2002, it was decreed that the deceased's estate, consisting of Thengenge/Karia/1560 and Laikipia/Nanyuki/Marura Block III/Sweet Waters/552 be shared equally between the two houses of the deceased. In those proceedings, the plaintiffs' house was represented by the 2nd defendant while the other house was represented by Agnes Wanjiru Wangombe.

39. According to the evidence adduced in this case, the deceased had entered into an agreement with the 1st defendant for sale of a portion of Thengenge/Karia/1560. However, that transaction did not materialise. The purchase price was refunded to the 1st defendant after the presiding Judge, **Khamoni J.**, directed the deceased's estate to do so.

40. Before succession proceedings in respect of the deceased's estate were completed, the 1st defendant

entered into an agreement with Agnes Wanjiru Wangombe for sale of her share of Thengenge/Karia/1560 to wit, ¼ of an acre. That fact is born out by the sale agreement executed between the 1st defendant and the said Agnes on 4th July, 2009.

41. From the court record and the statement of defence filed by the 1st defendant, that was the only transaction through which the 1st defendant obtained rights to a portion of that parcel of land. However, whereas the evidence on record shows that Agnes sold to the 1st defendant her share of that parcel of land, being a ¼ of an acre, the 1st defendant ended up getting more than the ¼ an acre he bought. The title deed issued to him shows that he got more than his rightful entitlement of Agnes' share.

42. In his testimony before this court, the 1st defendant explained that he bought a portion of the parcel of land he owns from the deceased in 2002, another portion from Agnes and another one in 2011 after succession. It is noteworthy that apart from that explanation being at variance with his statement of defence, it is not supported by the evidence on record. For instance, with regard to the explanation that he bought a portion of the parcel he owns from the deceased, the evidence on record shows that the said transaction was cancelled and the purchase price in respect thereof refunded. In that regard see the judgment of **M.S.A Makhandia J.**, (as he then was) delivered on 17th September, 2009 at page 3 and paragraph 6 of the 1st defendant's statement of defence.

43. Concerning the allegations that he bought another portion of the said parcel of land in 2011, apart from that allegation being not pleaded, no evidence was produced capable of proving that fact. The explanation by his co-defendant (2nd defendant) on how he ended up getting more than he was entitled did not help things. This is so because it did not form part of what he pleaded in his statement of defence and because no evidence was produced capable of proving the alleged sale of the said parcel of land either to the women group that allegedly bought the parcel of land or by the 1st defendant.

44. It is trite law that parties are bound by their pleadings and as such they cannot be allowed to depart from them. In this regard see the case of **Joseph Kamau Gatimu v. Peter Gatimu Kanyonyo (2015) e KLR** Where the Court of Appeal quoted with approval a decision of the Malawi Supreme Court of Appeal-**Malawi Railways Ltd vs. Nyasulu (1998)MWSC3**, where the court quoted with approval an article by **Sir Jack Jacob** entitled "The present importance of pleadings" published in (1960) current legal problems at page 174 where the author states:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleading...for the sake of certainty and finality each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it than to adjudicate upon the specific matters."

45. That determination accords very well with the provisions of **Order 2, Rule 6** of the Civil Procedure Rules which provides as follows:-

"(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

(2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative."

46. In this case, the 1st defendant pleaded that he bought his parcel of land from Agnes. He did not plead that he got more than he was entitled to under the agreement executed between himself and Agnes on account of the agreement allegedly executed between himself and the deceased in 2002 or the other agreement allegedly entered into in 2011.

47. On his part, the 2nd defendant denied having sold a portion of the suit property to 1st defendant and asserted that he only acted in accordance with the judgment quoted herein above. According to the certificate of confirmation dated 17th September 2009, Agnes' share of Thengenge/Karia/ 1560 was merely half share. If the 2nd defendant acted in accordance with the said judgment and/or the decree obtained pursuant thereto, he would not have allowed the 1st defendant to obtain more than he was entitled to under the judgment, which was merely what Agnes was entitled to. The explanation that Agnes paid her share of the estate's debt does not add up given the explanation that the land was sold not to her but to the Women's Group that allegedly lent the estate some money to pay off the debt owed to it.

48. I think I have said more than enough to demonstrate that the 1st defendant holds more than his rightful share of the deceased's estate. Whatever circumstances led to the 1st defendant getting more than his rightful share of the deceased's estate, I am not convinced that the transfer to the 1st defendant of more land than what he bought was justified or in tandem with the 2nd defendant's duty as a trustee of the plaintiffs' entitlement to that parcel of land.

49. There is evidence that following the decision of the 2nd defendant to confer more rights to the 1st defendant than he was entitled, the 1st defendant caused the plaintiffs' houses to be demolished. From the explanation given by the 2nd defendant and D.W.3, that the plaintiffs' house received some money (Kshs.50,000/= as compensation for loss of those houses), I entertain no doubt that the 2nd defendant was privy to the impugned destruction of the plaintiffs' houses.

50. Although the 1st defendant claims to have issued notice on the plaintiffs to vacate the parcel of land he allegedly owned, I find the procedure used by the defendants to remove the plaintiffs from the suit property to have been illegal, the same not having been sanctioned by a court of law or any other lawful authority. It is my view that this amounted to taking the Law in their own hands. In the process, they ended up causing the plaintiffs unnecessary suffering and trouble. It is not enough for the 1st defendant to say that he issued an eviction notice, which the plaintiffs failed to comply with. He ought to have sought the help of the authorities to remove the plaintiffs from the suit property. It is only in such a forum, where it would have been determined whether the plaintiffs were justified or not in their refusal to move out of the suit property.

51. Having found the actions of the defendant's to have been unlawful and being of the view that the actions of the defendants amounted to trespass to the plaintiff's property which is actionable per se, I award the plaintiffs Kshs.100,000/= being damages for trespass to land/property to be paid by the defendants jointly and severally under prayer 3 of their plaint.

52. Although the plaintiffs' have not proved a case for cancellation of the title held by the 1st defendant, I am satisfied that they have proved a case for rectification of that title to the extent that the title size of his parcel of land shall be amended to read ¼ of an acre or the same measurements in hectares.

53. As for prayer (b), there being no contention that the 2nd defendant holds the two titles in trust for himself and his brothers, I allow it as prayed.

54. Finally, I award the costs of the suit to the plaintiffs.

Dated, signed and delivered at Nyeri this 13th day of July, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Charles Kihumba Wang'ombe – 1st plaintiff

Peter Wachira Wangombe – 2nd plaintiff

Mr. Nderi for the 1st defendant

David Gachangi Wambombe – 2nd defendant

Court assistant - Lydia