



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 375 OF 2017

CHARLES CHEGE MAINA.....PLAINTIFF

VS

EPHANTUS P. MWANGI MAINA.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant seeking orders as follows:-

- a) That the Defendant be ordered to transfer the whole land parcel number LOC.12/SUB-LOC.5/2072 to the Plaintiff.
- b) Costs of the suit and interest thereof.
- c) Any other or better relief this Honourable Court may deem fit to grant.

2. The Plaintiff's claim is a share of the family land LR. No. 5/554 in specific LR NO.12/SUB-LOC.5/2072 which remains registered in the name of the Defendant in trust for him.

3. In response to the Plaintiff's claim the Defendant denies that the Land LOC.12/SUB-LOC.5/554 is family land. He avers that the land belongs to him and he had mutually agreed to settle his brothers, the Plaintiff included on the land subject to each meeting the cost of subdivision and transfer of their respective titles. He avers that the Defendant has not paid Ksh. 32,500/=.

4. The Plaintiff led evidence that LOC.12/SUB-LOC.5/554 is family land registered in the name of the Defendant during demarcation to hold in trust for himself and 5 of his brothers. The land was later subdivided and shared out among them in equal shares. That he paid part of his share of subdivision cost in the sum of Kshs. 800/= to effect transfer of LOC.12/SUB-LOC.5/2072 to his name. That he has settled on LOC.12/SUB-LOC.5/2072 with his family. That the Defendant has refused to transfer the said parcel to him.

5. PW 2 – Michael Nguro Maina stated that he is one of the brothers of the parties and he too got his title from the Defendant upon payment of the requisite fees and charges. That he paid 750/= being his share of the expenses in respect to his title. The witnesses confirmed that the Plaintiff paid Kshs. 800/= to the Plaintiff in respect to the title.

6. PW 4 Samuel Njuguna Waweru stated that he is former Assistant Chief and recalls the Plaintiff had paid Kshs. 800/= in 1985 in his presence in his office and there was a record at the Chiefs office but could not trace it.

7. The Defendant led evidence that he is ready and willing to transfer the title LOC.12/SUB-LOC.5/2072 to the Plaintiff upon being reimbursed costs of the subdivision transfer in the sum of Kshs. 32,500/=. He avers that the other 4 brothers refunded their portion except the Plaintiff.

8. That he gave the original title to the Plaintiff in 1985 for safekeeping. That the land belongs to him and he has settled on it with his family. Asked to procure the receipts, he stated that the documents were lost in a fire incident in his house.

9. The Plaintiff elected to file written submission while the Defendant did not. Before the hearing begun the parties had attempted an out of Court settlement which did not see the light of day.

10. Having reviewed the totality of the evidence in this case as presented by the parties the main issue for determination is whether the Defendant is entitled to the refund of Kshs. 32,500/=. Whether the Defendant should transfer the title to the Plaintiff.

11. The facts of the case are rather straightforward. According to the evidence of the Plaintiff the land was to be shared equally between 5 brothers; Patrick Mwaniki, Simon Wathuo, Michael Nguro, the Plaintiff and the Defendant. In 1985 the Defendant did subdivide the land into 5 equal portions and registered them in his name with the agreement that each brother would refund to the Defendant the sum of Kshs. 800/= being the costs he incurred in survey fees, transfer costs and cost of transaction for each parcel. According to the Defendant, Michael Nguro being the youngest brother received his title after refunding Ksh. 750/= and Samson Wathuo paid Kshs. 20,000/= leaving a balance of 12500/=. But the Plaintiff has refused to pay him Kshs. 32,500/=. The Defendant states that he handed over the original title to the Plaintiff. The execution of the transfer documents was held in abeyance pending the payment of the said Kshs. 32,500/=. The Defendant has stated that he is ready and willing to execute the transfer to the Plaintiff only if he refunds him the Kshs 32,500/=.

12. The Plaintiff has led evidence which is supported by the PW 2, PW 3 and PW 4 that he did refund the Defendant Kshs. 800/=. The Defendant has denied receipt of Kshs. 800/=.

13. The Defendant did not lead evidence to support the refund of Kshs.32, 500/=. He stated that the refund was in respect to purchase of land maps, payments made to the lands office, for title preparation, survey fees, valuation fees, and transport expenses. All these are services that would in the ordinary course of business be transacted with official receipts with the exception of may be transport expenses. The Defendant informed the Court that the receipts got lost during a theft incident in his house and therefore he did not have them. No evidence in form of police abstract was tabled to support this assertion. Based on the unsupported claim of a refund as above the Court is unable to determine the validity or otherwise of the claim and finds and hold that the same has no legal basis. The payment is unsupported.

14. As to whether the Defendant should transfer the title to the Plaintiff, according to the Plaintiff the land was ancestral/family land registered in the name of the Defendant upon gathering and determination and so held it under trust for himself and family. According to the Defendant he acquired the land and held it personally but subject to the family mutual agreement to settle his brothers on the land, he carried out subdivisions into 5 portions, pointed out to each where to settle which portions they live in todate. It is generally agreed by the parties that the land/is family land and each of the brothers is entitled to an equal portion. Evidence led on trial is that each is settled on their portions on the ground. Equally that the Defendant has transferred titles to the others unlike the Plaintiff. The Defendant has unequivocally stated that he is ready willing to transfer the land to the Plaintiff on payment of 32,500/=. The Court has determined that the Kshs. 32,500/= is not payable on reasons adduced above. In the circumstances the Defendant is hereby ordered to execute the transfer of the suit land to the Plaintiff in fulfillment of the sharing of the family land held in trust which is not contested.

15. The upshot is that the Plaintiff's case succeeds and the Court makes orders as follows:

a) The Defendant is hereby ordered to transfer the whole LOC.12/SUB-LOC.5/2072 to the Plaintiff. In default the Deputy Registrar is hereby mandated to execute all the relevant documents to effect the said transfer.

b) Parties being brothers each to meet his own costs of the suit.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 10TH DAY OF MAY, 2018.

J G KEMEI

JUDGE.



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