



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO. 161 OF 2011

JAPHET KAIMENYI M'NDATHO.....PLAINTIFF

VERSUS

M 'NDATHO M'BWIRIA.....DEFENDANT

J U D G M E N T

In his plaint dated 22nd November, 2011 the plaintiff prays for judgment against the defendant in the following terms:

- (a) A Declaration that the Defendant Holds Lands Parcel NOS.NYAKI/MUNITHU/2609, 2610, 2611 & 2612 in TRUST for the plaintiff and other members of the Defendant's family.***
- (b) An order of injunction against the Defendant, his agents, servants, employees from interfering with the use and occupation of the piece of land measuring 1½ being part and parcel of the original Land Reference NO.NYAKI/MUNITHU/397.***
- (c) The Defendant be ordered to apply for combination of the new parcels NOS.NYAKI/MUNITHU/2609, 2610, 2611 & 2612 to revert to the original Land Reference No. NYAKI/MUNITHU/397 for fair and reasonable sub-division of 1½ Acres, 1½ Acres, 1½ Acres, and the balance of 1.00 Acre as agreed among family members in the year 1984.***
- (d) The costs of this suit***
- (e) Any other better relief as the Honourable Court may deem fit to grant.***

The plaintiff claims that he was born and raised in the original land reference No. NYAKI/MUNITHU/397 and had lived there for 54 years by the time he filed this suit. He says that he and his family consisting his wife and his children live on the suit land. The plaintiff says that in 1984, the defendant sub-divided the original suit land into 4 portions of 1½ to give 1 ½ to the plaintiff, 1½ to John Gakuubi, 1½ to Silas Murerwa M'Ndatho and the balance of 1.00 acres to the defendant and his daughter Margaret Kithiira M'Ndatho.

The plaintiff has averred that the defendant holds 1½ acres of the original land reference No. Nyaki/Munithu/394 in trust for him. He proffers that the existence of the alleged trust is buttressed by the fact that the defendant consented, permitted and authorized the plaintiff to construct a family house and develop a portion of land measuring 1½ acres being part and parcel of the original parcel of land Nyaki/Munithu/397.

The defendant in his averments has merely denied the plaintiffs assertions. In his defence he proffers that

the plaintiff, his son, has lost moral focus and lacks locus standi in this suit without substantiating with good grounds the basis for this opinion.

On 8.5.2012 after hearing interpartes an application dated 1st February, 2012, the Honourable J. A. Makau, J, issued an order of inhibition against land parcel No. Nyaki/Munithu/ 2612 registered in the name of the defendant until the hearing and determination of this suit.

When this suit came up for hearing on 12.11.2014, the plaintiff pointed out that both he and the defendant were present in Court before the suit was called out for hearing. The defendant was, however, not in Court to facilitate the hearing. He asked the Court to give judgment as per prayers in his plaint. I allowed the plaintiff to proceed ex- parte.

Without the defendant's input in this matter, one is inclined to give judgment in favour of the plaintiff in terms of the prayers in the plaint. This court can not, however, close its eyes to the situation on the ground. This Court, through the ruling of the Hon. Justice Makau delivered on 8th May, 2012 refused to issue inhibition orders against parcel Nos. Nyaki/Munithu/2609, 2610 and 2611. It only issued an inhibition order against parcel No. 2612. All these 4 parcels were sub-divisions of parcel No. Nyaki/Munithu/397.

The court can not speculate on if or not the uninhibited parcels of land have been transferred to other parties or not. It can not also speculate on what developments have taken place on those parcels of land. It is, however, clear that the plaintiff's main interest is getting 1½ acres from the original parcel No. Nyaki/Munithu/397. I note that the plaintiff has deliberately avoided to state in his plaint and averments if the parcel in which he has a house is No. Nyaki/Munithu/2612 which is the parcel of land this Court inhibited. I, however, note that the defendant in his replying affidavit swears that he had given parcel No. Nyaki/Munithu/2612 to the plaintiff but due to the disrespect he had shown towards him, he was offering to give this parcel of land to the plaintiff's 4 sons in equal shares.

I do note that the defendant has averred that only parcel No. Nyaki/Munithu/722 was family/ancestral land which he held in trust for the family. He has, however, failed to demonstrate that parcel Number Nyaki/Munithu/397 was not family/ancestral land. As Parcel No. Nyaki/Munithu/722 is not the subject of this suit, I will not say anything about it.

Having carefully looked at the positions taken by the parties, who are son and father, I make the following determination:

- 1. I declare that Land Parcel No. NYAKI/MUNITHU/2612 is held by the defendant in trust for the plaintiff.***
- 2. I decline to declare that Land Parcel Nos. NYAKI/MUNITHU/2609, 2610 and 2611 are held in trust for the plaintiff.***
- 3. I DO NOT grant the prayer that the defendant be ordered to apply for combination of new parcel Nos. Nyaki/Munithu/2609, 2610, 2611 and 2612 to revert to the original land parcel No. Nyaki/Munithu/397 for fair and reasonable sub-division of 1½ acres, 1½ acres, 1½ acres and balance of 1.00 acres as agreed by family members in the year 1984, if they so agreed.***

Regarding costs, I order that this being a matter involving a father and a son, each party should bear own costs.

It is so ordered.

Delivered in Open Court at Meru this 18th day of November, 2014 in the presence of:

Cc. Daniel

Japhet Kaimenyi - Plaintiff

M'Ndatho M'Mbirwa - Defendant

P. M. NJOROGI

JUDGE