



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Case 163 of 2002

**PETER NGACHA MIANO.....PLAINTIFF
Versus
MWERI MUIGIRIRI.....DEFENDANT**

J U D G M E N T

This suit was initiated by a plaint dated 24th September, 2002 and filed in court on 30th September, 2002 through Messrs Kebuka Wachira & Company Advocates. In the plaint Peter Ngacha Miano hereinafter referred to as “*the plaintiff*” sought orders against Mweri Muigiriri hereinafter referred to as “*the defendant*” in terms that:-

- “(a) The defendant who holds this land in trust be ordered to terminate the trust and transfer half of Konyu/Gachuku/875 to the plaintiff.
- (b) The defendant be ordered to pay costs of the suit.”

To the plaintiff this suit was necessary because the defendant was the elder brother of Miano Muigiriri deceased, the plaintiff’s father. The defendant was registered as the proprietor of land parcel Konyu/Gachuku/875 hereinafter referred to as “*the suit premises*” in trust for himself and the plaintiff’s deceased father. The defendant, the plaintiff and the plaintiff’s brother, Kihara Miano had since the time of land consolidation and demarcation stayed on the suit premises. They had severally requested the defendant to have the trust terminated and formally subdivide the suit premises into two and transfer one portion thereof to them but he had refused to do so. Hence the suit.

In response, the defendant through a defence filed by Messrs Kagondu & Mukunya advocates contended that the plaintiff’s deceased father was called Miano Kihara and not Miano Muigiriri and the deceased was not the defendant’s brother but a brother-in-law as he had married the defendant’s sister by the name Hellen Wangithi Miano, the plaintiff’s mother. Therefore the defendant being the plaintiff’s uncle from the plaintiff’s mother’s side, could not have been registered as the owner of the suit premises in trust for the plaintiff as his mother was married. The defendant further stated that the plaintiff, his brother, Kihara Miano and their mother Hellen Wangithi Miano have their own family land Konyu/Gathuku/868 from their deceased father/husband. It is the defendant’s case further that the plaintiff is not truthful when he states that there has been no other case in relation to the suit premises because his own mother, Hellen Wangithi Miano was sued by the defendant in Nyeri SRMCC No.179 of 1980 which case was decided in the defendant’s favour whereupon the plaintiff’s mother was compensated for her family’s development on the suit premises and she was ordered to vacate the suit premises. Finally the defendant contended that this suit was frivolous and bad in law as it is an ill-advised attempt to appeal in a case that has been heard and determined.

On 13th November, 2003, the hearing of the suit commenced before Okwengu J with the plaintiff testifying as follows: that he knew the defendant as his paternal uncle since he was a son of Miano Muigiriri, the defendant’s younger brother. The two had a sister called Hellen Wagithi. Both his parents were deceased. He had a brother by the name Kihara and both stay on the suit premises. Though the defendant was the registered proprietor of the suit premises, the same had been subdivided into two by

their late grandmother and clan elders. Whereas he and his brother occupy one portion, the other portion is occupied by the defendant. Since the suit premises initially belonged to their grandfather, it should have been divided between his deceased father and the defendant. He denied that he was not a son of Miano Muigiriri. Neither was he a son of Hellen Wagithi. He also denied that he was a son of Miano Kihara. He also denied that his rightful land is Konyu/Gachuku/868. Finally he denied that he was a party to SRM.CC 179 OF 1980. He conceded though that Hellen Wagithi was sued in that case by the defendant.

Cross-examined by Mr. Mukunya, learned counsel for the defendant, he stated that he never knew his parents as they passed on when he was a toddler. That he had nothing to show that he was a son of Miano. Though his late mother was called Wagith Miano, he had nothing to show that indeed that was his mother. He conceded that he knew Hellen Wagithi Miano who was her aunt. Miano was her husband though. Though the plaintiff's father was also known as Miano, the two Mianos were however not related. He denied that Miano, the husband of Hellen wagithi was his father. He was aware of the case between the defendant and Hellen Wagithi in which the court ordered the eviction of the Hellen Wagithi. However he was not a party to the said suit. He denied that he filed this suit after his mother aforesaid was evicted. He maintained that he was a son of Miano Muigiriri and therefore entitled to the suit premises as it belonged to his grandfather.

The 2nd witness called by the plaintiff was Helen Wagithi. She testified that the plaintiff was her brother's son by the name Miano Muirigiri. The wife of Miano Muigiriri died. She stays were she was married after she had been evicted from the suit premises.

Before this witness could be cross-examined, the case was adjournment. It was however not until 8th May, 2007 that the case re-surfaced for further hearing. By which time Okwengu J had ceased to have jurisdiction over the case following her transfer to the High Court of Kenya at Nairobi. However parties agreed before Kasango J, that the case would proceed from where Okwengu J had left.

When the matter next came up for further hearing on 18th September, 2007 it transpired that the defendant had passed on. By an application dated 23rd October, 2007, the applicant, Wanjau Mweri a son of the deceased sought and was allowed to substitute his deceased father. On 13th October, 2009 the case came up for further hearing when PW2 took the stand for purposes of cross-examination. However it transpired that she had become totally deaf and dumb or so it appeared. She could not whether by design or deliberately respond to questions put to her by Mr. Mukunya. My suspicion however was that she was play acting. However since she could not be forced to answer questions put to her in cross-examination, she was dispensed with. Whereupon the plaintiff closed his case.

The defendant first called Regina Wambogo Njiru from the department of National Registration Bureau as a witness. She produced the registration documents of the plaintiff which showed that his father was Miano whereas his mother was Hellen Wagithi.

Cross-examined by Mr. Wachira, learned counsel for the plaintiff, she stated that the information in the documents was provided by the person being registered meaning the plaintiff himself.

The defendant testified that the original defendant, Mweri Mugiriri who was his father passed on and he had substituted him in the proceedings. His deceased father had a brother and sister. The deceased was the registered proprietor of the suit premises. He sued his sister, Hellen Wagithi in Nyeri SRMCC. No.179 of 1980 for her eviction. He was successful in the suit and Hellen Wagithi was evicted from the suit premises. Initially Hellen Wagithi had placed a caution on the suit premises which had since been removed. When she was evicted she relocated and went to stay with her husband Miano Kihara from Munjiru clan. The defendant's clan was however known as Muthiegeni. The plaintiff was a son of Hellen Wagithi. He denied that there were two Miano's. There was only one Miano, the husband of Hellen Wagithi and father to the plaintiff. Hellen Wagithi had been allowed by the deceased to occupy a portion of the suit premises after she had been chased away by her husband. Later the deceased asked her to go back to her husband and when she refused the deceased sued her as aforesaid. It was after she was evicted that the plaintiff commenced this action as a means of going around the eviction order aforesaid.

Cross-examined by Mr. Wachira, the defendant stated that the plaintiff was his cousin and had come to the suit premises with his mother sometimes in 1979. There was no person known as Miano Muigiriri. Their grandfather had only 2 sisters. He had no brother. The plaintiff though married, his children are named after his father, Miano. The plaintiff was evicted alongside his mother, Hellen Wagithi.

With that the defendant closed his case. Thereafter parties elected to file and exchange written submissions. This was subsequently done. I have carefully read and considered them.

So what are the issues for determination in this case? Essentially they are three; (1) Whether the

plaintiff is the son of Miano Muigiriri, a brother to the defendant, (ii) whether the defendant is the registered proprietor of the suit premises in trust for himself and the family of his brother Miano Muigiriri and (iii) costs.

Starting with the first issue, there is the uncontested and unchallenged evidence from DW1, Regina Wambugu Njiru. She was an expert witness from the Department of National Registration Bureau in Nyeri. She tendered in evidence documents which showed that the plaintiff was the son of one, Miano and that his mother was Hellen Wagithi. The documents further proved that the plaintiff's clan was Munjiru. This witness stated categorically that the aforesaid information was provided by the plaintiff. That assertion was neither challenged nor controverted. The defendant stated in his evidence that his clan was Muthiegeni. Now if the plaintiff was a son of the defendant's brother as claimed by him he could not at the same time have belonged to Munjiru clan. Rather he would also have belonged to Muthiegeni clan. The registration documents no doubt proved that the plaintiff lied to court when he disclaimed Hellen Wagithi as his mother. Hellen Wagithi too also lied to court when she also stated that the plaintiff was not her son. Much as her evidence is worthless as she was not cross-examined, after feigning deafness and or dumbness, she clearly lied in examination in chief when she disowned the plaintiff as her son. If the two can lie on such mundane things as their own relationship what else are they not capable of lying about! The plaintiff alleges without any cogent proof that the documents that were produced from the National Registration Bureau connecting the plaintiff to Hellen Wagithi as aforesaid are not genuine. That they were fabrications and should be ignored. These documents to my mind were never challenged at all with regard to their authenticity. Nor did the plaintiff object to their production based on their authenticity. If the authenticity of the documents were in doubt, one would expect that the plaintiff would tender in evidence the authentic documents to counter that evidence. He did not do so meaning that there were no other documents with regard to his registration, other than those tendered by DW1 and as already stated, the information therein was provided by the plaintiff himself. There is also unchallenged evidence that the deceased had only two sisters. He had no brother called Miano Kihara. This fact too was not seriously challenged. If that be the case, then clearly the so called Miano Kihara can only be, as stated by the defendant, the husband of Hellen Wagithi and father to the plaintiff. That being the case the plaintiff cannot be a son of the defendant's brother. The upshot of the forging is that the plaintiff is not a son of the deceased defendant but a son of the deceased's defendant's sister, Hellen Wagithi.

In 1980 the deceased's defendant sued Hellen Wagithi for eviction in Nyeri SRM CC No.179 of 1980. Hellen Wagithi however counterclaimed for $\frac{1}{2}$ portion of the suit premises which she claimed that the defendant held on her behalf as a trustee. It is however instructive that though the plaintiff in this case claims that his father, the defendant, Hellen Wagithi and one Wangui were brothers and sisters, in SRMCC No.179 of 1980, Hellen Wagithi claimed $\frac{1}{2}$ share of the suit premises. Now if indeed the plaintiff's father ever existed and Wangui, one would expect that Hellen Wagithi would have claimed $\frac{1}{4}$ and not $\frac{1}{2}$ of the suit premises.

I think and as correctly submitted by Mr. Mukunya that by initiating this suit, the plaintiff was seeking a second bite of the same cherry. The plaintiff was making a second attempt to get the defendant's land, the first time having failed when the defendant successfully sued his mother for eviction. The decision in Nyeri SRMCC No.179 of 1980 has not been the subject of an appeal. That being the case, this suit is actually *Res judicata*.

Taking into account all the foregoing and considering that the plaintiff is not a nephew to the defendant, he cannot have a claim against the defendant based on family trust as he does not belong to the defendant's family tree. His claim should lie on his family land, Konyu/Gachuku/868. The plaintiff's mother, Hellen Wagithi having counter claimed a portion of the suit premises on account of family trust vide Nyeri SRMCC No.179 of 1980 and the same having been dismissed, there cannot therefore be a trust that accrues to her son, the plaintiff which could not accrue to her initially. Essentially then my answer to issue (ii) is that the defendant is the registered proprietor of the suit premises solely and not in trust for the plaintiff and or his family.

On costs, the general rule is that costs follow the event. I have no reason to depart from this general principle. Accordingly, since the plaintiff has been unable to prove his case on a balance of probabilities and is therefore for dismissal, the plaintiff will have to bear the costs.

The plaintiff's suit is accordingly dismissed with costs to the defendant.

Dated and delivered at Nyeri this 25th January, 2010.

M.S.A. MAKHANDIA
JUDGE