



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 19 of 2007

MWAI NDATHI.....APPELLANT

VERSUS

BERNARD NJOKA MWAI.....RESPONDENT

J U D G M E N T

The parties herein are father and son. The father sued his son before the Senior Resident Magistrate Kerugoya to have him vacate his land. Accordingly to the Plaintiff/Appellant, he is the registered owner of land parcel No. L.R KABARE/GACHIGI/527. He bought the same when the defendant and his other siblings were already grown up. The same was not therefore family land inherited from their forefathers. Like any good parent would do, the Appellant showed the Respondent a small part of land where he could cultivate and settle his family. The defendant did so but after some time, he became disrespectful to his father. He is said to have assaulted his father on several occasions resulting in court cases. The defendant appears to have forgotten that you don't bite the hand that feeds you. His father therefore withdrew his licence and decided to kick the defendant out his land. The defendant refused to move out and hence the institution of this suit.

In his statement of defence, the respondent herein only stated that he has lived on the said plot for over 30 years and has built his house there and planted some tea bushes. He thinks his father owes him to settle him and so he asked the court to dismiss the suit.

Interestingly, the learned trial magistrate found as a fact that the plaintiff is the registered and absolute owner of the land parcel in question but went ahead to make the following finding;

1. ***“Although the father is the registered owner of the land, having given it as a gift to his son who has been occupying that land for a long time and has nowhere to go, cannot be called a licensee in its strict term. I believe the plaintiff is holding title in trust for the plaintiff as family land just as he is doing for other children.*”**

It would be inhuman to give your son land and then tomorrow because of some differences kick him out. I cannot make such an order. It will be immoral..”

He proceeded to dismiss the suit and thus prompting this appeal. The Appeal relies on 6 grounds of Appeal which I have considered. Accordingly to counsel for the appellant, the learned trial magistrate was supposed to apply the law and not ***‘morality.’***

I am totally in agreement with counsel for the appellant. The learned trial magistrate did find that the appellant was the absolute proprietor of the land in question. He is not therefore holding the same in trust either for the defendant or for any of his other children. This is land he bought and it was not inherited. He can give it to anybody he wants and he can withdraw it from anybody who is living there with his permission. The learned trial magistrate erred in law in finding that the appellant was holding the land in trust for the Respondent and his other siblings. He had not infact been asked to declare the existence of any trust. There is no trust here. The Appellant as a father decided to allow his children to settle on his land. There is no evidence that he gave them the land as a gift as erroneously concluded by the learned trial magistrate. The Respondent is a licensee on that plot. He lives there on at the pleasure of this father. If he chooses to disrespect him and even assault him, then he runs the risk of being thrown out of the land. it is really upto him to decide to abide by his fathers terms or to leave the land. He should choose to either shape up or ship out.

Contrary to what some people in communities around here seem to think, a parent has no responsibility whatsoever to look after and care for grownups adults as a matter of right. A parent does not work hard and buy land so that he/she can give it to his or her children as a matter of right. If they want their land, let them also work for it. If their parents are magnanimous enough to give them land, then they should respect the parents and appreciate what they are doing for them. Those are hard facts and there is nothing immoral about it. The Respondent herein is himself a mature man with his own family. His father has no obligation to cater for him. The appellant bought the land in question with his wife. Let the Respondent also by his own land and settle his children thereon. If he is unable to do so, then he should humble himself before his father, seek his forgiveness and behave himself in order to be allowed to continue living on the plot in question. That is nonetheless not an order from this court. It has nothing to do with the law. It was just unsolicited advice. As the law stands, the stark reality of it is that the appellant has no duty in law to provide for the father of his grandchildren. He is living on that land as a licensee and since his conduct has caused the said licence to be cancelled then the court has no business forcing the appellant to live with him.

The learned trial magistrate’s Judgment was not based on any law. It was erroneous. The Respondent is not holding the land in question in trust for either the Respondent or any of his children. This appeal must therefore succeed. The same is allowed. The Judgment of the lower court is hereby set aside. Judgment is entered for the Plaintiff/Respondent as claimed in the lower court less the claim for mesne profits as the same does not appear to have been pursued. Each party will bear its own costs of this appeal and

also of the suit in the subordinate court. It is so ordered.

W. KARANJA
JUDGE

Delivered, dated and signed at Embu this.....21.....day of May, 2010

In presence of:-