



CIVIL

- Claim of holding property in trust

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 160 OF 1991

M'MBIJIWE M'MBUI ----- 1ST PLAINTIFF

KABITHI M'MBIJIWE ----- 2ND PLAINTIFF

- VERSUS -

MWITA THIRIKWA ----- DEFENDANT

JUDGMENT

The plaintiff's claim is that parcel no. NTIMA/IGOKI/892 was held by M'Ikunyua their brother now deceased in trust for the family. They alleged further that the defendant became the registered owner of that parcel of land and that he holds that land in trust for the family. In the particulars of trust in that plaint they alleged that the defendant had knowledge of the plaintiffs occupation of that parcel of land. The final prayers of the plaintiff are for declaration that the defendants holds that land in trust for the family further for an order of transfer of that portion occupied by the plaintiffs. The portion that the plaintiffs are alleged that they occupy was not stated in the plaint. However in evidence the 1st plaintiff stated

“I occupy 1.5 acres. The balance is occupied by Muita (defendant).”

The defendant in his defence denied the plaintiffs claim and counterclaim that the plaintiffs had forcibly trespassed on the suit property. Only the 1st plaintiff gave evidence before court. It therefore should be noted that the 2nd plaintiffs case was not proved. 1st plaintiff in short stated that he was born on that land and his family lives there. He has planted beans, yams, coffee and bananas. In 1992 he said the defendant asked them to vacate the land. He refused and todate he said he is still on the land. Although he said he was born on that land and that his father died on that land, he had not obtained a green card in respect of that property. His brother M'Ikunyua was however according to him buried at the hospital where he died and not the suit property. The 1st plaintiff said that the defendant does not have a house on that land. PW2 stated that he was aware that the defendant exchanged with M'Ikunyua the land for a lorry. Contrary to what the plaintiff had said this witness said that the plaintiff occupies 2.5 acres of that suit property. The defendant in evidence stated that he exchanged the land with his lorry. This was after M'Ikunyua heard that he had a land dispute on another parcel of land he owned elsewhere. M'Ikunyua offered to give him the suit property in exchange for the one he had a dispute. This was in 1968. They went to the land office with M'Ikunyua and on showing their identification the transaction was recorded. In 1970/71 when titles were issued he obtained his title over this land. He produced before court a copy of the green card and a copy of his title. He also produced documents to prove that he was delivering coffee, which he had planted on the property. Even though the property was transferred to him in 1968 he said there had been no disputed between him and the plaintiff until the death of M'Ikunyua. The defendant said that the plaintiff is not in occupation of that land. He also denied that he is a trustee for the plaintiff and his family. When he was cross-examined the defendant said that M'Ikunyua transferred the suit property to him and at that time there was no one occupying that land. He also stated that he paid to M'Ikunyua Kshs.31,000/= to compensate him because the land he exchanged with M'Ikunyua was smaller than the suit property. The defendant said that he had built a house on the suit property. DW2 confirmed that the defendant paid Kshs.31,000/= to M'Ikunyua when they exchanged the land. He was the one that counted that money. He

also accompanied the defendant and M'Ikunyua when the transfer was done at the land office. This witness said that the 1st plaintiff vacated the land when M'Ikunyua exchange it with the defendant. DW3 had been a pastor for 39 years. He got to know the defendant when he exchanged his land with M'Ikunyua. He said that it was only after the death of M'Ikunyua that the plaintiffs began to claim the land. This witness said his land is near the suit property. DW4 was the land registrar who confirmed that the suit property is registered in the defendants name. It was registered in his named on 8th January,1970.

The plaintiff failed to prove the defendant holds the suit property as a trustee for them. The evidence of the defence was clear and uncontradicted. Particularly DW3 stated that the plaintiff moved out of the suit property when the defendant obtained the suit property from his late brother M'Ikunyua. There is no evidence before court that the plaintiff has continued to occupy the suit property. Indeed the defendant stated that it is whilst this case was subsisting that the plaintiff trespassed on the suit land. The plaintiff's evidence was contradictory and cannot be relied on. The plaintiff therefore has failed to prove his case on a balance of probability. There is no basis for the prayers sought by the plaintiff. For that reason the 1st plaintiffs claims is hereby dismissed with costs to the defendants for failure to prove his case on a balance of probability. The 2nd plaintiffs claims is dismissed with costs to the defendant because the 2nd plaintiff did not tender evidenced to prove his claim. The defendant has on a balance of probability proved that he is the owner of the suit property. He is in occupation of the same. The plaintiffs since the filing of this case have illegally and forcibly trespassed on his land. The defendant counter claim is therefore proved to that extent. I grant the following orders;

- 1. The plaintiffs claim is dismissed with costs being awarded to the defendants.**
- 2. An order is hereby issued for both plaintiffs to give vacant possession of parcel no. NTIMA/IGOKI/892 forthwith. Failure to give vacant possession an order shall issue from this court for the eviction of the plaintiff from parcel no. NTIMA/IGOKI/892.**
- 3. The defendant is awarded costs of the counterclaim.**
- 4. The caution registered against the title NTIMA/IGOKI/892 by M'Mbijiwe M'Mbui is ordered to be removed forthwith.**

Dated at Meru this 22nd October, 2010

MARY KASANGO

JUDGE