

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 77 of 2006

MARTIN KINYUA PLAINTIFF

VERSUS

VERONICA KANYAMU IKINGI 1ST DEFENDANT

JAMES NDEGWA IKINGI 2ND DEFENDANT

PHARIS RIUNGU 3RD DEFENDANT

NJERI IKINGI 4TH DEFENDANT

PHARIS NYAGA 5TH DEFENDANT

NYAMU MBAONI 6TH DEFENDANT

MUGAMBI MBAONI 7TH DEFENDANT

JUDGMENT

The plaintiff filed this claim claiming that the first defendant was in occupation of a parcel of land No. KARINGANI/MUGIRIRWA/1231. The plaintiff further pleaded that the second to the 8th defendants had trespassed on his property and cut down trees thereon. He therefore claimed for orders for the first defendant to vacate the suit property and all the defendants to be stopped from trespassing and cutting trees thereon. The plaintiff's claim is denied by all the defendants who in their defence and counter claim pleaded that the plaintiff obtained registration of the suit property in his name by means of fraud. In the particulars of fraud in the defence and counter claim, the defendants states that the plaintiff had by fraudulent means obtained registration of the suit property in his name which belong to the first defendant. The first defendant in her counter claim averred that the plaintiff fraudulently combined her one acre when he was obtaining registration of his parcel of land. She averred in that counter claim that the one acre was the entitlement of her deceased mother. She alleged that the plaintiff held one acre on her behalf under customary trust. That in breach of that trust, the plaintiff had sought to evict her and had harassed her amongst other things. She therefore prayed for a declaration that the plaintiff held one acre in trust for her. She further sought that the plaintiff be compelled to transfer one acre to her. Plaintiff in his evidence stated that he was the grand son of Ikingi Ndegwa, deceased (herein after called Ndegwa). Ndegwa was the registered owner of KARINGANI/MUGIRIRWA/123 and 731 which eventually were subdivided. Ndegwa was the father to the first up to the 4th defendants. The mother of the plaintiff was also a daughter of Ndegwa. She was unmarried. The 5th to the 8th defendants were the plaintiff's neighbours. In the lifetime of Ndegwa, the plaintiff said that he, Ndegwa, had expressed his wishes that the plaintiff be given part of his land. The plaintiff said that Ndegwa directed the 2nd defendant to give him land. Further to those directions, and after the death of Ndegwa, he was given 2 acres in 1996. To prove his ownership of the 2 acres, he produced a certificate of official search. The portion that was given to him had been shown to the 2nd to 4th defendants. He said that his grandfather Ndegwa died in 1972. There was a succession cause filed in respect of his estate being Chuka RM Succession No. 4 of

75. In those proceedings, which he produced before court, the court declared the second third and fourth defendants as heirs of the estate of Ndegwa. In those proceedings, the learned magistrate stated that Ndegwa was the registered owner of parcels No. KIRINGANI MUGIRIRWA NOs. 123 and 731. The plaintiff further stated that Ndegwa had given a condition which he had to fulfill before getting his portion of land. That he was instructed to give his uncles i.e. second to fourth defendants herein a goat and honey according to the Kimeru custom. He said that he gave his uncles the items requested by Ndegwa in a ceremony that was witnessed by the sub area (village elder). His mother, Alice Karinga, Njeru Ikingi and the second defendant were also present at that ceremony. The ceremony took place, according to him, in 1995. He produced photographs to prove the same. The photographs, however, one of them has a stamp at the back of it presumably put there by the photo studio showing the date of 23rd August 1997. The other photograph has a writing at the back of it by biro of 1997. It therefore seems doubtful whether they were for the date given by the plaintiff. In those photographs, he said that one could see that he was handing over an animal to the second defendant in fulfillment of the conditions given to him. On the property being transferred to his name, he said he moved there installed water and planted trees. Later on, because his mother was not getting on with her brothers, he invited her to stay with him. Similarly, the first defendant who is his aunt did not get on with her brothers and he also invited her to live with him on the land. The first defendant however began to be rude and quarrelsome. After a while, she began to destroy trees. The other defendants, according to the plaintiff, began to interfere with his use of his land in support of the first defendant. On being cross examined, the plaintiff admitted that when Ndegwa passed away, he was 13 years old. He said that Ndegwa had indicated that he should get part of his land around 1970 and 1971. That when Ndegwa uttered those words, the 2nd to the 4th defendants were present. He said that he was given 2 acres out of the original parcel No. KARINGANI MUGIRIRWA/123. He got this land after the second defendant delineated the boundaries of all who were to get land. Thereafter a surveyor was summoned to correctly subdivide the land. Plaintiff accepted under cross examination that he had been charged with criminal offence of assaulting the first defendant. PWII said that he knew all the parties in the suit and that he was related to Ndegwa. Ndegwa was a brother to his mother. He had heard Ndegwa often say that he desired the plaintiff to inherit a portion of his land. The portion he was to inherit was where Ndegwa was residing in his life time. He referred to the photographs that had been exhibited in evidence which he said showed the ceremony following the plaintiff obtaining his portion of land. The defence evidence was lead by the second defendant who said was the first born of Ndegwa. After the conclusion of the administration cause at Chuka court, the family sat together to decide what portions each was to get. When they did the division amongst themselves, they failed to allocate land to Jane Ikingi, wife of Ndegwa and mother of the first defendant. She complained of being excluded and another meeting was convened where she was allocated one acre which was next to the plaintiff's one acre. She took occupation of that land but before the title was issued in her name she died in 1995. Second defendant said that the plaintiff through the use of bribery obtained his title which included the one acre allocated to Jane. It was not until the first defendant went to the lands office that she discovered this. Second defendant said that when the family allocated the plaintiff one acre, they were following the instructions given by Ndegwa. In respect of the photographs that were exhibited, he said that he had visited the plaintiff and found them having a ceremony. He however denied that he was the person in plaintiff's exhibit number 4. He also denied that Ndegwa had laid down conditions for the plaintiff to fulfill in order for him to get his inheritance. The defendant said:-

“As a Meru man, I had to do what he (Ndegwa) requested me to do”.

He was however categorical that Ndegwa did not indicate that the plaintiff had to get 2 acres. DWII said that he knew the family of Ndegwa. He was present when the family met to agree on distribution. He was aware that Jane Ikingi did complain about being excluded from the distribution. As a result, another meeting was convened and that meeting allocated both Jane and the first defendant one acre. They put boundaries as they had agreed but later it was discovered that the plaintiff had obtained a title for both his portion and the first defendant's portion. He denied that he had entered the plaintiff's land or that he had cut his trees. This witness said that Ndegwa in his life time had said:-

“If I die, do not chase away Martin Kinyua (plaintiff).”

He too was categorical that Ndegwa did not indicate the number of acres that were to be given to the

plaintiff. First defendant also gave evidence and said that she was a daughter of Ndegwa. On his death, his land was to be distributed by 2nd to the 4th defendant. When the family first met and they excluded her and her mother from the distribution, they complained. As a result of that complain, the family later allocated them 1 acre. She, like the other defence witnesses, said that the plaintiff in obtaining his title combined both his one acre and her one acre. She prayed that the court could return the one acre to her. The plaintiff had uprooted her fence, her coffee bushes, her fence and banana trees. She said that he even chased her with a panga in the suit property. In being cross examined, she said that one acre became hers on her mother's death. That was the evidence tendered by the parties. The parties indeed filed written submissions and I have considered them. The issues that present themselves for consideration are whether or not the plaintiff is entitled to his prayers for the first defendant to give him possession of the suit property and whether the second to the 8th defendant should be ordered to cease to trespass upon the plaintiff's land and by restraining orders be stopped from cutting down his trees. Further, the court needs to determine whether the 1st defendant is entitled to her prayers for one acre of the suit property. In respect of the first issue, the plaintiff did not prove by his evidence that the first defendant is in occupation of the suit property. The plaintiff in evidence only stated that he did invite the first defendant to live on the suit property but she later became abusive and destructive. Plaintiff's own witness PWII said that the first defendant is no longer on the suit property. Considering that evidence, in respect of the first issue, I find that the plaintiff is not entitled to his prayer for the first defendant to vacate the suit property. Similarly, the plaintiff did not prove by evidence that the 2nd to the 8th defendant were trespassing his land. He stated that when he requested the first defendant to vacate the suit property, she refused and indeed she was supported by a councilor. He did not prove that any of the defendants trespasses the suit property or that they cut down his trees. The finding of the court on this issue therefore is in the negative. The plaintiff did not prove that the defendants had trespassed his land or cut trees. Accordingly, having made that finding, the plaintiff's case is dismissed with costs being awarded to all the defendants. In respect of the issue whether the first defendant is entitled to her prayers for an acre, I make reference to the facts which cannot be disputed. It is not in dispute that the first defendant was a daughter of Ndegwa the owner of the land which the plaintiff was eventually allocated. It is also not in dispute that Ndegwa had intimated that the plaintiff should be given part of his land on his death. It is not however clear when he communicated this information having regard to the date of his death. It is clear however that the plaintiff and the defendant do not deny that he communicated those instructions. The plaintiff at first in chief stated that Ndegwa said he should be given land after his death. It was not until the plaintiff was prompted by his advocate that he began to say that Ndegwa had indicated he should get two acres of land. That was denied by all the defendants who said that there was no clear indication of how much land he was to get. By the time the mother of the first defendant died, the one acre that had been allocated to her had not been registered in her name. It was at that time still in the name of Ndegwa. The first defendant being a daughter of Ndegwa was entitled just like any of her siblings to inherit from her father. It does seem that it had been agreed between the 4th and 2nd defendant that she should inherit that land that had been allocated to her mother. It is alleged both in the defence and in the counter claim and further in the defence evidence that the plaintiff fraudulently had that land combined with his. In my finding, the first defendant as a daughter of Ndegwa had priority much more than the plaintiff in obtaining inheritance of Ndegwa. I however take into account that it has been accepted by all that the plaintiff was to get part of the land of Ndegwa. When the parties were giving evidence, I had an opportunity to observe them and it became very clear to me that the plaintiff, due to his youthfulness and education may have taken advantage of the defendants who were much older than him and less educated, if at all. He does even seem that the plaintiffs photographs i.e. plaintiffs exhibits number 3 and 4 were stage managed by the plaintiff with the sole intention of using them in a court action such as this one. Plaintiff exhibit number 4 shows the plaintiff to be far much younger than he seems to be in plaintiff exhibit number 3. Similarly, even the second defendant is far much younger to the extent of not being recognized in exhibit 4. It was clear to me that the plaintiff used unfair means to have the first defendant's one acre combined with his. Indeed it was fraudulent on his part. For that reason, the interest of justice do demand that the registration of the suit property be cancelled to right the wrong done by the plaintiff. In this regard the maxim of equity "equity will not suffer wrong be without a remedy" will come to the aid of the first defendant. In respect therefore to the last issue, I find it in the affirmative in favour of the first defendant. The judgment of this court is as follows:-

1. The plaintiff's suit is hereby dismissed with costs to all the defendants.

2. The court orders that the registration of parcel No. KARINGANI/MUGIRIRWA/1231 be canceled. The land registrar shall not require the surrender of the original title to carry out the said cancellation. Thereafter, the land on KARINGANI/MUGIRIRWA/1231 shall be divided into two equal portions with one equal portion being registered in the plaintiff's name and the other equal portion being registered in the first defendant's name.

3. The deputy registrar of this court is authorized to sign all documents to put into effect the judgment of this court.

4. The first defendant is awarded costs of the counter claim.

Dated and delivered at Meru this 25th day of September 2009.

MARY KASANGO

JUDGE