



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 95 OF 2005

GODFREY KAGIA GITHIRE.....PLAINTIFF

VERSUS

GEORGE NDICHU KAGIA.....1ST DEFENDANT

PETER NDURU KAGIA.....2ND DEFENDANT

ELIUD NGICHU KAGIA.....3RD DEFENDANT

DAVID MUKIRI GODFREY.....4TH DEFENDANT

JOSHUA MBEKE KAGIA.....5TH DEFENDANT

JUDGMENT

The plaintiff is the father of the five defendants. In this suit he seeks for orders against his five sons that; he be declared the owner of *LR No. Nyandarua/Pesi/88* by virtue of an allocation by the settlement Fund Trustees; an order that the five defendants be evicted from the suit premises, and he be paid mesne profits. The defendants filed a joint statement of defence and counterclaim. They denied being licensees on the suit premises. They sought to be recognized as beneficial owners and alleged that the plaintiff owned the suit land in trust, having sold the family ancestral land in Kiambu District and used the proceeds to purchase the suit premises.

The defendants also alleged that they contributed towards the loan repayment to redeem the suit premises from the Settlement Fund Trustees; they therefore claimed an equitable right to occupy the land. In the counterclaim, the defendants sought for a declaration that the plaintiff is registered as their trustee, they contended that they have equitable right to occupy the land. They also sought for an order of permanent injunction restraining the plaintiff from interfering with their occupation, possession and enjoyment of the suit premises.

When this matter came up for hearing, the plaintiff gave evidence in support of his claim. He testified that he is the father of the five defendants who live on the suit premises, and wanted them evicted from the suit premises. The plaintiff testified that he purchased his land in 1965 from the Settlement Fund Trustees after he sold a piece of land in Kiambu which he inherited from his father. The suit premises measures approximately 50 acres, the plaintiff occupied the suit land in 1965 with his children who included the defendants. He contended that he educated the defendants, they should move out of his land. He also paid the loan to the suit premises, at one time; the plaintiff had difficulties repaying the loan to the Settlement Fund Trustees. He summoned all his children to make a contribution but it is only **Stephen Njihia** who sold a cow and made a contribution. The defendants declined to make a

contribution, thereby forcing him to sell 2 1/2 acres in order to settle the loan in October 1999. He produced receipts for the payments made to the Settlement Trust Fund.

In 1987 there was a disagreement with the defendants which degenerated into a fight when the 3rd defendant wanted to construct a house without the approval of the plaintiff. The matter was reported before the area chief and the elders. The plaintiff insisted that the defendants were disrespectful of him as the registered proprietor of the property. These disagreements continued in the year 2000 and 2001 when the 1st defendant is alleged also to have assaulted the plaintiff. The other defendants also joined in the fray that is when the plaintiff gave notice to the defendants to move out of his land. This matter also affected the plaintiff's relationship with the defendants' mother.

The plaintiff alleged that the defendants took away his wife and they have been trying to force the plaintiff to subdivide the land among the defendants against his wishes. This matter was also reported to the local police. However the defendants went on threatening the plaintiff to subdivide the land and they threatened the tenants whom he had leased land and ordered them vacate the premises. The plaintiff contended that he is an old man. He is unable to work on his land because of the interference by the defendants. The defendants have also placed a caution on the suit premises thereby preventing the plaintiff from dealing with his parcel of land as he may please. He therefore filed the present suit so that the defendants can be evicted from his land and he can be able to deal with it as he pleases.

The plaintiff also relied on the evidence of his son **Stephen N. Kagia**. He confirmed that the family used to live in Kiambu but they moved in the suit premises in 1965 when he was 11 years old. He testified that it is the plaintiff who purchased the land single-handedly; the children were very small to contribute. As regards the land in Kiambu it is the plaintiff who was entitled because the land belonged to his father. He urged the court to allow the plaintiff to deal with his land as he may please.

On the part of the defendants the 1st, 2nd, 3rd and 4th defendants testified of how they previously used to live in Kiambu in their grandfather's land measuring about 6 acres. At the time, the plaintiff was working with the Government when he borrowed a loan from the bank. In order to save the Limuru land from being sold by the bank he sold the land and used the proceeds to pay the loan and to purchase the suit premises in 1965. The defendants were living on this land when they were children between 1965 and 1971. They used to work on the land and sell the produce such as milk and pyrethrum to repay the loan with the Settlement Fund Trustees.

George Ndichu Kagia (DW1) recalled that in 1971 when he finished Form II examination he kept some cows which the plaintiff sold so as to pay the Settlement loan. In 1980 after the plaintiff sold 2 1/2 acres there was still an outstanding balance and the defendants contributed Kshs 1,500/= which DW1 paid at the Lands office Nairobi to redeem the plaintiff's title. He produced the receipt which was issued in the name of the plaintiff as the registered proprietor. DW1 was in occupation of 11 acres where he has constructed his house and kept dairy cows. He complained that the plaintiff has been interfering with his household and he has been forced to move after he was given notice by the plaintiff.

The plaintiff has purported to give some children of DW1 land which has brought tension in his household because the other children from his second wife were left out. DW1 currently lives on a friend's parcel of land but he still cultivates his parcel of land. He complained that it is the plaintiff who made malicious allegations that the defendants beat him. The plaintiff has reported the defendants severally to the authorities. However the Police have never found any evidence against the defendants.

The evidence by DW1 was reiterated by that of **Peter Nduru Kagia (DW3)** who lives on the suit premises with his wife and four children and three grandchildren. He also confirmed that he contributed to the payment of the loan to the Settlement Fund Trust. He further contributed to pay a loan that the plaintiff had with the KCC. He also used to work on the farm and deliver milk and pyrethrum to the cooperative society. He contended that having contributed to the payment of the loan over the suit premises he became a partner with the plaintiff over the ownership of the land. He denied having been disrespectful to the plaintiff.

Eliud Ndichu Kagia, the 3rd defendant was evicted by the plaintiff from the suit premises in the year 2002. DW4 was given notice to move within hours. He moved to the Primary School where he teaches. DW4 had built a house in 1993. At first the plaintiff insisted that he should move to another portion of the land. He was forced to demolish the house and when he built it in another part of the land, he was still ordered to move out thus he has not been staying on the plaintiff's land but he has been cultivating two acres. He also testified that he contributed to the payment of the loan with the Settlement Trust Fund. He confirmed that they have been living on the plaintiff's parcel of land with a lot of difficulties.

The 4th defendant also testified, he too worked on the parcel of land, milking cows and picking pyrethrum for sale at the co-operative society where money was deducted to pay the loan. He denied having harassed the plaintiff. He has been cultivating 2¹/₂ acres of the land although the plaintiff interferes with the peaceful occupation. The defendants' mother Janet Wanjiru Kagia also testified on behalf of the defendants. She told the court that she is opposed to the defendants being evicted from the family land. DW6 narrated how the family migrated from Kiambu in 1965. The plaintiff sold the land in Kiambu Kabuku and raised the money to purchase the suit premises. She has ten children who include the defendants. She denied that the defendants have beaten the plaintiff.

The defendants also relied on the evidence of their uncle **George Nganga Githire (DW2)**. He confirmed that the plaintiff is his brother. He was given six acres of land in Kiambu by their late father. The plaintiff sold the land in Kiambu and moved to Nyandarua where he acquired a bigger portion of land. DW2 urged the court not to evict the defendants from their father's land. He testified that the defendants do not even drink alcohol therefore they cannot disturb their father.

Both counsel for the plaintiff and defendant filed written submissions. They have also relied on several decided cases both by the High Court and by the Court of Appeal. I thank them for their industry in conducting extensive research. I will rely on some of the decisions in the course of analysing the evidence before this court.

This case brings out the triangular issue of land ownership, occupation by members of the family **vis vis** the rights of a registered proprietor. The plaintiff is the father of the defendants; he is also the registered proprietor of the suit premises. Decisions over disputes of this nature abound both the High Court and the Court of Appeal. Counsel for the plaintiff argued that the Court should follow the decision by the Court of Appeal in the case of **Muriuki Marigi vs. Richard Marigi Muriuki & Another, Civil Appeal No. 189 of 1996 (Nyeri)**. The dispute involved a father and a son over the ownership of a parcel of land registered in the name of the appellant under the provisions of **Registered Land Act (Cap 300)**. The Court of Appeal dismissed the son's claim on the grounds that customary trust is not an overriding interest which is envisaged under Section 30 of Cap. 300. This was also the decision taken in the reported cases of **Obiero –vs.- Opiyo & Others [1972] EA 227** and **Esiroyo –vs- Esiroyo & Another [1973] EA 388**. Furthermore the defendants did not prove the contributions they made towards purchasing the suit property. Their evidence according to counsel fail to satisfy the principles set out under the Law of Evidence because there were no documents produced to prove the payments. The defendants are legitimately expected to assist their parents in the normal cause of growing up. That contribution cannot be enforceable in law against the parents.

I find this case different from the case of **Muriuki Marigi**; in this case it is the plaintiff who instituted this suit against his sons seeking for an order of eviction. Secondly, the defendants counterclaimed and alleged that the plaintiff held the property in trust. Finally the plaintiff has not yet been registered as proprietor of the title which would entail an enquiry over persons who are in occupation of the suit premises; the plaintiff's land was allotted to him in 1965. The transfer was executed by the Settlement Fund Trustee on 4th December 1995 as well as a discharge of charge. From the material on record, it is not clear when the title was issued to the plaintiff. It is more probable than not, if it was at all issued, it was after 1995. However a restriction on a certificate of search which was entered in June 2003, it is noted that no registration of transfer from Settlement Fund Trustees until a family dispute over the land is settled.

The issue of customary trust has been raised in this case, I think it deserves some discussion. As it will

become clear later in this judgement, the trust alluded to in this case, is a constructive trust based on the law of equity and not a customary trust. Before the onset of the registration of land and the application of the Registered Lands Act, land belonged to the community or a particular clan and its members. All the members of the family and clan were entitled to occupy and work on the land. They all had beneficial interest, none could turn another away, and none of the members could also dispose of the land to the detriment of the family members. The registration of title under the Registered Land Act Cap 300 changed that land tenure and conferred absolute rights to the registered proprietor. The decision in the case of **Muriuki Marigi & Others** (*supra*) explains this scenario very clearly.

However the case before me is different in the sense that the plaintiff has not become registered, and if he were to be registered the land Registrar is enjoined to make an inquiry over the persons in occupation. A title in the plaintiff's favour has not been issued, and even if it had, the interests of the defendants who have been using the land in their capacity as his sons ought to have been inquired upon. Under the provisions of **Section 30 (g) of Registered Lands Act (Cap 300)** it provides as follows:

“unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same without their being noted on the register – (a) ... (g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where enquiry is made of such person and the rights are not disclosed.”

The defendants were invited by the plaintiff to live or occupy the suit premises; they have done so, since 1965. They also gave evidence that they contributed to the acquisition of the suit premises, by contributing to the payment of the loan with the Settlement Fund Trustees. Due to that contribution, counsel for the defendants submitted that the plaintiff became a constructive trustee for the defendants as beneficial owners. Besides the defendants occupying this land and they have put up their dwelling houses. This position was reiterated in **Onyango Omoke vs. John Omoke, CA Civil Appeal No. 10 of 1981 (Kisumu)**, See also **Equity And The Law of Trusts** by Philip H. Pettit, 4th Edition at page 46 where it is stated;-

“...a constructive trust is one imposed by a court of equity regardless of the intention of the owner of the property.”

In **Hussey V Palmer [1972]3 ALL ER 744**, Lord Denning held that a constructive trust;

“Is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.”

What is the justice of this matter, the plaintiff is the father of the five defendants. The defendant's mother and Uncle urged this court not to evict the defendants from the suit premises. I take the evidence of the plaintiff's wife and brother as the voice of the family. As **Alexander Solhenitsya** described justice as;

“Justice is conscience, not a personal conscience but the conscience of whole humanity, those who clearly recognize the voice of their own conscience usually recognize also the voice of justice”

The ends of justice would be served if the defendants are not evicted from their father's land. Moreover, it would also be against public interest and good order to issue an order of eviction against the defendants. That will be perpetuating poverty, homelessness and social disorder. This is also social justice that requires the defendants, in the same way their father cannot evict them from their land, they too should honour their father by respecting and providing for him.

Taking all the circumstances of this case into account, I disallow the plaintiff's prayer, the defendants filled a counterclaim and sought for a declaration that the plaintiff holds the suit premises in trust. The defendants have been able to prove that there is a constructive trust due to their financial contribution in paying the loan to the Settlement Fund Trustees. The plaintiff is also restrained from interfering with the

defendants' peaceful occupation over the suit land.

This being a family matter there will be no order as to costs.

Judgment read and signed on 24th November, 2008

M. KOOME

JUDGE