REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 55 of 1995

JOSEPH KABURU …… PLAINTIFF

VERSUS

M'ITHINJI M'MBURUGU …… DEFENDANT

JUDGMENT OF THE COURT

By his amended plaint filed in court on 25.1.99, the plaintiff herein JOSEPH KABURU M'ITHINJI, who describes himself as an adult male from Ukuu sub-location in Uruku-Nkuene sued the defendant, who is father of the plaintiff by the defendant's second wife and avers that the defendant holds in his name two title deeds for parcel No. NKUENE/UKUU/445 measuring 5.59 acres or thereabouts and also parcel No. NKUENE/UKUU/53 measuring 2.77 acres or thereabouts. That the two parcels of land are occupied by the family which includes the defendant, the plaintiff and another son of the defendant by the first wife. That out of land parcel No. UKUU/445, the plaintiff occupies 2.00acres while the defendant occupies 1.5 acres, or thereabouts while one Michael Kinya, the plaintiff's half brother occupies 2.00 acres and that each of the occupants has developed his own portion of the land. The plaintiff has averred further that upon land parcel No. UKUU/53, he occupies 1.00acre. Michael Kinja occupies 1.00acre while the rest of the acreage is occupied by the defendant. That before the land was registered in the name of the defendant the same was held by the "**ABWEGUNE ya "RITHO"** for the benefit of the family and also for posterity of the family of "**MBURUGU M'ANGETA".** That upon adjudication, the defendant held the land as trustee for himself and the family of Mburugu M'Angeta, presently represented by the defendant and his two sons, the plaintiff and Michael Kinja and that the defendant was not to hold the said parcels of land absolutely for his own use. The plaintiff alleges that sometime in 1978, the defendant, in the presence of both family and clan members showed each of his two sons which side of the land each was to occupy, retaining some of the land for himself and his surviving wife. That upon being shown his portion of the land, the plaintiff proceeded to construct a permanent house thereon and also planted coffee, bananas and installed a piped water system in addition to constructing a zero-grazing unit thereon and that the plaintiff has independently occupied the portion he was shown by the defendant for over 21 years. At paragraph 16 of the amended plaint, the plaintiff alleges as follows:-

"16. That the defendant under the influence of his son-Michael Kinja and his mother – who is alive, are trying to change this position. The defendant being used by his other son to evict the plaintiff from the land which he has occupied for his life."

The plaintiff then proceeds to state the orders he seeks from the court namely a declaration that the defendant holds the two parcels of land in trust for the plaintiff and other members of

the family of M'Ithinji Mburugu; a declaration that the plaintiffs' occupation and development of this land is permanent and cannot be violated whether by the defendant or any other person; a declaration that the plaintiff has now acquired his rights under the doctrine of adverse possession. Finally, the plaintiff prayed for an order to permanently restrain the defendant from dealing with the land to the detriment of the plaintiff's interests without the plaintiff's written consent. It is worth noting that though the plaintiff's half brother, Michael Kinja and his mother are specifically alluded to in the plaint, they were not made parties to the suit.

The defendant filed his defence on 2.2.99 by which he admits paragraphs 1, 2 and 3 of the plaint. The defendant avers that he is registered as the freehold proprietor of the parcel of land, the same being a first registration without any encumbrances and denies that the suit land ever belonged to the clan or that he was registered as trustee for the family or for anybody else or at all. He states in his defence that he bought the suit land with his own money, gathered it during land adjudication and had it registered in his own name. Paragraphs 7, 8 and 9 of the plaint are denied by the defendant. The defendant avers that in 1990, out of love and affection as a father towards his son, he showed the plaintiff a portion comprising one (1.00) acre on L.R. No. NKUENE/UKUU/53 and authorized the plaintiff to take possession of the same but that the plaintiff rejected the defendant's gesture of good will and instead forcefully occupied L.R. No. NKUENE/UKUU/445 which the defendant had reserved for his elder son, Michael M'Ithinji. The defendant also averred that any development undertaken by the plaintiff on the suit land were done in contempt of court orders made in Meru CMCC No. 214 of 1990 and for which contempt he plaintiff was jailed for six (6) months. That the plaintiff was a mere licensee on the defendant's land and that the license has since been terminated. Further, the defendant averred that this suit is res-judicata Meru CMCC No. 214 of 1990 and denied that the plaintiff was entitled to the reliefs sought.

The defendant also counter-claimed against the defendant, alleging that having declined to take his portion of land in Nkuene/Ukuu/53, and having forcefully occupied a portion in NKUENE/UKUU/445, the plaintiff should be evicted from LR. No. NKUENE/UKUU/445 and also prayed for an order for the plaintiff to remove all his developments/structures on LR No. NKUENE/UKUU/445 and in default the same be forcefully removed. He also asked for costs and interest.

In his reply to defence and counter-claim (there was no defence to counter-claim), the plaintiff dismissed the defendant's counter-claim and averred that the defendant had no colour of right to evict the plaintiff from the suit land. That Meru CMCC was disposed off on the basis of an erroneous technical point and could therefore not form a basis for the defendant's plea that this case is res-judicata. The plaintiff prayed for the defendant's defence and counter-claim to be struck out, and for judgment to be entered for the plaintiff as prayed in the plaint.

From the record, the parties did not frame any issues although they had agreed that the issues would be agreed upon and filed before the hearing date.

The history of this case goes back to 8.2.95 when the plaintiff filed a suit in the High Court of Kenya at Nairobi by way of an originating summons being HCCC No. 401 of 1995 under order 36 Rule 1 of the Civil Procedure Rules, Section 28 of The Registered Land Act, Section s7, 37 and 38 of the Limitation of Actions Act. The plaintiff set out three issues for determination by the court:-

(a) whether the plaintiff/applicant had acquired title to a portion of land measuring two acres on land parcel number NKUENE/UKUU/445 by way of adverse possession.

(b) Whether the plaintiff/applicant was entitled to any other or further relief which this court may deem fit to grant.

(c) Who should pay the costs of this originating summons.

By an order dated 9.2.95, by Alouch J. on an application dated and filed on 8.2.95, in which the plaintiff/applicant had sought an order restraining the defendant from evicting him from the suit land, the original Nairobi HCCC 401 of 95 was transferred to Meru High Court for hearing and determination of not only the application for injunction but also for hearing and determination of the main suit. That is how the present case came into being.

From the pleadings on record, the issues for determination are whether the defendant holds the suit land in trust for the plaintiff and other members of the M'Ithinji Mburugu family, and whether the plaintiff's occupation of a portion of the said land are inviolable and also whether the plaintiff has acquired title to a portion of land measuring two acres out of land parcel No. NKUENE/UKUU/445 by adverse possession. Whether the plaintiff is entitled to a permanent injunction restraining the defendant from dealing with this land to the detriment of the plaintiff without the plaintiff's written consent. And finally, there is the issue of whether or not this suit is res-judicata Meru CMCC No. 214 of 1990. First, the evidence.

The plaintiff is the younger of the two sons of the defendant being the son of a second wife of the defendant who died earlier than the defendant's first wife. The defendant is the registered owner of two parcels of land known as NKUENE/UKUU/53 and 445 (hereinafter referred to as suit land) measuring 2.77 acres and 5.30 acres respectively, which suit land the plaintiff alleges was inherited by the defendant from the plaintiff's grandfather, one Mburugu M'Angeta. That sometime in 1978, at a clan meeting summoned by the defendant, the defendant distributed part of the suit land to the plaintiff and the plaintiff's elder half brother, Michael Kinja, sharing the suit land equally between the two sons and leaving a portion of the suit land for himself. That each party then developed their respective portions. There seems to have been some disagreement between the plaintiff and the step family which allegedly sought to evict the plaintiff from land parcel Nkuene/Ukuu/445. A meeting of the clan elders was again allegedly convened at which the plaintiff paid a he-goat to the defendant for having abused him and at which the defendant also re-affirmed the distribution of the suit land to the plaintiff and to Kinja. The plaintiff contended that inspite of the sharing out of the suit land, Kinja and his mother wanted the plaintiff out of land parcel No. NKUENE/UKUU/445 hence these proceedings.

The plaintiff called three witnesses, Simeon M'Mugambi M'Mwitari (PW2) who told the court that he was a member of the Abweguna Clan. That the first clan meeting was called by the plaintiff and that at that meeting the defendant showed the clan members present how the suit land was to be shared between the plaintiff and Kinja. PW2 could not recollect a second clan meeting though he mentioned that during the second clan meeting the defendant refused to discuss the issue of the suit land. PW3, Paul Kairichia and PW4 Justus M'Mbwiria repeated a similar story.

The defendant's case is that he is the registered owner of the suit land which he bought on his own. That as registered owner, he was not obliged to share the suit land with anybody and that the title deeds to the suit land contain no conditions upon which he holds the same. He produced the green cards in respect of Nkuene/Ukuu/53 and Nkuene/Ukuu/445 as exhibits 1 and 2. That he has his homestead on 445 and that that is the portion of land where he has always lived with his two wives (both now deceased). That he shared out the suit land between his two wives, with the bigger portion going to his senior wife and the smaller portion going to the junior wife (plaintiff's mother) and required each of the two sons to move into the portion of land allocated to the mother, but that the plaintiff refused to move and insisted on remaining on the larger portion of the suit land being Nkuene/Ukuu/445. That he shared out the suit land according to his own decision as father of the two sons and as registered owner in absolute ownership. That the plaintiff constructed a house on the bigger portion of the suit land against the defendant's wishes and in contravention of a court order for which the plaintiff was arrested and jailed for contempt. That it is not true that the plaintiff has extensibly developed the portion of land on 445 and all the same, the defendant wants the plaintiff to shift from 445 to 53 which parcel the defendant had given to the plaintiff's mother and which parcel the plaintiff has a right to inherit.

The parties' advocates made lengthy oral submissions. Mr. Mithega for the defendant submitted that the plaintiff is not entitled to the reliefs sought. That the defendant being the registered owner of the suit land cannot be said to be holding the same in trust for his children. That in any event, the plaintiff has not proved the existence of such a trust as no particulars of the same are pleaded in the amended plaint, and that failure to particularize the trust contravenes the mandatory provisions of Order 6 Rule 8 of the Civil Procedure Rules (CPR). The relevant portion of Rule 8 of Order 6 of the CPR provides as follows:-

"8(1) Subject to sub-rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generally of the foregoing:-

(a) Particulars of any mis-representation, fraud, breach of trust, willful default or undue influence on which the party pleading relies: and

(b) ……**."**

That even if the defendant got the suit land from his father, the defendant was under no obligation to share out the same with his children. In this regard, Mr. Mithega relied on the Court of Appeal decision in Civil Appeal No. 189 of 1996 – MURIUKI MARIGI V. RICHARD MARIGI MURIUKI & 2 others. Further, that relief of adverse possession is not available to the plaintiff who is son to the defendant, the latter being the registered owner of the suit land. That plaintiff has not proved the necessary ingredients for the relief of adverse possession such as open and quiet possession with full knowledge but without consent of registered owner. That the plaintiff is a mere licensee on Nkuene/Ukuu/445. Secondly it was submitted that the plaintiff's claim for adverse possession cannot stand since the plaintiff's suit is not by way of originating summons as required by law. In this regard, he relied on the Court of Appeal decision in Civil Appeal No. 96 of 1998 – WILSON KENYENGA V. JOEL OMBWARI, and pointed out that since the provisions of Order 36 Rule 3 (D) of the CPR are mandatory, failure to comply with the same is fatal to the entire suit.

Regarding the plaintiff's relief for permanent injunction against the defendant, Mr. Mithega submitted that the relief was not available to the plaintiff for the simple reason that as registered owner in absolute proprietorship the defendant cannot be injuncted from dealing with his land as he deems fit. That in any event, the plaintiff has not met the prerequisites for granting of injunctions as set out in the classic case of GIELLA V. CASSMAN BROWN and that infact it was because of his inability to meet those prerequisites that the plaintiff abandoned the initial interlocutory application filed on 8.2.95. Mr. Mithega dismissed the plaintiff's second relief arguing that any developments made by the plaintiff on portion 445 of the suit land were made without the consent of the defendant and in contravention of court orders for which the plaintiff was arrested and jailed.

On the defendants counter claim for eviction of the defendant from portion 445 of the suit land, Mr. Mithega submitted that this should succeed as there is evidence on record to support the same. That as registered owner the defendant is at liberty to distribute his property during his lifetime as he wishes and that parcel number Nkuene/Ukuu/53 is available for the plaintiff's taking. In this regard, he cited the persuasive High Court authority (Ringera J as he then was) in Bungoma HCCC No. 40/98 – MORRIS WANJALA V. RICHARD WANDERA & 2 others, where the learned judge held that once land is registered, all customary law rights are extinguished and the land ceases to be family land. Section 27 of the Registered Land Act (RLA) provides as follows:-

"**27. Subject to this Act-**

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or

appurtenant thereto.

(b) ……"

Finally on the issue of res-judicata pleaded by the defendant, Mr. Mithega submitted that the plaintiff having admitted the existence and judgment in Meru CMCC No. 214 of 1990 between the same parties, then this case is res-judicata.

Mr. Kioga for the plaintiff submitted that the suit land is family land which the defendant holds in trust for the plaintiff and other members of the family of M'Ithinji Mburugu. That the fact that the defendant shared out the suit land to his sons in the presence of clan elders was a clear indication that the suit land was family land. That this suit is not res-judicata CMCC No. 214 of 1990 which was dismissed on a technicality. That the plaintiff has proved his claim in adverse possession or alternatively that the plaintiff is a permanent licensee who cannot be evicted. Mr. Kioga referred to sections 30 and 28 of the RLA to support his contention that the defendant held the suit land in trust for the plaintiff and others in the family. He also cited the Court of Appeal decisions in MUTHUITA V. WANOE (1982) KLR 166 and KANYI V. MUTHIORA (1984) KLR 712 and submitted that the defendant was not relieved of his obligations as a trustee under section 28 of the RLA. Mr. Kioga also cited the High Court decision in Civil Suit No. 2306 of 1980 – MWANGI & ANOTHER V. MWANGI (1986) KLR 328 and submitted further that this court should look at and consider the pre-registration rights of the plaintiff as envisaged by section 30 of the R.L.A. That in distributing the suit land, the defendant was recognizing that the plaintiff had rights in the suit land flowing down to him, from his grandmother one Maritha Kanyenju. Mr. Kioga cited four other authorities namely GATIMU KUNGURU V. MWEA THALANG (1976) KLR 253, dealing with section 26 of the RLA, ASHBURN ANSTALT V. ARNOLD & ANOTHER (1988) 2 ALL ER 147 dealing with constructive trusts as they affect licensees, CENTURY AUTOMOBILE LTD V. HUTCHINGS BIEMER (1965) E.A. 304 dealing with equitable estopped which Mr. Kioga submitted applies in this case and COMMISSIONER OF LANDS V. HUSSEIN (1968) E.A. 585 also dealing with equitable estopel and that on the basis of these last two cases, the defendant is estopped from going back on his earlier decision to give part of portion of the suit land to the plaintiff and from evicting the parcel 445 of the suit land to the plaintiff. Finally, Mr. Kioga submitted that the plaintiff is not suing the defendant in the capacity of a son but as an independent adult pursuing his own rights in the suit land. He also dismissed as irrelevant all the authorities cited on behalf of the defendant and argued further that Order 36 Rule (D) does not apply to this case.

In reply, Mr. Mithega submitted that the submissions made on behalf of the plaintiff are not supported by the evidence on record nor the pleadings which do not say anything about Kimeru Customary law on sharing of family land. That Chapter 283 Laws of Kenya has no relevance to this case since the suit land is registered under the RLA, reiterating that there was no evidence of the creation of a trust for the benefit of the plaintiff. That all the authorities cited on behalf of the plaintiff are irrelevant as none of them deals with a dispute between a son and a living father where the latter claims adverse possession by virtue of living on his father's land and that even if the cases were found to be relevant they all deal with Kikuyu customary law which is not the same as Kimeru Customary Law. That there is no permanent licensee who cannot be evicted by a registered owner and further that the principle of equitable estoppel is not applicable in this case, especially because according to Mr. Mithega, the plaintiff has not come to court with clean hands.

Before I move on to determine the substantive issues of the plaintiff's claim, I wish to deal with one issue brought up by Mr. Kioga in his submissions; that the plaintiff has not sued in his capacity as son of the defendant but as an independent adult pursuing his own rights in the suit land. With due respect to Mr. Kioga, that submission is not supported by the evidence and the pleadings. At paragraph 3 of the amended plaint duly filed in court on 25.1.99, the plaintiff avers that the defendant is the father of the plaintiff by his (defendant's) second wife – who is now deceased, and at paragraph 5 thereof the plaintiff avers:-

"5. The plaintiff is one of the two sons of the defendant – but from different households."

In his evidence in chief at the very beginning of his testimony, the plaintiff stated in part:-

"…… I am the plaintiff in this matter. I have sued the defendant M'Ithinji who is my father."

The court need not go beyond the pleadings and the record to establish that the plaintiff is indeed the son of the defendant. The plaintiff has said so with his own mouth. Even the defendant said it in his testimony during his evidence in chief when he stated in part:-

"I am M'Ithinji M'Mburugu. I am the defendant herein. The plaintiff is my son."

So that apart from Mr. Kioga's submission, which the court can only say were misplaced, there is no other piece of evidence disputing the paternity of the plaintiff. The rest of the judgment will be given on the basis of the relationship of son and father as pleaded and as admitted by both parties in their evidence.

I shall deal with the issue of whether or not this case is res-judicata the decision in Meru CMCC No. 214 of 1990. The parties in that case are the same parties in this suit where the plaintiff made the very same claim as in this suit. The plaintiff sought prayers that the suit land be shared equally between himself and his half brother Kinja, thereby disputing the defendant's decision to give Nkuene/Ukuu/445 to Kinja and 53 to the plaintiff. In his judgment, the learned trial magistrate found that the plaintiff's claim of land against the father on grounds of trust could not be sustained and that the defendant's right in the suit land was indefeasible and that he was entitled to enjoy the title to his land free from any interference. The learned trial magistrate further found that the court had no jurisdiction to entertain a claim of trust or one based on trust, which he rightly stated was the domain of the High Court. He dismissed the plaintiff's claim and allowed the defendant's counter claim for eviction of the plaintiff from the suit land portion 445. The learned trial magistrate also discharged the caution that had been lodged by the plaintiff on the suit land. This judgment was given on 19.1.95 and on 8.2.95, the plaintiff filed HCCC 401 of 95 in Nairobi which is the parent of this present suit.

Contrary to Mr. Kioga's submission, the case in the lower court was fully canvassed by both parties and a judgment given, dismissing the plaintiff's suit against the defendant.

On 13.7.95, Mr. Mwarania advocate who was then appearing for the defendant herein took up the issue of this case being res-judicata. The preliminary objection on a point of law was argued before the late Mr. Justice C.O. Ongudi who in his reserved ruling delivered on 21.7.95 said:-

"I am satisfied that this matter is not res-judicata. The lower court dismissed the plaintiff's case stating clearly that it had no jurisdiction to determine issues of trust. That left the plaintiff's remedy unsettled at law. He has come to the court clothed with the necessary jurisdiction and he shall be heard and issues determined according to law. I dismiss the preliminary objection earlier raised and order cost to be in the cause..

C.O. ONGUDI

JUDGE

21ST JULY 1995."

It is clear to me therefore that the issue of res-judicata was settled by that ruling following the raising of a preliminary objection on a point of law by the defendant's advocate on 13.7.95. I would therefore find that I need not belabour the point again here as the same was settled. As rightly pointed out by the learned judge, the plaintiff has now come before a court that is clothed

with the jurisdiction to determine the issues in dispute and I now proceed to do so.

I have given careful thought to the pleadings the evidence by both parties, the exhibits produced before me and the very detailed submissions by learned counsels for the parties. The first issue for determination is whether indeed the defendant was registered as proprietor of the suit land in trust for the plaintiff and other members of the M'Ithinji family. After considering all the evidence adduced before me and the cited cases, I find that the plaintiff has not proved that the defendant held the suit land in trust for the plaintiff and for other members of the family. In his evidence, the defendant produced as exhibits 1 and 2 copies of the green cards in respect of the suit land where it is shown that the defendant was registered as absolute proprietor of the suit land on 10.3.65, namely NKUENE/UKUU/445 measuring 2.236 hectares and NKUENE/UKUU/53 measuring 1.108 hectares. It is to be noted that there is no entry on the said title to show that the defendant was registered as trustee. In his plaint at paragraph 11 the plaintiff avers that the defendant was given the suit land to hold as "**Trustee"** for himself and the family of Mburugu M'Angeta. The plaintiff did not plead particulars of such a trust. The plaintiff did not adduce evidence, either through his own testimony or through the evidence of the witnesses he called that the defendant was registered as trustee for the family of Mburugu M'Angeta. It would appear to me therefore that the whole reason why the plaintiff made the claim against the defendant is because the defendant gave to the plaintiff a smaller portion of the suit land than the one given to Kinja. The plaintiff's witnesses offered no assistance to the plaintiff's case, stating as they did that the defendant's land was his and that in deciding to share out the land between his two sons, the defendant was acting according to his own wishes as registered proprietor in absolute proprietorship. Under Section 27 of the RLA, the defendant as absolute proprietor was and still is at liberty to deal with the suit land as he deems fit. The plaintiff has contended that he had overriding interests in the suit land under section 30 of the RLA, which interests need not be noted in the register as attaching to any given parcel of land registered under the Act. To get a proper perspective of this issue, section 28 of the RLA provides: -

"**28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtances belonging thereto, free from all other interests and claims whatsoever, but subject:-**

(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and

(b) Unless the contrary is expressed in the register to such liabilities rights and interests as affect the same and are declared by section 30 not to require noting on the register:-

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee."

It has been submitted for the plaintiff that the right which the plaintiff claims under section 30 of the RLA is that of having a beneficial interest in the suit land of which the defendant was registered as "**trustee"** for himself, plaintiff and other members of the family. The plaintiff sought to prove this right by relying on customary law when he called PW2, PW3 and PW4 and also by contending that his rights in the suit land flowed down to him through his grandmother Maritha Kanyenju. My finding is that there is no overriding interest to which the defendant's title in the suit land can be said to be subject. The plaintiff did not adduce evidence to prove his claim under Kimeru Customary Law. The plaintiff is claiming part of the suit land because he is a son of the defendant. There is evidence that the defendant has indeed already given NKUENE/UKUU/53 to the plaintiff but the plaintiff would prefer to have the defendant distribute the suit land according to the wishes of the plaintiff. On the basis of the Court of Appeal

decision in Civil Appeal No. 189 of 1996 – MURIUKI MARIGI V. RICHARD MARIGI MURIUKI (supra), the provisions of section 27 of the RLA and section 3(2) of the Judicature Act Cap 8 Laws of Kenya, the plaintiffs claim for a declaration that the defendant held the suit land in trust for him and other members of the family must therefore fail. Section 3(2) of the Judicature Act provides thus:-

"**The High Court, the Court of Appeal and all subordinate courts shall be guided by African Costmary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide……."**

Apart from the fact that the plaintiff has not proved his claim under customary law, to allow such a claim would be inconsistent with the provisions of section 27 of the RLA. In effect therefore, the plaintiff's perceived rights under section 30 of the RLA are excluded by the clear provisions of not only section 27 but also section 28 of the RLA.

What about the plaintiff's prayer for an order declaring that he has acquired a portion of the suit land by way of adverse possession? It has been submitted on behalf of the defendant that the plaintiff is not entitled to that relief firstly because he has not brought his claim by way of originating summons and secondly that such an order is not available to a son as against his father. In MURIUKI MARIGI V. RICHARD MARIGI MURIUKI & 2 OTHERS (supra) the Court of Appeal noted that:-

"…**.. The Law of Succession Act (Cap 160 Laws of Kenya) does recognize the rights of wives and children over their husband's or father's estate as the case may be. Those rights accrue after death. Otherwise the rights remain inchoate and are not legally enforceable in any court of law or otherwise."**

As stated earlier in this judgment, the plaintiff has made all these claims against the defendant as a son of the defendant. The defendant is still alive and is at liberty to deal with the suit land as he deems fit. Infact he has already taken the bold step of sharing out the suit land between his two sons and as the learned judges of appeal noted in the MURIUKI MARIGI case *supra) his property is not available for sub-division and distribution among the sons except as he has personally on his own free will decided to distribute it between his two sons, the plaintiff and Kinja. In view of this finding, I do not find it necessary to consider whether or not the claim for adverse possession was properly before court. I need only mention that if this was a serious claim for adverse possession, the plaintiff would have had to comply with Rule 3(D) of Order 36 of the CPR as read with section 38 of the Limitations of Actions Act (Cap 22 Laws of Kenya).

I have given careful consideration to the authorities cited by Mr. Kioga on behalf of the plaintiff and find that the same do not add any weight to the plaintiff's case. The facts in most of those cases are distinguishable from the facts in this case in that in none of those cases was the dispute between a son and a father who is alive. In KANYI V. MUTHIORA (1984) KLR 712, the appellant was the widower and the respondent the daughter of the original owner of the suit land. The suit land was registered in the name of the appellant. The respondent instituted the suit claiming half share of the suit land basing her claim on the inheritance of an unmarried daughter under Kikuyu Customary Law, and the court found in her favour. The appellant appealed against the decision on the grounds that she was the first registered owner, that customary law was not applicable, that the land was not held in trust and that the court could not rectify the register. It was held inter alia:-

(1) The title of a registered owner under the RLA (Cap 300) is free from all interests and claims except all those shown in the register together with such overriding interests that exist and are not required to be noted in the register.

(2) Rights under customary law are not among the overriding interests under section 30

of the RLA.

As I have already stated the facts in that case are distinguishable from the present case. It was also found that the respondent was an unmarried daughter under Kikuyu Customary Law and further that she had been in possession and occupation of part of the suit land, which the court found amounted to an overriding interest. In MWANGI & ANOTHER V. MWANGI/supra, the court held that registration of a title is a creation of the law and one must look into the considerations surrounding the registration in order to determine whether it was envisaged that a trust should be created. I have given considerable thought to the registration of the suit land in the defendant's name, the circumstances surrounding this case, including the defendants free decision to share the suit land between his two sons and I find that no trust was envisaged. To my mind both the plaintiff and his brother should count themselves lucky that the defendant has sorted out inheritance issues for them during the defendant's lifetime. Should the plaintiff desire to have more land, as indeed it appears that he does, he should work hard and acquire more. The plaintiff admitted while under cross-examination that since 1990, the defendant has been telling the plaintiff to settle on NKUENE/UKUU/53 and according to the plaintiff, the defendant had no right to change his earlier decision if any, to let the plaintiff settle on NKUENE/UKUU/53 and further that the defendant had no right to change his earlier decision if any, to let the plaintiff settle on NKUENE/UKUU/445. The plaintiff's view of the defendants proprietary rights over the suit land is completely flawed. From the foregoing the plaintiff's prayer for an order that the plaintiff's occupation and development of the suit land is permanent and cannot be violated whether by defendant or any other person is not sustainable in law.

During submissions on behalf of the plaintiff, Mr. Kioga stated that if the court finds that the plaintiff's claim for adverse possession is not proved, then it should find that the plaintiff is a permanent licensee who cannot be evicted. According to BLACK'S LAW DICTIONARY – 7th Edition, the word licensee is defined thus:-

"**One to whom a license is granted. One who has permission to enter or use another's premises, but only for one's own purposes and not for the occupiers benefit."**

and the word license is defined as:-

"**A revocable permission to commit some act that would otherwise be unlawful, especially, an agreement (not amounting to a lease or profit a prendre) that it will be lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal."**

There is also definition of **bare (naked) license** which is given as:-

"**A license in which no property interest passes to the licensee, who is merely not a trespasser. It is revocable at will."**

It is not in dispute that the defendant is the registered proprietor in absolute ownership of the suit land. When the plaintiff was being cross examined, he admitted that he was a licensee of the defendant who had allowed him to work the suit land and that when he cautioned the suit land in 1990, he did so in his capacity as such licensee. The plaintiff has not adduced any evidence to show that his license for the suit land was not a naked one. When the defendant exercised his discretion to give NKUENE/UKUU/53 to the plaintiff, he indeed created a licensee coupled with an interest over that portion of the suit land in favour of the plaintiff. That portion is still available for the plaintiff's taking. The defendant has not said that he is about to or has revoked the license over that portion of the suit land. Finally, as a registered proprietor whose title has no proven overriding interests in favour of the plaintiff, the defendant cannot be injuncted by this honourable court from dealing with the suit land as he deems fit. He needs no permission from anyone to deal with what absolutely belongs to him, least of all permission from the plaintiff.

In the result, I find that on a balance of probability, the plaintiff has been unable to prove his entire claim against the defendant. The same therefore fails and is accordingly dismissed with no order as to costs.

I have considered the defendant's counter claim against the plaintiff. There is ample evidence in support of the same and I find that the plaintiff planted himself on NKUENE/UKUU/445 against the wishes of the defendant and in contravention of a court order. The plaintiff has been given NKUENE/UKUU/53, but he has refused to take possession of the same and to occupy it. The defendant has proved his counter-claim against the plaintiff and I accordingly allow the same. The plaintiff should move from 445 onto 53 and plaintiff should also remove all and any developments of his being and standing on 445 and settle down on 53.

Since this is a dispute between father and son, it may not be in the interests of the family to order costs against the losing litigant. I therefore order that each party will bear his own costs of this case.

It is so ordered.

Dated and delivered at Meru this 19th day of January 2005.

RUTH N. SITATI

Ag JUDGE

19.1.2005