



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO.106 OF 1988

MAYIEKA NYAKUNDI
PLAINTIFF

VERSUS

- 1. MORAA NYAKUNDI – DEAD)**
- 2. SAMWEL NYAKUNDI)**
- 3. ROBERT AREBA MAYIEKA)**
DEFENDANTS
- 4. ANDREW RIRO MAYIEKA)**
- 5. ISAAC RIRO MAYIEKA)**

JUDGMENT:

The plaintiff MAYIEKA NYAKUNDI sued five defendants: MORAA NYAKUNDI; SAMUEL NYAKUNDI; ROBERT AREBA MAYIEKA; ANDREW RIRO MAYIEKA and ISAAC RIRO MAYIEKA seeking to have them evicted from his land NO. ISOGE SETTLEMENT SCHEME/183 and an order that they pull down all illegal structures built therein. He also prays for costs. In course of time the first defendant died and the case against her abated. The case against the 5th defendant was withdrawn and he therefore proceeded against the 2nd, 3rd and 4th defendants.

The plaintiff is the father of the 2nd, 3rd and 4th defendants. He was the husband of the 1st defendant who died. He has two other wives who are still alive. He told the court that initially he lived with his family in their ancestral land Central KITUTU MWABOSIRE/1116. In mid 1960's he was allocated land by Settlement Fund Trustee (S.F.T.) and the land was registered in his name. It is land NO.ISOGE SETTLEMENT SCHEME/183. He moved from Central Kitutu and went to settle in that land. He moved with his 2nd wife Moraa Nyakundi now deceased. The defendants who are his sons followed there later and have built their homes there. Plaintiff married his 3rd wife while already settled in the land. He told court that the settlement of the defendants in the land was without his consent and he now wants them evicted from there and move back to his land in Kitutu Central. The land is still registered in his names.

The defendants' defence was that the land in Central Kitutu was prone to landslides. Thus in mid 1960's the government settled about 16 families which includes the plaintiffs at Isoge Settlement Scheme. The defendants told court that they settled in the land in the late 1960's. They live there with their families and all have built their houses there with the consent of the plaintiff. They told court that they assisted in paying loan to the Settlement Trust Fund as they worked the land.

I have considered all the evidence and submissions. The main issue is whether the plaintiff is registered owner of the land in trust of the family who includes the defendant. It is not in dispute that he is the sole

registered owner of land. The defendants have been living there. I find no basis to hold that the plaintiff was registered in trust of the defendants. True he admitted that there were landslides in Central Kitutu where the ancestral land is. However his first wife still lives there.

The defendants may have assisted in repayment of the loan when they helped in cultivation of crops in the land, which were sold to meet the loan. That alone however does not mean that they owned the land with their father.

The plaintiff did not deny that the defendants are his sons and live in the land with their families. In fact though he had wanted his wife evicted from the said land he eventually buried her in the same land. He was aware when the defendants put up their homes in the land and he never stopped them. He cannot now turn round and term them as trespassers. They settled there with his consent. They are his sons and he did not tell this court if there is any disagreement between him and them. I concur with submissions of the counsel for the defendants that it is unconscionable and illogical to require them to move out of the land after having been there for over 20 years. The land is 14.30 hectares and he sold 3 acres without the defendants raising any issue which shows they respect his ownership.

It is not a small piece of land while the one in Kitutu Central is said to be 7 acres and prone to landslides. The plaintiff's prayers are therefore not morally sound. The defendants settled there with his full consent and I feel it too late in time to tell them to leave.

Thus though I find the plaintiff is the registered owner of the land, his prayers for eviction are not proper. His case is therefore dismissed. Parties should maintain Status Quo.

Each party to bear his own costs.

It is so ordered.

KABURU BAUNI

JUDGE

15/6/04

Signed, dated and delivered on 15th June 2004. Mr. Mainye for defendants. Mr. Maisiba holding brief for Mr. Soire for plaintiff.

KABURU BAUNI

JUDGE

15/6/04

30 days R.O.A.

KABURU BAUNI

JUDGE