



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL SUIT NO. 16 OF 2000**

NJERU RUGENDO MWITHIGA ..... PLAINTIFF

VERSUS

NTWIGA MWITHIGA ..... DEFENDANT

**JUDGMENT**

The Plaintiff NJERU RUGENDO MWITHIGA has brought this suit against his paternal uncle Ntwiga Mwithiga praying for his eviction from the Plaintiff's piece of land known as MAGUMONI/THUITA/358.

The facts of this case which were not disputed are that the Plaintiff's father was the stepbrother of the Defendant. The Plaintiff's grandfather had three wives, the eldest being the grandmother of the plaintiff and had one son called Tarcisio who was the father of the plaintiff. The second wife was the mother of one Ileri who is still alive while the third wife was the mother of one Nkayi and the present Defendant, both of whom are still alive. The father of the Plaintiff being the eldest son of his father had inherited several pieces of land but he was a careless man and sold most of those pieces of land. During demarcation, Ileri and Nkayi were given separate pieces of land according to their mothers' house. The father of the Plaintiff, because of his conduct, was not given any land. The clan however, gave a piece of land, which is the present suit land, to the Plaintiff though he was still a minor. During this time the Defendant was working between Nairobi and Tanzania and was not present during demarcation. He later returned home and was allowed to put up his temporary house on the suit land where the Plaintiff's father was also residing. This land was all along registered in the name of the Plaintiff.

In December 1996 the clan elders met and agreed that the Defendant should move out of the Plaintiff's land and be given his own piece of land.

It was decided that each brother would contribute one acre to the Defendant.

Ileri was to give out one acre, Nkayi was to give one acre and the Plaintiff's father, because he had no land of his own to give to the Defendant, was to pay Kshs.10,000/- to the Defendant as his share. That agreement was reduced in writing and was signed by all those present including Ileri and the Defendant.

Ileri objected to the D.O. about his surrendering of one acre and another meeting was held at the D.O's office with the clan elders and it was again resolved that the Defendant moves to Ileri's piece of land where he was to get one acre. A further condition was added which was that since the Defendant did not have the money for the sub-division, the Plaintiff was to pay all the expenses for the sub-division of the Ileri's land. The Plaintiff together with Ileri and the Defendant attended Chuka Land Control Board where the consent to sub-divide Ileri's land was given. The Plaintiff paid the expenses involved and also paid for the surveyor to carry out the subdivision. On the appointed day of the survey, Ileri ran away from his home and hid. The survey could not be carried in his absence. The Plaintiff was frustrated by the whole exercise and decided to buy one piece of land measuring one acre for the Defendant to move in. The Defendant and his wife went and visited the piece of land but later refused to move on to the same as it was not fertile enough for cultivation. The Plaintiff then filed this suit against the Defendant.

From the foregoing, it is quite clear that the suit land belongs to the Plaintiff. The suit land was given to the Plaintiff by the clan. All houses of the Plaintiff's grandfather were taken care of in that Ileri was given 5.9 acres. We were not told the acreage of Nkayi's piece of land while the Plaintiff's father had also been given his share which he squandered. The suit land was given to the Plaintiff and registered in his name

so that it would be out of reach of his father or any of his father's brothers. It cannot therefore, be said that it was given to him in trust for the Defendant since he was a minor at the time. The suit land is 4 acres and is currently occupied by the Plaintiff, his mother and his brothers. The Plaintiff has also his own children. The clan recognised the fact that the suit land is overcrowded and that is why they sought to give the Defendant some land as he was not present during demarcation.

The issue for determination is whether the Defendant should vacate the Plaintiff's piece of land or not. In his evidence the Defendant simply stated that he is willing to move to Ileri's land if he is given the Title Deed by the Plaintiff. He does not want the land bought for him by the Plaintiff as it is not productive.

The suit against the Defendant is for the specific performance of the agreement entered and for eviction. It would have been more straightforward if the Plaintiff had simply declared the Defendant a trespasser. The evidence shows that the Defendant had no right whatsoever to reside on the Plaintiff's land. The fact that he was told by the plaintiff's father to put up his house on the Plaintiff's land is immaterial. The Plaintiff's father had no right to show the Defendant where to put up his house on the Plaintiff's land. The Plaintiff's father had already sold off the land he inherited from his and the Defendant's father. The suit land was not inherited by the Plaintiff. It was given to him by the clan.

The Defendant appeared to me as a cunning old man who having stayed in town for too long wants simply to frustrate the Plaintiff in the enjoyment of his land. The Plaintiff went out of his way to buy the Defendant a piece of land so that he would leave the piece of land where he resides to the one bought for him by the Plaintiff. If the Defendant had any claim whatsoever, then his claim would be directed to his brother and step brothers. He has no claim whatsoever against the Plaintiff. The upshot is that the Defendant has no right to be on the Plaintiff's land since the Plaintiff does not want him there. He has now become a trespasser who should be evicted.

I therefore enter judgment for the Plaintiff against the Defendant and order that the Defendant be evicted from the suit land forthwith. The Plaintiff will also have the costs of this suit.

Dated this 6th day of February 2003.

**J.V.O. JUMA**

**JUDGE**