



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 41 OF 2018

PAUL KAMURA KIRUNGE APPELLANT

VERSUS

JOHN PETER NYAGA RESPONDENT

(Being an Appeal from the Judgment and/ or Ruling of the Hon Olwande P.M at Limuru Law Courts delivered on 17th December 2018, in the Senior Principal Magistrate's Court Civil Suit No. 108 of 2011 at LIMURU)

BETWEEN

JOHN PETER NYAGA.....PLAINTIFF

VERSUS

PAUL KAMURA KARINGE.....DEFENDANT

JUDGMENT

The Appellant herein **Paul Kamura Kirunge**, was the Defendant while the Respondent **John Peter Nyaga** was the Plaintiff, in **Limuru CMCC 108 of 2011**.

By a Plaint dated **12th May 2011**, the Plaintiff filed the above suit against the Defendant and sought for orders that;

- a) An eviction order from the subject land.**
- b) The Defendant to hand over to the Plaintiff the original Title Deed of land parcel Escarpment Kinari Block 1/1920.**
- c) Damages for illegal occupation of the Plaintiff parcel of land and building for the last ten years.**
- d) Costs of this suit and any other relief this Honourable Court may deem for to grant.**

In his statement of claim, the Plaintiff (Respondent) averred that he is the registered owner of the suit property which he purchased for value from **Mwaura Hindu**. That the purpose of purchase of the suit property was so that he could re locate his late father to the suit property. That the Defendant (Appellant) took advantage of the presence of their late father on the suit property and in due course started trespassing without notifying the Plaintiff/Respondent.

Further that the Defendant (Appellant) was in forceful possession of the original title deed of the Plaintiff's (Respondent's) suit land and has initiated subdivision without his consent. That the Defendant's (Appellant's) acts are illegal and unlawful and infringe on the Plaintiff's (Respondent's) proprietary rights and rental income generating thereto. That there is real and imminent danger of the said land being wasted and damaged.

The suit was contested and the Defendant (Appellant) filed a statement of Defence dated **3rd February 2014**, and denied all the allegations made in the Plaint. He averred that he is in possession of the original title deed of the suit property by virtue of being the legitimate owner of the suit property. That the suit property is family land and he and the Plaintiff (Respondent) are members of the same family. That the Plaintiff (Respondent) sought to disinherit them from the suit property.

After close of pleadings, the matter proceeded by way of viva voce evidence wherein the Plaintiff (Respondent) called 2 witnesses and closed his case and the Defendant called 3 witnesses and closed his case.

PLAINTIFF'S CASE

PW1 John Peter Nyaga adopted his witness statement dated **19th May 2011**. He further produced his list of documents dated **19th May 2011**, and a further list of documents dated **24th August 2017**, as exhibits. That the suit property belongs to him as he bought the same from one **Mwaura Hindu in 1992**. Further that his father had no land and was living in the church compound. That his father found the vendor on his behalf , negotiated and completed the transaction and had the land registered in the Plaintiff's name. That he then constructed a house and settled his father on the said property and his siblings and himself would occasionally visit his father.

That his father lived alone on the suit property and sometime he noted that his brother, the Defendant (Appellant) started cultivating on a portion of land on the suit land and it did not bother him as his father could not cultivate the whole land. That upon the death of his father, he informed his brother that he wanted to use the suit property which was his, but the Defendant refused to leave. He produced a sale agreement as Exhibit 1, letter dated **14th May 1992** as Exhibit 2, transfer of land exhibit 3. LCB consent exhibit 4 and green card as exhibit 5. Caution exhibit 6.

That he filed a suit against the Defendant, and the Court heard the case in **2013**, and ordered the Defendant to vacate the suit property and to issue him with title. He produced the Decree as Exhibit 7. That he sought evictions orders and the Court issued the said orders. However, the Defendant came on board and the same was stayed. That he knew his father had a plot from Cooperative Society, he sold the land and divided the proceeds amongst himself, his brother and the Plaintiff. That he has a parcel of land in Naivasha measuring **15 acres**, which he bought himself and he had sold a portion of it to buy the suit property.. He produced documents to prove he sold his land, title deed as exhibit 8, payments of processing title exhibit 9 and a sale agreement dated **7th May 2019** exhibit 10.

That his father was a witness in the transaction which he bought the suit property and he was in the mining industry. That he sold his land for **Kshs. 150,000/=** and he did not give his father nor his brother's anything. That his father did not sign the sale agreement in which he bought the suit land. That he wanted to subdivide the land so that he could charge a portion to sort out financial problems. That he requested the Defendant to find him a surveyor and he gave him his title deed and when he asked him for it, the Defendant told him he did not have it. That the Defendant was given 2 properties that were registered in his mother's name . That he was given the Nyakinyua plot . That there are two plots in Nyakinyua one was given to his sister while another was registered in his name and that of the Defendant . That when his father died, no plot was registered in his name. That the Defendant does not live on the suit property.

PW2 Mwaura Hindu, testified that the Plaintiff bought **1½ acres** of land from him and it was carved from the land he lives in. That two people witnessed the transaction. That the Plaintiff paid him the money at a bank in Naivasha. That the Plaintiff's father stayed on the suit property alone and upon his demise, no one lives on the suit property. That their agreement was in one document and he could not recall the exact sale consideration but it was over **Kshs. 90,000/=**.

DEFENCE CASE

DW1 Paul Kamura Kirunge adopted his witness statement dated **30th June 2017**, as his evidence in Court. He produced a letter dated **12th April 2011**, as exhibit 1. He produced the share certificates as Exhibit 2, Copies of receipt for payment as Exhibit 3 a & b. That the parcel where the Plaintiff stays used to belong to their father and their father was buried in the said land. That when their father was still alive, he said they should subdivide the land in the presence of their 5 sisters . That while processing the subdivision, they wanted to appear before the Land Control Board and they went to the Board with **Mwaura**, who sold to them the land. That they sold their land and bought the suit land. Further that they went to the Land Control Board and they agreed with his brother that they would first process the title in his name and then subdivide later. That when the transfer was signed, his father represented his interests. That the surveyor gave him the title deed to the parcel of land after the death of his father. That his father had 2 wives and he was apprehensive that there would be issues, hence he decided to subdivide his property and gave them their respective parcels and his request was that the land be subdivided as per his father's wishes.

That his son lives on the suit land and he has built him a house there. That his brother sold his father's land situated in Naivasha and used the money to pay **Mwaura**, who was the owner of the suit property in order to acquire the suit property . That he was first paid by cash and the balance was paid by cheque. That their father then moved to the suit land and stayed with his sister's son. That he was not staying on the suit land, but when his father died, he only took his son and cows upon his demise. That the agreement to purchase the suit land was done in his father's presence and in the name of the Plaintiff because he is the one who had the money . That he was holding the title deed because the land belonged to them.. That his father had other assets, that they have not distributed. That in Naivasha, they had **15 acres**, and they sold 5 acres and the other 10 are still registered in the Plaintiff's name.

DW2 Francis Muiru Kagunya, adopted his witness statement as his evidence in Chief . That he is the one who drafted the sale agreement dated **14th May 1992**, and it bears his signature and that of the witnesses. That the sale agreement stated that **Mwaura Hindu**, was selling to **John Peter Nyaga**, the buyer. That he was the witness and **Robert Wainaina** and **Mwaura's** wife were also present

DW 3 Lucy Wanjiru Maina, adopted her witness statement dated **30th July 2017**, and testified that her father sold the land in Naivasha then bought the land in **Kinare**, though she was not a witness but her father told her.

Thereafter, the parties filed written submissions and the trial Court delivered its Judgment dated **11th December 2018**, and entered Judgment in favour of the Plaintiff as against the Defendant (Appellant) with costs.

Being aggrieved by the said decision, the Appellant filed the instant Memorandum of Appeal dated **18th December 2018**, and prayed that;

- a) *That the appeal be allowed.*
- b) *That the Judgment passed on the 17th December 2018, be quashed and or set aside.*
- c) *That this Honourable Court do make its own findings on the law and the facts.*
- d) *That in the alternative the case be referred for hearing before a different magistrate.*
- e) *That the Respondent pays the costs of the appeal and of the lower Court case.*
- f) *Any other relief deemed appropriate in the circumstances.*

The grounds upon which the Appeal is grounded are;

1. *The trial Magistrate erred in Law and in fact in passing a Judgment against the Appellant*
2. *The trial Magistrate misdirected herself in both law and in fact in failing to take into account an authority from the Supreme Court of Kenya on the issue of customary trusts.*
3. *The trial Magistrate erred in law and in fact in failing to find that the Respondent had not proved his case to the required standard of proof.*
4. *The trial Magistrate erred in law and in fact in finding that the Respondent was entitled to an order to evict the Appellant against the preponderance of the evidence.*
5. *The trial Magistrate erred in Law and in fact in not taking into account or consideration the submissions of the Appellant and evidence adduced.*
6. *The trial Magistrate erred in Law and in fact in taking into account the Respondent's documents which were impugned and not proved.*
7. *The Learned Magistrate erred in Law and in fact in applying wrong principles in determining the issues of right to land, inheritance and gifts inter vivos.*
8. *The Learned Magistrate erred in law and in fact in ignoring the clear provisions of the Land Act and Land Registration Act.*
9. *The Learned Magistrate erred in law and in fact in totally ignoring the law put in by the Appellant thereby arriving at a wrong decision on the issues presented before her by the Respondent.*

The Appeal as canvassed by way of written submissions and the Appellant through the Law Firm of **James T. Makori & Company Advocates**, submitted that the suit property was at all times family land and the Appellant was farming on the said property and still farming the same. That the Respondent admitted that the deceased father was buried on the suit property and their father's land was sold in Naivasha, to buy the suit property. The Appellant relied on the case of **Isaack M'innaga KiebiaVs.... Isaaya Theuri M'intari & Another (2018)**, and urged the Court to find that the registration of the Respondent was in trust for the family of which the Appellant is a beneficiary.

The Respondent filed his written submissions through the Law Firm of **Angaya, Nasimiyu & Associates Advocates**, and submitted that the Appellant has not addressed and proven the various issues he raised in the Memorandum of Appeal. That the Appellant's entire Appeal and submissions all premised on a non-existent admission. That the fact that the Respondent allowed his father to live and be buried on the suit land does not make the same family land. It was further submitted that the Appellant is trying to mislead the Court that the suit property was held in trust. That the Appeal raises nothing new and the trial Court had not considered and capitalizes on falsehood that are not in any record. The Court was therefore urged to dismiss the Appeal.

This being a first appeal, it is the duty of the first appellate court to re-evaluate the evidence led before the trial court both on points of law and facts and come up with its own findings and conclusions. See the case of **Kamau ...Vs...Mungai [2006] 1 KLR 15**, where the Court held that;

“Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions, remembering that it had neither seen nor heard witnesses hence making due allowance for that.”

The Court has carefully read and considered the written submissions, the Record of Appeal, the grounds thereof and the Judgment by the trial Court and finds that the issue for determination is ***whether the Appeal is merited.***

In determining whether or not the instant Appeal is merited, it is the Court's considered view that it must first determine whether the Respondent held the suit land for the benefit of the family and therefore held it in trust.

In the case of *Justus Maina Muruku ...Vs.. Jane Waithira Mwangi [2018] eKLR* the Court held that;-

“In the case of Mbui vs Mukangu vs Gerald Mutwiri Mbui