



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 6A OF 2011

ZAKARIA KIRUKI IKIARA.....PLAINTIFF

-VERSUS-

SHADRACK MWITI M' MWARANIA.....1ST DEFENDANT

JANET MARINGA M' IKIARA.....2ND DEFENDANT

EVANGELINE NKIROTE M' IKIARA.....3RD DEFENNDANT

JUDGMENT

Background

1. The suit land is parcel no. Nkuene/U-Mikumbune/574 which is about 3 acres and is registered in the name of the plaintiff. This land was initially owned by IKIARA MAGIRI who was the father of 2nd and 3rd defendants. The plaintiff and 1st defendant are step brothers, born of the same father one M'Mwarania M'Magiri who was a brother of Ikiara Magiri. 1st defendant apparently occupies a portion of the suit land and plaintiff desires that he be evicted. Defendants on the other hand aver that they are the ones entitled to the suit land.

The pleadings and the record

2. By a Plaint filled in court on 21ST January 2011, the plaintiff filed suit initially against the 1st defendant seeking the following orders;

a). An order for eviction to eject the defendant from L.R Nkuene /U-Mikumbene/574.

b). An order of permanent injunction to restrain the defendant himself, members of his family, his employees and servants, his agents and whomsoever from entering, remaining, cultivating and/or in any other way using by any other means whatsoever the plaintiffs land L.R Nkuene/U-Mikumbene/574.

c).Exemplary damages for trespassing into the plaintiffs land with impunity

d). Costs of the suit and interest thereof.

e). Any other better relief that this honourable court may deem fit and just to grant.

3. The 1st defendant on the other hand, subsequently filled a defence and counter claim contending that the suit property belonged to M'Ikiara M' Magiri which he gave to himself, Janet and Evangeline (the 2nd and 3rd defendants respectively).

4. 1st defendant has also counter claimed that plaintiff fraudulently caused the suit land to be registered in his name.

5. The 2nd and 3rd defendants subsequently made an application to be enjoined in this suit which application was allowed by the court whereupon they subsequently filled defence and counter claim on 28th October 2011. Their case is more or less like that of 1st defendant. They aver that plaintiff fraudulently transferred the suit land to himself, yet as children of Ikiara, they are the ones who are entitled to the suit land.

6. The record of the court is in shambles. The hand written record of the court is torn, so are some of the recorded typed statement of witnesses. For instance, only the page containing the name of 3rd defendant is traceable in the court file. I had brought to the attention of the

advocates for the parties that the record was in disarray on 23/4/2018. The advocates had opted to have case proceed from where matter had stopped despite this hitch. By then, plaintiff's case and that of 1st defendant had been closed.

7. During the course of the trial, 2nd defendant (Janet) died and was substituted with her legal representative namely, Julius Mutwiri Mwithimbu.

Plaintiff's case

8. The plaintiff's case is that he was seeking eviction of the 1st defendant namely; Shadrack Mwiti from his land parcel no. Nkuene/Mikumbene/574, which land was in his name and that he was not willing to give 1st defendant one acre of the suit land

9. It was his further evidence that he knew the 2nd and 3rd defendants whom he was not supposed to have given any portion of the suit land. He claims that these two defendants ought to have gotten the land from their father. He avers that the two defendants did not live on the suit land as they were married. He admitted that he had another parcel of land at Mikumbene which belonged to his father.

Case for 1st defendant

10. DW1 Shadrack Mwiti while adopting his witness statement as evidence testified that the suit property belonged to Ikiara Magiri (deceased) who was his uncle as he was a brother to his father and that the plaintiff was his brother but from a different mother. It was his evidence that he entered the suit property in 1963 and that he utilized about an acre or so and that he had planted various trees thereon. It was his further evidence that the plaintiff only moved to the land in 1968 with his mother, when the latter was chased away by M' Mwarania (plaintiff and 1st defendant's father). 1st defendant had apparently beseeched Ikiara (deceased) to help them and he gave them a place to stay. It was his further evidence that Zakaria Kiruki (the plaintiff) was not a child of Ikiara and that his father was Mwarania and that he learnt that that the suit property was registered in the name of the plaintiff in 1997. They subsequently had a court case in which he (the plaintiff) lost. It was his further evidence that he and the plaintiff were step brothers and that the land belonged to their uncle and that in the counter claim he was seeking to be given land that he was given by his uncle .

Case for 2nd and 3rd defendants

11. DW2, Evangeline Nkirote's evidence is that she knew the plaintiff as a son of M' Mwarania and half brother of the 1st defendant and that the suit property belonged to her late father M' Ikiara M' Magiri who had two children namely herself and Janet Maringa (the 2nd defendant who is now deceased). She reiterated and corroborated DW1's evidence that during his lifetime, her father had called a clan meeting whereby he asked the 1st defendant (Shadrack Mwiti), who was his namesake to prepare wine for clan elders. During the clan meeting, her father had given her and her sister Janet (the 2nd defendant) and the 1st defendant the suit property in presence of the clan elders. That, the 1st defendant took possession of his portion during her father's lifetime and had been cultivating the same to date and that herself and her sister, (Janet) continued working on their respective portions but later stopped due to family commitments.

12. DW2 further stated that plaintiff had in the lifetime of her father been chased away by his father M' Mwarania and the 1st defendant requested their father to allow him and his mother to occupy a small portion of the suit property. Her father became old and sick and that this was when the plaintiff without their knowledge brought their father to the lands office where they made him sign documents transferring the land to himself. DW2 states that Mwarania used to beat up Ikiara when the two were alive.

13. DW2 avers that the plaintiff stayed in Nairobi and never attended her father's burial and she later went to work on the portion of land given to her by her father, but the plaintiff threatened her and warned her of dire consequences and that he later told her that he had been registered as the owner of the suit land. She contended that the suit land belonged to herself, her sister and the 1st defendant and that the plaintiff was holding the same in trust for them.

14. DW 3 Gilbert Kimathi while adopting his witness statement filed in court on 22nd November 2011, testified that the plaintiff was a step brother to the 1st defendant, that their father was M' Mwarania and that the plaintiff's father had chased his wife with the plaintiff and the 1st defendant asked M' Ikiara M' Magiri to allow them construct a house and live on the disputed land. Plaintiff then went to Nairobi and Shadrack Mwiti (the 1st defendant), took care of M'Ikiara M' Magiri till his death. It was his further evidence that 2nd and 3rd defendants were cultivating on the suit property the same having been given to them by their deceased father before clan elders. He further testified that 1st defendant was in occupation and possession of 1 acre of the suit land from the time he was given to date.

15. DW4, Mwanja M'Muguongo testified that sometimes in the year 1974 while at Nkubu town, he was approached by the plaintiff who hired his motor vehicle to transport his father from Kigane to Meru Lands Office. That, while in the company of the plaintiff, they went to the home of M'I Kiara M' Magiri (deceased) where they found him sleeping and that he appeared sick and old whereupon he drove them to the lands office together with the plaintiff. It was his further evidence that he knew that the plaintiff, M' Mwarania and M' Ikiara M' Magiri had land transactions since he took them to Meru Lands Office and Nkubu Land Board.

16. DW5 Stephen Meme M' Iringo evidence was that he was a member of the Kiiru clan to which the plaintiff and the defendant belonged. He avers that the suit property belonged to M' Ikiara who had no son but had two daughters namely; Evangeline Nkirote and Janet Maringa (the 2nd and 3rd defendants herein) and that M' Ikiara had divided the suit land to his two daughters aforesaid and the 1st defendant. He further testified that the plaintiff had fraudulently transferred M'Ikiara's land to himself.

17. DW6 Julius Mutwiri who represented the 2nd defendant herein opted to fully rely on the evidence of the defence witnesses as there was no objection from the plaintiff's advocate.

Submissions

18. Briefly, it was submitted for the plaintiff that he was the owner of the suit land, the same having been transferred to him by Ikiara Magiri on 16th December 1974 and that the same was a gift *intervivos* and that no intimidation or coercion had been proved. Plaintiff further submitted that defendants have advanced a case of the property having been given to them via an oral will, but such will could only pass if the donor had died within 3 months as per Section 6 of the Law of Succession Act. He M'Ikiara therefore could not have legally passed on the land to defendants via an oral will.

19. For the 1st defendant, it was submitted that the plaintiff had filed Meru Chief Magistrate Civil Case No. 67 of 1998 whose claim was similar to the one in the instant case, which claim was dismissed on 4th August 2010, for want of jurisdiction and that the plaintiff had not appealed against the same.

20. It was also submitted that the 1st defendant had been given 1 acre from the suit property by the late M'Ikiara Magiri during his lifetime and had been in occupation of the same and that all the defence witnesses gave evidence to this effect and that the 1st defendant therefore could not have been trespassing on the suit property as claimed in the plaint. 1st defendant avers that his rights over the suit property were not extinguished by the transfer of the land to plaintiff.

21. For the 2nd and 3rd defendants, it was submitted that before his death, the original proprietor (Ikiara) had given the 1st defendant 1 acre of his land and the rest was being utilized by the 2nd and 3rd defendants who were his biological children and that there was no evidence adduced to show that the plaintiff was using and occupying the land when the original proprietor was well and alive. It has been further submitted that when the deceased became old and senile the plaintiff used trickery and fraud to transfer the land to himself. It was submitted that the plaintiff had not shown any credible reason as to why the original proprietor who was not his relative would disinherit the defendants who were his blood relatives and whom he had given permission to stay and use the land during his lifetime.

Determination

22. I have carefully considered the evidence tendered by the parties, the rival submissions thereof and the authorities relied upon by the 1st defendant. From the evidence on record, it is not in dispute that the 2nd and 3rd defendants are daughters of the deceased (Ikiara). It is also not in dispute that the plaintiff and the 1st defendant are step brothers. It is also not in dispute that initially, the suit property belonged to the 2nd and 3rd defendants' father (deceased), and that the suit land is now registered in the name of the plaintiff.

23. I have stumbled upon a copy of the land certificate in respect of the suit land. It indicates that plaintiff became the registered owner of the suit land on 2/1/1975. The provisions of **section 26 of the Land registration Act stipulates that "the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, un-procedurally or (c) through a corrupt scheme".**

1. This court has to analyze the evidence to establish if indeed the transfer of the suit land was proper or not. In particular, the court will try to establish if the transfer of the land was a gift *intervivos*.

2. The plaintiff's evidence was that his father was M'Ikiara Magire. He then corrected himself and stated that M' Ikiara Magiri was his elder paternal uncle. On being pressed further, he stated as follows; "***M' Mwarania is my real father....***". During cross examination, plaintiff stated that the suit property was transferred to him by the deceased in the year 1975 and that he did not attend his burial. He further admitted in cross examination that he had a *shamba* at his father's place though the same did not have a title. He also stated that no advocate or family member was involved in the transfer. He confirmed that the suit property originally belonged to the 2nd and 3rd defendant's father. He however appeared to contradict himself when he stated that the 2nd and 3rd defendants were not brought up on the suit land while at the same time stating; "***they have been on the land, but the parents were living there...***" He also confirmed that him and his mother had been chased away by their father whereupon they moved to the suit land and that that was how he entered the suit property.

26. Save for the plaintiff generally stating that the suit land was transferred to him by the deceased sometimes in the year 1975, no other evidence was tendered by the plaintiff to support his claim. The plaintiff indeed admitted that no one was involved including the family members when the said transfer was allegedly effected.

27. On the other hand the defendant's evidence was to the effect that the original proprietor of the land belonged to the 2nd and the 3rd defendant's father. It was their further evidence that during the deceased's lifetime, he had shared the suit property to his daughters (the 2nd and 3rd defendants) and the 1st defendant herein in presence of clan members. The defendants further stated that it was the 1st defendant who requested the deceased to allow the plaintiff's mother to occupy part of the suit property after the plaintiff and his mother had been chased away by their father, a fact that the plaintiff seemed to corroborate in cross examination when he stated as follows; "***yes it is true she was chased away with the children by my father. It is true after she was chased, she moved to the suit land and she was with me and our other children. That is how I entered the suit land....***"

28. The actions and the conduct of the plaintiff clearly depict him as somebody who was dishonest and his evidence cannot be believed. There are telltale signs that the transfer of the suit land from the name of M'Ikiara Magire to plaintiff was not above board. The court has considered the circumstances surrounding the transfer and the conduct of the plaintiff after the death of M'Ikiara to arrive at the aforementioned conclusion.

29. Firstly, it appears that Plaintiff had presented himself as the son of M'Ikiara. Plaintiff has been using the name of M'Ikiara throughout even in court proceedings. In the Judgment before the tribunal (**LDT Case no. 99 of 2001**, one of the documents availed by Ntarangwi and Company Advocates), it had been ruled that plaintiff "**had fraudulently changed his name from Kiruki M'Mwarania to Zacharia Kiruki M'Ikiara in order to get this parcel easily**". During his testimony, plaintiff had attempted to again pass on the name of M'Ikiara as his father, he then retreated. The plaintiff ought to have come clean on why he abandoned his father's name (M'Mwarania) in favour of M'Ikiara. The logical conclusion to make is that he was passing himself as the son of M'Ikiara solely to get the suit land.

30. The second issue to consider is that the transfer appear to have been conducted in secrecy. As earlier pointed out, none of the close members of M'Ikiara were aware of the purported transfer.

31. The third issue to consider is with regard to the health status of M'Ikiara at the time he was allegedly being taken to land offices. DW4 states that M'Ikiara was sleepy sickly and old. He had to be assisted to get into the vehicle. If this transaction was above board as plaintiff would want this court to believe, how comes that plaintiff did not find it necessary to inform the other close members of M'Ikiaras family including the wife, the daughters and 1st defendant. Again, the logical conclusion to make is that plaintiff was taking advantage of the old sickly man.

32. Finally, I have taken into account plaintiff's conduct after the transfer. After the transfer, plaintiff went to Nairobi. He did not even attend the burial of M'Ikiara (he admits that much). Now he wants this court to believe that the two (himself and M'Ikiara) were so close, such that M'Ikiara even gifted his land to him. I take judicial notice that Burying somebody is a sensitive matter in African customary systems. It is a show of respect to intern a beloved. **The relationship between plaintiff and M'Ikiara doesn't pass the test of this respect**. What I can say on this issue is that plaintiff's conduct after the land transfer is inconsistent with someone who was close to deceased during the latter's life time.

33. In conclusion, I am inclined to believe that the transfer of the suit land from M'Ikiara to plaintiff was through Misrepresentation.

34. It has also emerged during the trial that 1st defendant has for many years utilized a portion of the suit land to the extent of one acre. As for the other two defendants, this was their fathers land. There is no evidence to indicate that they were raised anywhere else other than on the suit land. I am inclined to find that the defendants have beneficial interests in respect of this land. Their claim is hence anchored on Trust.

35. In *Halsbury's Laws of England*, 4th ed., Vol. 48 at para.585 it is stated as follows;

"A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property.

36. In the **Court of Appeal decision, *Mumo v. Makau* [2002] 1E.A. 170**, it was stated as follows;

"Trust was a question of fact to be proved by evidence...There was ample evidence showing that Makau had owned the original parcel of land and lived there with his entire family. Upon its demarcation and registration, the appellant's mother was to hold the suit land in trust for the entire family and in trying to deny the other house of its natural inheritance, she had acted fraudulently."

37. This is a court of law as well as a court of equity see –***Karuntimi Raiji vs. M'Makinya M'Itunga* (2013) eKLR** where it was held that **"It is inconceivable that a court of equity can leave a party with a genuine claim without a remedy. A court of equity ought to intervene in fairness to ensure that an applicant's possible interests are not vitiated"**.

38. This court also has a constitutional mandate to uphold the national values of **human dignity, equity and social justice** as enshrined in **article 10 of the constitution**. What kind of justice is there if plaintiffs claim was to be allowed, whereby 1st defendant would lose the place he has called home since the 1960s?, What kind of justice is there if 2nd and 3rd defendants are deprived of the land of their father only for it to end up with someone who actually had no regard for their father. That in actual sense is injustice.

39. Taking into totality all the circumstances of this case, and while invoking **the doctrines of equity and fairness**, I am satisfied that the defendants have proved their case against the plaintiff on a balance of probability, that the 1st defendant is entitled to 1 acre of the suit property and that further the 2nd and 3rd defendants are entitled to a transfer of the balance after deducting 1 acre for the 1st defendant.

40. Accordingly the plaintiff's suit against the 1st defendant is dismissed in its entirety and judgment is accordingly entered for the defendants as follows;

41. An order is hereby issued for the cancellation of title number L.R.NKUENE/U-MIKUMBUNE/574 which is in the name of ZAKARIA KIRUKI KITHARA, thereafter, one acre thereof is to be registered in the name of SHADRACK MWITI MWARANIA, the balance of the land to be registered in the names of JULIUS MUTWIRI MIRINGO and EVANGELINE NKIROTE M'IKIARA.

42. The deputy registrar of this court is hereby authorized to sign all requisite documents to facilitate the aforementioned transfer of the land.

43. The costs of this suit shall be borne by the plaintiff.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 17TH OCTOBER, 2018 IN THE PRESENCE

OF:-

Court Assistant: Janet

Kiome holding brief for Ntarangwi for 1st defendant

Kithaka for 2nd and 3rd defendant

Ashaba holding brief for Riungu for plaintiff

All defendants

HON. LUCY. N. MBUGUA

ELC JUDGE