



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 393 OF 2013

KARIMI KABUTHI PLAINTIFF

VERSUS

MWAI KABUTHI DEFENDANT

JUDGMENT

By his plaint filed herein on 22nd September 2011, the plaintiff seeks the following orders against the defendant:-

- a. ***A declaration that the defendant holds land parcel No. MUTIRA/KAGUYU/145 in trust for himself and the plaintiff and determination of trust in land parcel No. MUTIRA/KAGUYU/145 i.e. the land to be divided and registered into two equal portions in the names of the plaintiff and the defendant.***
- b. ***A permanent injunction against the defendant restraining him through himself, his agents and/or in any other way interfering with the plaintiff's possession of land parcel No. MUTIRA/KAGUYU/145***
- c. ***Costs and interest at Court rates.***

The parties are brothers and it is the plaintiff's case that the parcel of land MUTIRA/KAGUYU/145 measuring 1.8 Ha (hereinafter referred to as the suit land) was originally clan land but after demarcation, it was registered in the defendant's names to hold in trust for himself and plaintiff since their father was working elsewhere. However, the defendant has now chased him away yet he (plaintiff) has 400 tea bushes on the suit land.

In his defence however, the defendant denies that he holds the suit land in trust saying he was registered as the owner of the same since he made contributions to the clan. He therefore denies the plaintiff's claim which he urges me to dismiss with costs.

Each of the parties adduced evidence and called a witness in support of their respective claims.

As stated earlier, the parties are brothers and sons of the late KABUTHI Karii and it is the plaintiff's case that since their father was working in Eldoret during the demarcation period, the suit land which was family land was registered in the names of the defendant as the eldest son to hold in trust for him. Trust is matter to be determined from the evidence and if such evidence is available, the Court must declare a trust notwithstanding the registration of the land in one party's names – see ***MUMO VS MAKAU 2004 I K.L.R 13***. On the evidence before me, it is clear that both parents of the parties are buried on the suit land and that their father, though working in Eldoret, moved to the suit land upon retirement. He worked on the land and grows a crop on it. The defendant similarly

admitted in cross-examination that the plaintiff also grows tea on the land. Defendant stated as follows in cross-examination by Ms Wangechi for the plaintiff:-

“The plaintiff does not harvest any tea on the land. He only planted about 500 stems of tea which he has allowed someone else to harvest because he has no number given by the factory (KTDA) to enable him harvest”

The defendant goes further to state as follows in cross-examination:-

“I cannot recall exactly when he planted the 500 stems of tea. I did not up-root them or report him to anybody. I did not sue him because he is my brother and the tea can assist all of us”

It is instructive to note that earlier on in his evidence in chief, the defendant had denied that the plaintiff has crops on the suit land. There is evidence that the parties' father was working in Eldoret and it is him who made contributions and directed that the suit land be registered in the defendant's names to hold in trust. There is no evidence that the defendant was himself engaged in any employment and he could not explain exactly how much he made in contributions. It is clear following the decision of the Court of Appeal in **HENRY MWANGI VS CHARLES MWANGI C.A CIVIL APPEAL NO. 245 of 2004 (NBI)** that under Kikuyu Customary Law, to which both parties herein are subject, the eldest son inherits land as a muramati to hold in trust for himself and other heirs. Taking into account all the evidence herein including the fact that the father of the parties moved and worked on the suit land following his retirement in Eldoret where he was working, the fact that he and his wife were both buried on the suit land and also that the plaintiff has all along worked on his tea crop on the said land, I am satisfied that the only reason the suit land was registered in the defendant's names was so that he could hold it in trust for himself and the family given the fact that he is the first born and their late father was working away from home during the demarcation period. I reject the defendant's claim that the land was given to him by the clan because of the contributions that he made to the clan. Indeed the defendant and his witness ZAKARIA GAKUYA (DW1), contradicted each other as to what exactly was the defendant's contributions towards the acquisition of the land. On this issue, the defendant's evidence was as follows:-

“I cannot tell the exact amount that I contributed since I had to do it in stages. The amount of contribution could be 20/= or 10/= . It was random”

However, the defendant's witness had this to say in cross-examination:-

“I know that defendant is the one who made the contributions. His contribution was the work. I don't know about the money”

Clearly, the defendant and his witnesses were not being candid on this issue and I am satisfied that the truth of the matter is to be found in the testimony of the plaintiff and his witness.

Ultimately therefore, having considered the evidence on both sides, I am satisfied that the plaintiff has proved his case as required in law. I accordingly enter judgment for him as prayed in the plaint. As the parties are family, each shall meet his own costs.

It is so ordered.

B.N. OLAO

JUDGE

5TH MARCH, 2014

5/3/2014

Coram

B.N. Olao – Judge

CC – Mwangi

Ms Munene for Plaintiff – present

Mr. Munene for Defendant – present

COURT: Judgment delivered this 5th day of March 2014 in open Court.

Ms Munene for plaintiff present

Mr. Munene for defendant present

Right of appeal explained.

B.N. OLAO

JUDGE

5TH MARCH, 2014