



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Civil Case 14 of 2005

ANSELIMO NGENI WARUL.....1ST PLAINTIFF
CYPRIANO NYAGA NYANGE.....2ND PLAINTIFF
JAMES MUTHEKE GAKOMBE.....3RD PLAINTIFF
(All suing on their behalf and on behalf of the Agaciku Mbari ya Mbogo Clan)

VERSUS

KIRINYAGA COUNTY COUNCIL.....DEFENDANT

J U D G M E N T

In this representative suit, the 3 plaintiffs have sued the defendant County Council of Kirinyaga on behalf of an entity referred to as “AGACIKU MBARI YA MBOGO CLAN”. Their claim is for 25 acres of land described as LR NO. BARAGWI/RAIMU/63 within the Kirinyaga County Council. According to paragraph 3 of the plaint, the said parcel of land was reserved for the “Agaciku Mbari ya Mbogo Clan” (hereinafter referred to as the clan) during the land demarcation and adjudication exercise. They claim that the clan allowed the Ministry of Agriculture to set up a demonstration farm in the said plot. The said demonstration farm was later relocated in 1976. The said plot remained in the name of the defendant but according to the plaintiffs, the defendant was to hold the same in trust for the clan. Some time in the early 1980’s the plaintiff’s representatives started following up the matter with the Provincial Administration and the defendant. The defendant is said to have allocated the parcel in question to other public institutions and some individuals. The plaintiffs are now asking for what they claim is their land and if the land cannot be transferred to them, then they should be compensated with another land or with money equal to the value of the said land.

In its defence, the defendant denied that the parcel of land ever belonged to the plaintiff. It stated that the land was set aside during the adjudication/demarcation exercise as a public utility land in order to accommodate a Farmers Training Centre. The defendant stated further that the Training Centre was relocated elsewhere and the land is now occupied by RAIMU PRIMARY SCHOOL, and a part of it by KIANYAGA CHILDREN’S HOME.

The defendant therefore denied the claim in toto and urged this honourable court to dismiss the same with costs.

At the hearing, a total of 4 witnesses testified for the plaintiff while 2 witnesses testified for the defendant. Several documents were produced in evidence to show the history of the said plot. A valuation report was also produced in evidence to show the value of the plot. At the close of the case, both counsel tendered written submissions. I have carefully considered the evidence before me and I have been well informed by the said submissions.

The history of the said portion from the extract of the Register and the certificate of search produced in evidence is not disputed. The parcel was registered on 16/1/1959 in the name of NATIVE LANDS TRUST BOARD which is now the COUNTY COUNCIL OF KIRINYAGA- the defendant herein. The next entry shows that 0.180 H of the said plot was compulsorily acquired in 1974. The said

register does not indicate anywhere that the land was ever held in trust for the plaintiff or for any other persons. There are no overriding interests indicated on that register. The correct position is that the plot is still reserved for a rural institute.

It was incumbent upon the plaintiff to prove on a balance of probabilities that the land in question belonged to them and that they surrendered the same to the defendant in 1954 to hold in trust for them. Has the plaintiff discharged this onus?

In my considered view, no tangible evidence has been adduced to show that the land in question ever belonged to the plaintiff herein. Even if for the sake of argument we were to make an assumption that the land initially belonged to the plaintiff, on what conditions did they give it back to the Government to build the said institute? Was it supposed to be given back to the plaintiff at any one time and if so after how long and on what conditions? If indeed a Trust existed in their favour, why was it not indicated as an overriding interest in the register in 1959? “Trust” is an issue of both fact and law. The existence of the same must be demonstrated through proper and credible evidence. A “trust” is not created just because a person wakes up one day and decides another has been holding the land on his behalf. There is no evidence in this matter whatsoever that after the land demarcation/adjudication exercise, the said plot was allocated to the plaintiff. That would have been the starting point. It would have been the foundation upon which to build their claim. I do not understand how or why the plaintiffs would expect the court to find in their favour in the absence of any shred of evidence that they owned the parcel in question before the same was registered in the defendant’s name.

The plaintiff’s submission appears to dwell on what the defendant has done with the land thereafter..... that the same has been reallocated to other third parties instead of being returned to the plaintiffs with respect, that was not the issue. The plaintiff’s basic and most important duty was to demonstrate that indeed the land belonged to them and that thereafter they surrendered the same to the defendant to hold in trust for them. They have dismally failed to prove this.

The documentary evidence adduced shows that the land in question was registered in the name of “Native Lands Trust Board” – now County Council of Kirinyaga and the only easement recognized in the register is that it was reserved for “Rural institute.” The other documents (*P exh 1 and P Exh 2*) are merely letters showing communication between the plaintiff’s and the Provincial Administration asking for the land in question. These letters do not support their claim of ownership or existence of a trust in their favour. The plaintiff’s have failed both in fact and in law to demonstrate even remotely the existence of a trust in their favour over the land in question.

In my considered view, the plaintiffs have no justiciable claim whatsoever against the defendant herein.

I find and hold that the plaintiffs have failed to prove their case on a balance of probabilities. Their suit is hereby dismissed with costs to the defendant.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 2nd day of March 2010.

In presence of:-The plaintiffs present, Earnest Gathuri on

behalf of 1st plaintiff present .

N/A for defendant