



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**CIVIL SUIT 4147 OF 1986**

**PETER MUATHE NGUVI .....PLAINTIFF**

**versus**

**MASINYA MUTUA.....DEFENDANT**

**JUDGMENT**

The parties in this suit are cousins who hail from Mbiuni, Machakos. The suit concerns a piece of land known as Mbiuni/Katitu/484. It is registered in the name of Peter Muathe Nguvi, who is the plaintiff in this suit. He became the registered proprietor of it on 6<sup>th</sup> July 1984. He obtained a certificate of title on 9<sup>th</sup> July 1984.

In this action he alleges that the defendant, Raphael Mutisya Kamuya, did in or about October, 1985 and other diverse dates before and after that month trespassed on the land. He cut trees which were standing thereon, moved animals thereon which grazed on the grass which was thereon growing and used the felled trees to burn charcoal, which he subsequently sold. It is his case that the defendant did all that without his consent or approbation or without any colour of right. He therefore prays for a permanent injunction to restrain him by himself, his servants or agents from stepping on the land; general damages for trespass to be assessed by this court; mesne profits to be determined by this court; special damages of Kshs 6000/-; exemplary damages, costs and interest.

The defendant upon being served with summons to enter appearance and the plaintiff appeared and filed a written statement of defence denying he trespassed on the suit land. His case is simple. The suit land was originally family land. It was to be inherited both by the plaintiff and himself among others. The plaintiff fraudulently caused it to be registered in his own name to the exclusion of others and in particular himself. The plaintiff did that while he, the defendant, was in school and he could not therefore take steps to prevent him doing so; that the matter was discussed by the clan elders who decided the land would be divided and shared between them in designated proportions, and that it was after the elders decision that he moved on the suit land.

There is no doubt, and the defendant conceded as much, that the plaintiff is the registered owner of the suit land, and that the defendant actually moved onto the suit land, cut trees and cleared the bush on part of it. There is only one matter, principally, in controversy, viz, whether the defendant has any right in the suit land. If so, the next issue is what reliefs, if any, is the plaintiff entitled to?

The background facts of the case are significant. It is essential to recount them. The parties fathers were brothers. The parties are therefore cousins. The defendant's father was initially polygamous. He however, later divorced the defendant's mother. That was after the defendant had been born, but when he was still an infant. His father predeceased his grandfather, and the latter predeceased the plaintiff's father. The latter died before he had divided his land between his two sons. The effect was that the plaintiff's father received the entire estate of his father. He squandered quite a substantial part of it. He apparently left a small share for the defendant's step-mother and retained the rest. There was no provision made for the defendant or his mother. She had been remarried by another man. The defendant grew up there. However when he was big enough he returned to his father's home. From the evidence it is clear that the defendant's step-mother shared with him whatever the plaintiff's father had given her. He considered it too small and sought a share from the plaintiff from what his father had left to him.

The defendant's contention has all along been that the plaintiff's father should have divided the properties

he inherited from his father equally between himself and his (defendant's) father and in his absence his family members. That he did not do so he acted fraudulently in his view, because he held the property in trust for himself and the defendant's father's family. Hence his petition to the clan elders to intervene and have the land share fairly.

The suit land is registered in the name of the plaintiff as sole proprietor. It would appear his is a first registration. Even if it is treated as not being such, there is no evidence that the plaintiff defrauded the defendant. The plaintiff inherited the land from his own father. That much the defendant concedes. So that the plaintiff's title is indefensible. He is a third party as far as the land is concerned having not been party to whatever fraud the defendant alleges against the plaintiff's father. Moreover, the decision of the elders is unenforceable. They had no jurisdiction to sit in judgment respecting the suit land. It is registered land and disputes concerning it could only be handled by the courts which in appropriate circumstances, could refer it to the elders pursuant to the provisions of the Arbitration Act. The elders who dealt with the defendant's grievance did not do so pursuant to a reference made to them. Their decision was and is of no legal effect.

Considering all the evidence before me on a balance of probabilities I came to the conclusion that the defendant has no rights over the suit land. Moreover, there is evidence on record, which I accept, that the defendant was not totally unprovided for. He got some land from his step-mother, or so I understood, and his grievance is only that whatever he has is too small when looked at in relation to what the plaintiff has. The plaintiff has not been shown to have any obligation to the defendant. The land did not devolve to him as a trustee but as a son of his father, the person who theretofore had had the land peaceably.

I am satisfied that the plaintiff has proved his case to the standard required in civil cases. I grant injunction of a permanent nature to the plaintiff directed at the defendant, his servants or agents to restrain them from entering or interfering with the plaintiff's quiet enjoyment of the land.

I however, decline to award any damages as evidence is lacking as to the extent of loss suffered. The plaintiff had the onus of adducing evidence in that regard, but he failed to do so. Consequently he disentitles himself to an award. Costs of the suit to the plaintiff to be taxed if not agreed upon.

Dated at Nairobi and delivered this 14<sup>th</sup> day of May, 1991.

**SEO BOSIRE**

**JUDGE**