



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT NAIROBI

ELC SUIT NO. 788 OF 2007

FRANCIS MBURU MUTHANDI..... PLAINTIFF

=VERSUS=

PETER KIHUHA MUTHANDI.....DEFENDANT

JUDGMENT

The plaintiff and the defendant are brothers. The plaintiff is the registered proprietor of all that parcel of land known as Ndeiya/Ndeiya/508 (hereinafter referred to as the “the suit property”). The plaintiff was registered as the proprietor of the suit property on 17th January, 1983 and was issued with a title deed on the same date. The plaintiff brought this suit against the defendant on 10th August, 2007 seeking the following reliefs:

- a) A declaration that the suit land parcel belongs to the plaintiff absolutely and the defendant is occupying the same illegally and unlawfully.
- b) An order for eviction and ejection of the defendant, his wife and children, agents and/or servants and/or any other person and/ or persons claiming by and/or under him from the portion of the suit land parcel No. Ndeiya/Ndeiya/508 and from the portion of the house thereon occupied by the defendant illegally and unlawfully together with interest at court rates.
- c) A permanent injunction restraining the defendant his agents and/or servants, his wife and children and/or anybody, person or persons claiming by and/or under him from occupying, cultivating, remaining thereon, cutting down trees and/or interfering with any other property thereon, remaining upon and/or utilizing the land in any other way or at all.
- d) An award of General Damages for trespass to land, interference with the landscape that forms the suit premises and illegal cultivation of a portion of the land and cutting down indigenous trees on the land.
- e) Exemplary damages, together with interest at court rates.
- f) Mense profits for the portion of the house occupied by him illegally for 15 months at Kshs.12,000/- per month amounting to Kshs.180,000/- and a further Kshs.12,000/- per month until the final determination of the suit together with interest at court rates.
- g) Payment of the value of the blue gum trees and black wattle trees cut down and sold and burnt into charcoal amounting to Kshs.750,000/- together with interest at court rates.
- h) Costs of this suit together with interest at court rates.
- i) Such further and/or other relief as this honourable court may deem fit and just to grant.

The plaintiff’s complaint against the defendant was that in the month of May, 2006, the defendant illegally, unlawfully and without any right to do so entered the suit property, occupied the plaintiff’s house thereon and cut down several trees some of which he sold while others were burnt into charcoal. The plaintiff averred that the value of the trees that were cut by the defendant was approximately Kshs.750,000/-. The plaintiff averred that the defendant had continued to occupy his house on the suit property with impunity and that the rental income from the said house was approximately Kshs.12,000/- per month and that the defendant was liable to pay him Kshs.180,000/- on account of lost rent as at the time of filing suit. The plaintiff averred that despite demand made and notice of intention to sue having been served upon the defendant, the defendant had refused and/or neglected to vacate the suit property and/or pay damages and mesne profits thereby rendering the filing of the suit necessary.

The defendant filed a statement of defence on 2nd October, 2007 denying the plaintiff claim in its entirety. The defendant also filed a counter-claim against the plaintiff. The defendant denied that the plaintiff was the proprietor of the suit property. The defendant averred that

the plaintiff was registered as the owner of the suit property as a trustee. The defendant averred that during the land consolidation in Ndeiya Location in the year 1956, the plaintiff's and the defendant's deceased father was in prison and as the eldest son in the family, the suit property was registered in the name of the plaintiff instead of their father to hold as a trustee for the family. The defendant denied that he entered the suit property illegally in May, 2006 and committed the acts set out in paragraph 5 of the plaint.

In his counterclaim the defendant averred that in 1956 when their father was in prison, the land committee allocated the suit property to the plaintiff to hold as a trustee on behalf of their father and the entire family. The defendant averred that when their father was released from prison in 1957 he did not find it necessary to have the suit property transferred to his name because he had trust in the plaintiff as his eldest son. By way of counter-claim, the defendant sought the following reliefs:

- a) A declaration that the suit property belongs to Peter Kihuha Muthandi, James Ngigi Muthandi, George Wanjohi Muthandi and Francis Mburu Muthandi.
- b) A permanent injunction restraining the plaintiff from occupying, cultivating and interfering with the quiet occupation by the defendant and his brothers of the suit property.
- c) A declaration that the defendant has acquired 3 acres of the suit property by adverse possession and that the same be registered in his name.

At the trial, the plaintiff gave evidence and called 6 witnesses. On his part, the defendant gave evidence and called 4 witnesses. The plaintiff told the court that he works in Germany having moved there as a student in 1962. He told the court that he visits Kenya every year. He stated that he acquired the suit property in 1950's before he went to Germany from Kiambu County Council who were demarcating and allocating land to members of the public. He stated that the suit property that measures 12 acres was allocated to him in 1953 during which period he was working with the Survey of Kenya. He stated that on 24th July, 1981, the Land Registrar, Kiambu wrote to him asking him to go and collect the title deed for the suit property which title he collected on 17th July, 1983. He stated that when he collected the title deed for the suit property, his parents were still alive and none had laid a claim to the suit property. He stated that both parents accompanied him to the land office to collect the said title deed.

The plaintiff told the court that his parents did not claim the suit property at any time and that they told everyone that the property belonged to the plaintiff. The plaintiff produced in evidence a number of receipts for the payments he claimed to have made to the County Council of Kiambu on account of the suit property between 1972 and 1981. The plaintiff stated that he moved his parents from emergency village and settled them on the suit property. He stated that his parents were living in a colonial village before he constructed a house on the suit property and moved them to occupy the same. He stated that his parents did not lay a claim to the property and that they occupied the same with his permission.

The plaintiff stated that when he learnt that the defendant had entered the suit property, he lodged a complaint against him with the local chief and subsequently with the police. The plaintiff denied that he was registered as the owner of the suit property as a trustee for the family and that it was their father who paid for the suit property. The plaintiff stated that he was the one who built the house on the suit property that was occupied by his parents. The plaintiff stated that his parents requested him to build for them a permanent house on the suit property and he sent for them money to put up the house. He stated that after the house was constructed he installed electricity and telephone to the house. The plaintiff denied that the defendant was living with their mother on the suit property and that when their mother died he was left on the property. The plaintiff stated that he was not aware of the family meeting that was held on 1st May, 1993 at which his mother allegedly shared out the suit property amongst her sons. The plaintiff also denied that their father had written to him in 1984 asking him to surrender the title deed for the suit property. The plaintiff stated that the defendant had no valid claim over the suit property.

The plaintiff's first witness was Thuo Kamau Muthandi (PW2). PW2 was the plaintiff's neighbour at Ndeiya. He told the court that he was also allocated land by the government at Ndeiya measuring 12 acres not far away from the suit property. He stated that he was allocated the said parcel of land during the land demarcation period. He stated that prior to the demarcation and subsequent allocation of land to the residents, they were living on land in respect of which they had no titles. He stated that during the demarcation, the names of people were being called out at a playground and they were being allocated land. He stated that the plaintiff was allocated the suit property at the same time. He stated that the plaintiff and he were allocated land when the plaintiff's father was in jail having killed a woman in 1952. He stated that land was being allocated to individuals and not to families and that the suit property was allocated to the plaintiff as an individual. He stated that it is the plaintiff who moved her mother from the colonial village and settled her on the suit property.

The plaintiff's second witness, Leah Wanjiku Wanyoike (PW3) was also his neighbour. PW3 told the court that she was at Ndeiya during the land demarcation. She stated that land was allocated to individuals and not families and that each person was being allocated land measuring 12 acres. PW3 stated that they used to pay some little amount for the land that was allocated to them and that for the suit property, the plaintiff who was allocated the land used to send money to his mother to make the payment on his behalf. She stated that it was the plaintiff's parents who used to occupy the suit property since the plaintiff lived abroad. She stated that the defendant never used to occupy the suit property. PW 3 stated that the plaintiff's parents used to say that the suit property belonged to the plaintiff and that the plaintiff's brothers never occupied the property.

The next witness for the plaintiff was his sister, Leah Wanjiku Njenga (PW4). PW4 told the court that the plaintiff was her follower. She stated that when her mother moved from the colonial village, she remained in her mother's house in the said village. She stated that she was later on allocated land measuring 5 acres at Ngwirubi Thigio. She stated that the defendant was allocated land at a place called Ngwirubi Rwachumari. She stated that the plaintiff was allocated the suit property during the time of land demarcation at a playground. She stated that the plaintiff was given the land because he was working for a surveyor who assured him that he would give him land. PW4 stated that land was given to individuals and not families. She stated that after the plaintiff acquired the suit property he moved their mother from the colonial village and settled her on the suit property. She stated that the plaintiff used to send money to their mother to pay for the land. She stated that the defendant did not pay for the suit property and did not make any contribution towards the construction of the house on the suit property that was occupied by their mother. PW4 told the court that their mother could not afford to put up a house. She stated that after the

defendant got married she used to stay in Nairobi.

The next witness, Lucia Wanjiru Muthandi (PW5) was also the plaintiff's sister. She told the court that she was the plaintiff's immediate follower. She stated that she could still remember how the land adjudication was conducted. She corroborated the evidenced of PW3 and PW4 that land was being allocated at a playground. She stated that the plaintiff was given land because he used to assist the surveyors who were doing the demarcation exercise. She stated that it was the plaintiff who moved their parents from the colonial village and settled them on the suit property and that he later on built for them a permanent house on the property to which he also installed for them electricity and telephone. She stated that she never got married and that when the plaintiff moved their mother from the colonial village, her mother moved together with her children. PW5 stated that after the death of their mother, the plaintiff asked her to continue staying on the land with her children and to take care of the land. She stated that the defendant had never stayed on the suit property and that he used to stay at Dandora in Nairobi. She stated that one of her brother's Wanjohi used to stay at Riruta Satellite while the other by the name Ngigi used to stay at Gikatwa. She stated that when Wanjohi died the plaintiff refused to have him buried on the suit property. PW5 stated that the defendant came to stay on the suit property in 2006 and that he stayed for some time and started cutting trees on the suit property. She stated that the matter was reported to the plaintiff who had the defendant arrested. She stated that the defendant promised that he would vacate the suit property but he did not keep his promise. PW5 stated that the suit property was not family land.

The plaintiff's next witness was a forest officer, Joseph Maina Njoroge (PW6). He told the court that on 2nd August, 2011, he got a letter from the O.C.S Tigoni Police Station that a report had been made to him that someone had entered another person's land and cut down trees without permission and that he wanted him to assess the value of the trees that had been cut to enable the said O.C.S prepare a proper charge sheet. He was taken to the site which was a farm at Ndeiya where he saw the trees that had been cut. He assessed the value of the trees at KShs.21,600/-. He prepared a report which he submitted to the O.C.S Tigoni Police Station. PW6 produced his report as an exhibit.

The plaintiff's last witness was George Waiganjo Wanjiru (PW7). PW7 was the son of PW5 Lucia Wanjiru Muthandi. He told the court that he was born in 1978 and that he was staying on the suit property with PW5 and his elder brother. He stated that he had stayed on the suit property since he was born. He stated that as he grew up, it was only his mother, brother and two sisters who had been staying on the suit property in addition to their grandparents who had passed on. He stated that when he was young, the defendant was not staying on the suit property and that the defendant was introduced to him in 1985 when his grandfather died and that he left after the funeral. He stated that the defendant came to stay on the suit property on 25th May, 2006 and put his goods which were brought in a lorry on his (PW7) grandmother's house. He stated that they reported the incident to the plaintiff who told them to ask the defendant to go away which they did but the defendant refused to vacate the suit property. The plaintiff subsequently came and had the defendant arrested and taken to the police station. The defendant promised to move out of the suit property and the complaint against him was withdrawn. He however did not vacate.

In his defence the defendant(DW1) told the court that he was born in 1950 and that he was married with 4 children. He stated that he was born in Tiekunu, Ndeiya Division and had stayed in that place since then. He stated that he entered the suit property in 1959. He stated that they were initially staying in a different parcel of land with his parents from where they moved to a colonial village in 1956. He stated that land demarcation started after they moved to the colonial village and that during the demarcation exercise his father was allocated the suit property. He stated that after the allocation, the family moved to the suit property. He stated that the suit property was allocated to his father and that it was to be registered in his name but he was serving a jail term then. He stated that during the demarcation each family was allocated land measuring 12 acres. The defendant stated that since their father was in prison, the plaintiff as the eldest son stood in for the father and was registered as the owner of the suit property to hold in trust for the family. He stated that his youngest paternal uncle was a chief at the material time and that he was the one who arranged for the plaintiff to be registered as the owner of the suit property in place of their father so that he could hold the same as a trustee. He stated that when they moved to the suit property in 1959 they moved with their two (2) sisters who were unmarried then and one of his brothers who was in school. He stated that the plaintiff and one of his brothers were not living on the suit property. He stated that the plaintiff went to Germany in 1962 and when he used to visit Kenya, he used to stay in Nairobi. He stated that when the title deed for the suit property was ready, their father sent to the plaintiff a letter to come and collect the same and that the plaintiff came and was accompanied to Kiambu by their mother and brother, James Ngigi to collect the title deed for the suit property.

He stated that the plaintiff was supposed to take the title deed to their father so that he could divide the land amongst them. He stated that the charges that were levied for the suit property were paid by their mother and father. He denied that the plaintiff made any payment for the suit property. He stated that his sisters (PW3 and PW4) supported the plaintiff's case because he was not in good terms with them. He claimed that they were biased against him. He stated that he was living in the house on the suit property which was previously occupied by their parents. He stated that PW4 was also living in the same house in one of the rooms. He stated that their father died in 1985 while their mother died in 1997. He stated that the house he was occupying was built by their mother in 1976 after selling the land which she had in Subukia and the shares she had in Limuru Pyrethrum Growers. He stated that before building the new house, their parents lived in a grass thatched house which they moved to when they came from the colonial village in 1959. He stated that after they completed constructing the house currently on the suit property, they demolished the grass thatched house. He stated that it was their parents who paid the contractor, one Kariuki Ngandu who constructed the house. He denied that the money which was used to construct the said house came from the plaintiff.

The defendant stated that the plaintiff secretly took the title deed for the suit property to Germany where he stays and their father wrote to him in 1984 to return the same. The defendant stated that on 1st May, 1983 the family tried to subdivide the suit property with the assistance of the members of their clan. He stated that the property was sub-divided into 4 portions of 3 acres each and that the 4 sons were each given a portion measuring 3 acres. He stated that the agreement concerning the sub-division of the suit property was later reduced into writing on 11th December, 1993 and signed by those who were present. He stated that the agreement was prepared by their mother and that he and his other brothers except the plaintiff were present during the execution of the agreement. The defendant denied that he cut the trees on the suit property. He stated that the trees were cut by the plaintiff himself in 1989. The defendant stated that the plaintiff's interest was to get him out of the suit property so that he could sell the same. The defendant denied that he caused any damage on the suit property.

The defendant's first witness was Godfrey Wainaina Mwangi (DW2). DW2 told the court that the plaintiff and the defendant were his cousins. He stated that he attended a meeting that was held on 19th December, 1993 on the invitation of the parties' mother, Rahab Wambui Muthandi. He stated that the purpose of the meeting was for the parties' mother to inform the family about her wishes regarding the suit

property. DW2 produced the minutes of that meeting as an exhibit.

The defendant's next witness was Peter Muthandi Wanjohi (DW3). DW3 was also a cousin to the plaintiff and the defendant (the parties). DW3 gave the court the history of the suit property from 1920's. He stated that the parties' father was jailed for 7 years in 1952 for manslaughter having killed a relative over a land dispute. He stated that the parties' mother who was supporting freedom fighters was also jailed by the colonial government. DW3 stated that during the state of emergency, people were moved to colonial villages and that his father Wanjohi Mburu was the head of Nderu Village where the parties' family was moved. DW3 stated that his father position was equivalent to that of a sub-chief. He stated that consolidation and demarcation of land took place between 1956 and 1958 in the area when the parties' father was still in jail. He stated that their mother was released in 1956. He stated that the land in the area was sub-divided into plots of 12 acres each.

DW3 stated that part of the land that was occupied by the parties' father and his family before moving to the colonial village was comprised in the suit property. He stated that the consolidation and demarcation exercise returned the residents to the land they owned before the state of emergency was declared. He stated that through the effort of his father and the chief of the location, they ensured that the parties' father did not miss out on the land allocation. He stated that since at that time land was not being allocated to women, the suit property was allocated to the plaintiff as the eldest son to hold in trust for his siblings until they became of age. He stated that when the suit property was allocated to the plaintiff he was still in school.

DW3 told the court further that when the parties' father was released from jail in 1959, he moved his family to the suit property which was family land. He stated that the whole family moved except the daughters who were already married. He stated that the plaintiff moved to Germany in 1962 and had never lived on the suit property. He stated that when the titles were being issued, the plaintiff was issued with the title deed for the suit property as head of the family. He stated that after the death of the plaintiff's parents, he failed to share the suit property with his siblings and instead he decided to keep the whole land for himself. DW3 stated that the house on the suit property was put up around 1978 by the parties' mother who had her own money. He stated that the defendant also contributed to the construction of the house. He stated further that the plaintiff who was out of the Country did not make any contribution. He stated that the plaintiff had never stayed on the suit property and that he only comes to visit.

The defendant's third witness was his brother, James Ngigi Muthandi (DW4). DW4 told the court that the plaintiff and the defendant were his brothers and that they were born 4 boys and 4 girls to Mr. and Mrs. Elijah Muthandi. DW4 gave the court the history of their family. DW4 told the court that he had lived on the suit property since he was born in 1942 and that he moved out in 1965 when he got a job in Nairobi. He corroborated the evidence of the defendant and the defendant's previous witnesses that their father was sent to jail in 1952 and that during the state of emergency they were taken to a colonial village after which land demarcation took place while their mother and father were in jail. He corroborated the evidence of DW3 that their uncle one, Wanjohi had the land that belonged to them registered in the name of the plaintiff. He stated that the defendant was born on suit property before it was demarcated and that he only left the suit property to go and work. DW4 stated that the plaintiff was registered as the owner of the suit property as a trustee when their father was in jail. He stated that the plaintiff had never stayed on the suit property and that the only house on the property belonged to their parents. He stated that the plaintiff did come to bury their mother because of a dispute over the suit property which the mother had already shared amongst them. DW4 stated in cross-examination that the plaintiff as the elder son in the family was given the responsibility of "a muramati", that is a trustee in Kikuyu custom.

The defendant's last witness was Joshua Kariuki (DW5). He told the court that the parties' mother, Rahab Wambui Muthandi had engaged him to construct for her a house on the suit property. He stated that he was being paid by the parties' mother. He stated that he was being assisted by the defendant and that the building materials were being bought by James Ngigi (DW 4) who was a brother to the parties. He stated that he was paid Kshs.350/- for the work by the parties' mother who got the money from the sale of her land at Subukia. He stated that the plaintiff was unknown to him and that he met the plaintiff in court.

The submissions:

After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiff filed his submissions on 22nd March, 2018 while the defendant filed his submissions in reply on 27th April, 2018. In his submissions, the plaintiff reiterated the reliefs sought in the plaint and the evidence that was adduced by the parties in support of their respective cases. The plaintiff submitted that the defendant did not adduce any evidence in proof of his allegations that the suit property was allocated to the plaintiff to hold in trust for the family. The plaintiff submitted that when the suit property was allocated to him, the defendant was too young to know anything about land ownership and trust relationship. The plaintiff submitted further that during the construction of the house on the suit property which is now occupied by the defendant, the defendant's contribution was only that of a labourer who was assisting the person who was doing the construction and that he was not aware of the source of funds that were being used to put up the house. The plaintiff submitted that evidence before the court showed that his other brothers had their own parcels of land and that there was no way in which trust could be created only in favour of the defendant. The plaintiff submitted that the defendant only lived with their parents before he started working. The plaintiff submitted that the defendant moved to Dandora thereafter and that no evidence was placed before the court to prove that the defendant lived again on the suit property after he moved to Dandora. The plaintiff submitted that the defendant's evidence was full of hearsay and inaccuracy and as such the same was not worthy of credit.

The plaintiff submitted that considered as a whole, the defendant and his 4 witnesses failed to prove on a balance of probabilities that the plaintiff held the suit property in trust for his family. The plaintiff submitted that his witnesses were witnesses of fact and truth in that they participated during the land demarcation and consolidation exercise. The plaintiff submitted that he had proved on a balance of probabilities that the suit property was his personal property and that it was not allocated to him to hold in trust.

In his submissions in reply, the defendant reiterated the parties' claims as set out in the plaint and, the defence and counter-claim. The defendant also reiterated the evidence that was adduced by the parties in proof of their respective claims. The defendant submitted that he had established by his evidence and the evidence of his witnesses that the suit property was allocated to the plaintiff to hold as a trustee. The defendant submitted that he was born on the suit property and lived on the property throughout save when he worked as an electrician in Dandora. The defendant wondered why the plaintiff waited their parents to die before lodging his claim over the suit property. The

defendant submitted that their other siblings were brought up on the suit property and only moved out when they became of age and started working. The defendant submitted that Lucia Wanjiru (PW5) and he had lived on the suit property all their lives and that PW5 was not the plaintiff's caretaker on the suit property. The defendant submitted that the plaintiff had failed to prove his claim against the defendant and that the defendant had proved his counter-claim against the plaintiff on a balance of probabilities.

In support of his submission the defendant cited the case of Mumo v Makau [2004] 1 KLR 13 where the court held that trust is a question of fact and has to be proved by evidence and that there was nothing in the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) which precludes the declaration of trust in respect of registered land even if it is a first registration. The defendant also relied on the case of Muiruri v Kimemia [2002] 2KLR 677 where the court held that a party relying on the existence of a trust must prove through evidence the existence of such trust. The defendant submitted that the evidence adduced showed that the plaintiff was registered as the owner of the suit property to hold the same as a trustee of Muthandi family. The defendant submitted further that he did not trespass on the suit property and that he was not liable to the plaintiff in damages as claimed or at all. The defendant submitted further that the house on the suit property was put up by their mother and as such he was not liable to pay any rent to the plaintiff for occupying the same. The defendant urged the court to grant the reliefs sought in his counter-claim and for the plaintiff's suit to be dismissed with costs.

Determination:

I have considered the parties' respective claims, the evidence adduced in support thereof and the submissions of counsel. The parties did not frame issues for determination by the court. From my analysis of the pleadings and the evidence on record, the following are the issues that arise for determination in this suit;

1. Whether the plaintiff holds the suit property, Ndeiya/Ndeiya/508 as a trustee for himself and on behalf of his brothers.
2. Whether the defendant is a trespasser on the suit property.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Whether the defendant is entitled to the reliefs sought in the Counter-claim.
5. Who is liable for the costs of the suit?

Whether the plaintiff holds the suit property in trust:

In the case of Mumo v Makau (Supra) that was cited by the defendant, it was held that:

“1. Trust is a question of fact and has to be proved by evidence. Section 28 of the Registered Land Act Contemplates the holding of land in trust.

2. There is nothing in the Registered Land Act which precludes the declaration of trust in respect of registered land, even if it is a first registration.”

In the case of Muiruri v Kimemia (Supra) it was held that:

“A party relying on the existence of trust must prove through evidence the existence of such trust.”

In the case of Gatimu Kinguru v Muya Gathangi[1976]eKLR it was held that:

“.....the absence of any reference to the trust in the instrument of acquisition of the land does not effect the enforceability of the trust as the provisions of Section 126(1) of the Registered Law Act as to reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely submissive.”

In the same case Madan J. referred to his earlier decision in Mwangi Mwangi Muguthu v Maina Muguthu, High Court Civil Case No. 377 of 1968 where he had stated as follows:

“As regards Section 126, there is no need to register the defendant as “trustee.” He was registered as owner as the eldest son of the family in accordance with Kikuyu Custom which has the notion of trust inherent in it. Ordinarily in pursuance of Kikuyu custom he would have transferred a half share in “Marango” (land) to the plaintiff. In any event this section does not make registration “as trustee” obligatory. It states may be described by that capacity.”

In the case of John Gitiba Buruna & Another v Jackson Rioba Buruna, Kisumu, Civil Appeal No. 89 of 2003, the court stated that:

“Although the rights of a registered owner of land are indefeasible under section 28 of the Registered Land Act, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

In the case of Njenga Chogera v Maina Wanjira Kimani & 2 Others [2005] eKLR, the court stated as follows on proof of trust:

“It was argued on behalf of the appellant that there was no sufficient evidence to prove customary law trust. On our re-evaluation of the evidence we are satisfied that there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did.”

In my view, the following facts were not disputed:

1. The plaintiff and the defendant are brothers.
2. Their parents were Elijah Muthandi Kimani and Rahab Wambui Muthandi (both deceased).
3. The family had 8 children (4 girls and 4 boys).
4. The plaintiff was the eldest son.
5. The plaintiff's and the defendant's ("the parties") father was jailed in 1952 for 7 years.
6. The parties' family was staying in Ndeiya Location, Kiambu.
7. When a state of emergency was declared in 1952, the family was moved with the other residents of Ndeiya to colonial villages.
8. The process of land consolidation and demarcation started in Ndeiya in 1956 or thereabouts.
9. During the land consolidation and demarcation, the residents were being allocated land measuring 12 acres each.
10. When the exercise was taking place, the parties' father was still in jail and as such could not be allocated land.
11. At the material time, the plaintiff was a young man of about 18 years and was still in school.
12. The plaintiff was allocated the suit property which measures 12 acres during this period.
13. After the end of the state of emergency, the parties' family moved from the colonial village and settled on the suit property in 1959.
14. The plaintiff was issued with a title for the suit property on 17th January, 1983
15. The parties' father died in 1985 while their mother died on 1997.
16. No dispute of any nature arose over the ownership of the suit property during the lifetime of the parties' parents.
17. The defendant moved with the family from the colonial village to the suit property in 1959 and was brought up on the suit property and only left the property for the duration he was working as electrician in Dandora, Nairobi.
18. The plaintiff has lived in Germany since 1962.

From my analysis and evaluation of the evidence on record as a whole, I am persuaded that the plaintiff was registered as the owner of the suit property to hold the property as a trustee on his own behalf and on behalf of the other members of the family of Elijah Muthandi Kimani who was in jail during the period of land consolidation and demarcation in Ndeiya. No convincing explanation was given by the plaintiff and his witnesses as to why the plaintiff who was a young man of about 18 years and was still in school would have been allocated land in exclusion of his mother and other siblings who were living in the colonial village with him. I did not find the reason that was given by Thuo Kamau (PW2) and Lucia Wanjiru Muthandi (PW5) convincing. The two claimed that the plaintiff was allocated the suit property because he was a friend of the surveyors who were carrying out the demarcation and was also assisting them. The plaintiff did not allude to any such relationship in his witness statement and oral evidence. In his evidence in chief, the plaintiff only claimed that he was working with the Survey of Kenya in 1950's. He did not at all relate the allocation of the suit property to him with that employment. No evidence of that employment was also produced in court. I find the evidence adduced by the defendant and his witnesses on the circumstances under which the plaintiff was registered as the owner of the suit property consistent with the notion of trust under the Kikuyu custom that was mentioned by DW4 in his evidence. In support of his contention that he was allocated the suit property as an individual, the plaintiff had referred to the payments which he claimed to have made for the property, the fact that he stopped the burial of one of his brothers, George Wanjohi on the property and that his parents recognised his title. As I have stated earlier, the plaintiff had over the years lived in Germany. There was no evidence that the payments shown in the receipts that were produced by the plaintiff in evidence were made by the plaintiff and not by his parents as claimed by the defendant. No documentary evidence was placed before the court showing that the plaintiff sent money to his parents to meet these expenses. I am in agreement with the defendant that since the plaintiff was the one registered as the owner of the suit property, receipts for all payments made could only be issued in his name. The said receipts could not therefore in themselves be conclusive evidence that the payments were made by the plaintiff. As concerns the burial of his brother George Wanjohi, no evidence was placed before the court apart from a mere allegation by the plaintiff showing that he was buried in Langata Cemetery because of the objection that was raised by the plaintiff. The plaintiff had also contended that the fact that his other brothers acquired land for themselves was clear proof that the suit property belonged to him. I am not persuaded by this argument. I do not think that the existence of family land that was held in trust could prevent members of the family from acquiring their own parcels of land.

In the final analysis, it is my finding and I so hold that the plaintiff was registered as the owner of the suit property to hold as a trustee on his own behalf and on behalf of other members of the family of Elijah Muthandi Kimani.

Whether the defendant is a trespasser on the suit property:

In Clerk & Lindsell on Torts, 18th Edition, page 923 paragraph 18-01, trespass is defined as any intrusion by a person, on the land in the possession of another without any justifiable cause. The onus was upon the plaintiff to prove that the suit property belonged to him and that the defendant entered therein without justifiable cause. As I have held above, the plaintiff holds the suit property in trust for among others the defendant. In the circumstances, the defendant had an interest in the suit property which entitled him to enter the same. The defendant's entry onto the suit property could not therefore be termed as unjustified so as to amount to trespass.

The plaintiff had also claimed that the house on the suit property belonged to him. Apart from his allegation that he gave his mother money to put up the house, the plaintiff placed no evidence of any remittance from him to his mother. DW5 who constructed the house did not even know the plaintiff and had no information that the house was financed by the plaintiff. In any event, the plaintiff claimed that he had put up the house for his parents. If that be the case, the house belonged to his parents and as such he had no exclusive right to lay a claim over the same after their demise. It is my finding therefore that the defendant had a right to enter the suit property and as such his entry and occupation thereof did not amount to trespass.

Whether the plaintiff is entitled to the reliefs sought in the plaint:

In view of the findings that I have reached above, the plaintiff is not entitled to any of the reliefs sought in the plaint. I wish to add that some of the heads of damages sought were special damages. The law on special damages is that the same must not only be pleaded but must also be strictly proved. The plaintiff placed no evidence before the court in support of the mesne profits that he claimed in the sum of Kshs.180,000/- and the sum of Kshs.750,000/- that he claimed for the trees that he alleged to have been cut by the defendant. No convincing evidence was placed before the court showing that the trees belonged to the plaintiff and that it was the defendant who cut down the same. The value of Kshs.750,000/= was also not proved. PW6 Joseph Maina Njoroge, a forest officer put the value of the trees that were cut on the suit property at Kshs.21,600/=. He told the court that he did not find out who had cut the trees as that was not his duty.

Whether the defendant is entitled to the reliefs sought in the counter-claim:

The defendant had sought a declaration that the suit property belongs to all the sons of Elijah Muthandi Kimani including him and the plaintiff and a permanent injunction restraining the plaintiff from interfering with his occupation and that of his other brothers of the suit property. In the alternative, the defendant sought a declaration that he had acquired a portion of the suit property measuring 3 acres by adverse possession and that he should be registered as the owner thereof. From my earlier findings, I am satisfied that the defendant is entitled to a declaration that the plaintiff holds the suit property in trust for himself and on behalf of the other family members of Elijah Muthandi Kimani. The defendant is also entitled to an injunction to restrain the plaintiff from interfering with his occupation of the suit property.

Who is liable for the costs of the suit?

This being a family dispute, each party should bear its own costs of the suit.

Conclusion:

In conclusion, I thereby make the following orders:

1. The plaintiff's suit is dismissed.
2. It is declared that the plaintiff holds the suit property namely, Ndeiya/Ndeiya/508 in trust for himself, the defendant and their other siblings.
3. Injunction is issued restraining the plaintiff by himself or through his agents from evicting the defendant from the suit property until such time that the trust shall have been satisfied by the plaintiff through the sub-division and sharing of the suit property amongst his siblings, the defendant included.
4. The order given in (3) above shall not entitle the defendant to exclusive occupation and use of the suit property or any portion thereof.
5. The defendant's counter-claim is allowed in terms of orders (2), (3) and (4) above.
6. Each party shall bear its costs of the suit.

Delivered and Dated at Nairobi this 12th day of April, 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Gaturu for the Plaintiffs

Mr. Kihara Ndiba for the Defendants

C. Nyokabi-Court Assistant