



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 105 OF 2015**

**BETTY L. KAJUJU AND GEOFFREY KIREMU MUTWIRI THROUGH THE DONEE OF THE POWER OF ATTORNEY  
GENERAL**

**JANET KAREGI MWORIA .....PLAINTIFF**

**VERSUS**

**RICHARD MUNENE MWORIA.....DEFENDANTS**

**JUDGMENT**

**Introduction**

1. The plaintiffs' are a wife and husband respectively and they are jointly registered as the owners of land no. Ntima/Igoki/451 measuring 0.20 ha. Defendant is a brother of 1<sup>st</sup> plaintiff (Betty Kajuju). The two plaintiffs acquired this land from the father of Betty Kajuju and Richard Munene (1<sup>st</sup> plaintiff and defendant). The two plaintiffs do not reside in Kenya, they stay in America. They however gave Janet Karegi Mworua (mother of 1<sup>st</sup> plaintiff and defendant) a power of Attorney in order to prosecute this suit. Defendant occupies a portion of the suit land.

**Plaintiff's case**

2. Plaintiffs' case is contained in their pleadings, the statements of Janet Karegi Mworua (PW 1) dated 19.11.2015 and that of 13.6.2016 as well as the testimony of PW 1(Janet).
3. Plaintiff's case is that the suit land Ntima/Igoki/451 was acquired by PW 1 and her husband in 1960 whereby they proceeded to build a house. Her husband died in 2007. By then he had already not only given this land to the plaintiffs but he had facilitated the transfer thereof.
4. Pw 1 further stated that since plaintiffs were residing in America, they allowed defendant to occupy the land. However, when the plaintiffs' wanted to develop the land, they requested defendant to vacate this land but he declined hence the filing of the suit.
5. PW 1 is emphatic that her husband never gave defendant the 0.05 ha of the suit land that defendant is claiming. She also told the court that defendant has land and a house at Kaaga where the family ancestral home is situated and that this is where PW 1 herself stays.
6. In support of the plaintiff's claim, PW 1 produced the following documents as exhibits:

- (i) A copy of title deed for land No. Ntima/Igoki/451 in the name of the two plaintiffs.
- (ii) Demand letter
- (iii) The power of attorney given to PW 1 by the plaintiffs

1. Plaintiffs' prayers are;

(a) An order of eviction of the defendant, his agents servant or anyone claiming under the defendant from the plaintiffs property known as L.R NTIMA/IGOKI/451.

(b) An order directed at the O.C.S Meru Police Station to provide security during the eviction and a permanent injunction to restrain the defendant, his agents or servants from re-entering or in any way interfering with the plaintiffs' property known as L.R Ntima/Igoki/451.

(c) Costs and interests.

### **Defence case**

2. Defendant's case is contained in his pleadings, his statement and the statements of his witnesses dated 19.1.2018, as well as their oral testimony given in court.

3. Defendant avers that the suit land initially belonged to his father but that at the some point, him and his sister Betty (1<sup>st</sup> plaintiff) were given this land. He was shown his portion which measures 50 x 100 feet (0.05 Ha). He admits that there was a house on that land when he started occupying the same. Defendant avers that the portion of the suit land is where his house is situated and that this is where he raised his children.

4. Defendants counter claim is that plaintiffs hold a portion of the suit land to the tune of 0.05 Ha in trust for him (defendant).

5. Defendant's witnesses, claim that plaintiff has always occupied the suit land.

6. Defendant's prayers are as follows:

(a) A declaration that the defendants in the counterclaim holds 0.05 Ha from L.R No. Ntima/Igoki/451 in trust for the plaintiff.

(b) An order for the plaintiff in the counterclaim to excise and transfer to the plaintiff 0.05 Ha from L.R No. Ntima/Igoki/451 and in default the deputy registrar be empowered to execute all transfer instruments in favour of the plaintiff in the counterclaim.

(c) Costs and interest.

### **Determination**

7. Plaintiffs want defendant to be evicted from the land while defendant wants the court to declare that he is entitled to the portion of the land on basis of trust. That being the case, I will deal with both claims simultaneously.

8. I have considered all the issues raised herein including the submissions of the parties. The main issue for determination is whether defendant's claim to the suit land falls under S. 28 of the Land Registration Act. That section stipulates that:

**“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— trusts including customary trusts”.**

9. This court has to consider whether defendants claim on basis of trust has been proved or not.

10. Defendant claims that all along he knew the land was given to him and his sister and that he only came to learn that the land had been transferred to his sister and brother in law in 2014.

11. I find that the title document, (PEX 1) indicates that the suit land was transferred to the plaintiffs on 27.10.1994 with the title being issued on 31.10.1994. The father of defendant passed on in 2007 (13 years later).

12. It is not fathomable as to how deceased could have transferred the land during his life time to the plaintiffs and then proceed to give this land to defendant. The intentions of the deceased were clearly expressed and manifested in the transfer of this land to plaintiffs during his life time. If deceased could take such deliberate steps to ensure that he gave his daughter and son in law the suit land, why then did he not subdivide the land and give defendant the portion he is claiming if indeed deceased had also desired to give this land to defendant?.

13. It has emerged during the evidence that deceased had a lot of property and had provided for his children. According to PW 1 she stated that **“My husband divided his property amongst his children. Munene was given a home at Kaaga and land at Timau”.**

14. During cross examination DW 1 had stated that **“My father died leaving a will. The suit land in the present case is not subject of the will. This is because he (father) had transferred the land”.**

15. This clearly is prove that the father of defendant had not the slightest intention of giving this land to defendant. In the contrary, it confirms that defendant's father had foreseen trouble in his son and had taken deliberate steps to ensure that this land was out of reach of defendant. Defendant is therefore actually going against the wishes of his father by claiming this land.

16. Defence has relied on the case of **Mbui Mukangu versus Gerald Mutwiri Mbui (2004) eKLR** to assert the claim on trust. However, this case can be distinguished from the present suit in that in the Mbui Mukangu case, the son was claiming the land from his father on the basis that the suit land was ancestral land. In the present suit, PW 1 has averred that the ancestral land for the family is at Kaaga where defendant has a home.

17. DW 1 appears not to have disputed that averment. If anything, he has stated that

***“The land Ntima/Igoki/451 (suit land) was acquired by our parents via purchase when I was in school. The land is not clan land. It was purchased by my parents”.***

18. Further in Mbui Mukangu case, the son had apparently put up developments on the land with the consent of the father and he was also in occupation and possession with the consent and knowledge of his father since birth.

19. In the present case DW 1 told the court that: **“I do not know how my parents put up the building but there was a permanent building. The building was even rented out by my parents at some point”.**

20. Defendant has further stated that **“I had started leasing the land to churches in the year 2000 and i have an agreement to that effect. Another church leased in 2005 – 2007 and recently another one has leased”.** He further told the court that **“I am the one who allowed neighbors to put materials there”.**

21. The foregoing is a clear indication that defendant is not utilizing the suit land as his home. He found the developments there and he is primarily using the land as rental premises.

22. Further, he has stated that his children, the ones who are married stay at Nakuru but the ones in school stay at the Kaaga home when they close school. On this point, defendant has testified as follows:

***“There is also another home where my parents home is and it is in Kaaga area and it is far from the suit land. That is where my children go to stay when on holiday. The mother of my children also stays there....”.***

23. The foregoing own testimony of defendant is a clear confirmation that defendant does not use the suit land as his home. But even if he was using this land as his home, there is no evidence to show that a resulting trust can be implied with regard to such occupation. This is because the circumstances under which defendant came to be on the suit land are clear. Defendant was only allowed to occupy and take up the suit land because his sister and her husband do not reside in Kenya. It is quite apparent that defendant is taking advantage of this position to deprive the owners of the land the uses of their property that is why he is taking liberty to utilize the land as he wishes by even leasing it out.

24. I am therefore in agreement with plaintiffs submissions that defendant has not proved a claim on trust in respect of the suit land.

### **Conclusion.**

25. Plaintiffs claim succeeds while that of defendant fails. I proceed to give final orders as follows:

(a) An order is hereby issued for the eviction of the defendant, his agents servants or anyone claiming under the defendant from the plaintiffs' property known as L.R NTIMA/IGOKI/451.

(b) An order is hereby issued directing the O.C.S Meru Police Station to provide security during the eviction.

(c) A permanent injunction is hereby issued restraining the defendants, his agents or servants from re-entering or in any way interfering with the plaintiff's property known as L.R Ntima/Igoki/451.

(2) The counter claim by defendant is hereby dismissed.

(3) Defendant is condemned to pay costs of the suit.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 23<sup>RD</sup> DAY OF MAY, 2018 IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

Gikunda for plaintiff absent

Mwirigi for defendant present

All parties absent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**