



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 174 OF 2013**

**KAGAI MWANGI..... PLAINTIFF**

**VERSUS**

**EPHANTUS NGARI MWANGI..... DEFENDANT**

**JUDGMENT**

[1] The plaintiff in this case filed suit against the defendant and prayed for an order of eviction of the defendant from land parcel KABARE/MUTIGE/160 together with his agents, servants and family members. He stated in his plaint that out of love and affection to the defendant who is his brother, he allowed him in the year 2002 to cultivate a small portion of his land by planting substance crops (maize) to enable him to feed his family because where the defendant lives is arid and dry. That in breach of the said trust, the defendant has lost respect of the plaintiff and started making false claims against the plaintiff's land.

[2] The defendant filed his defence and denied the allegations of the plaintiff. He averred that since the land demarcation in 1958, he has always been resident on the suit land

where he has built his residential house and planted coffee, trees, other cash crops and substance food crops for the family. He stated that during land consolidation demarcation and registration, his father MWANGI MBOGO caused the land parcel KABARE/MUTIGE/160 which was Clan land to be registered in the names of the plaintiff to hold in trust for himself and the defendant in equal shares. He contended that he occupied the suit land as of right and that he shall counter-claim for the dissolution of the trust.

[3] He filed a counter-claim for the dissolution of the trust and the transfer of ½ share of land parcel KABARE/MUTIGE/160 to himself. He averred that there has been other suits between the parties herein and that the trust had not been determined. He prayed for the determination of the trust and half share of the suit land plus costs of the suit.

[4] During the hearing of this case, the plaintiff told the Court that the land was registered in his name in 1958. He stated that it was the clan who gave him the land. He denied that he was registered as a trustee. He alleged that by then, he was a grown-up and married. He stated that the defendant was also a grown-up but was not married. He alleged that his brother was given land in Ngariama but he stated that he did not know that land's number. He also alleged that his brother was given a piece of land in Kutus which he sold for Ksh. 300,000/= and that he never gave him anything. The plaintiff said that the defendant lives in his land at Mwea. The plaintiff however admitted that the defendant's son lives on the suit land and that he has a timber house. He also admitted that he allowed the defendant to live on the land in 1958. That he was supposed to live there for a short period of time and that he was occupying a quarter of an acre. The plaintiff explained to Court that they have had cases in the Land Disputes Tribunal, Provincial Appeals Tribunal, where the defendant's claim of land was dismissed, Provincial Land Appeals Tribunal where the Tribunal decided the defendant be given one acre of land and Senior Resident Magistrate Court Case No. 245 of 202 at Kerugoya and at the High Court Embu where the Tribunal's order was quashed. He prayed that he be granted his orders of eviction and categorically denied that he was a trustee. On cross-examination the plaintiff admitted that he was born in 1948 and that the land was registered in 1958 when he was 10 years old. He equally admitted that the defendant has coffee trees on the land about 100 of them. He admitted having uprooted others. Further, that the defendant's children have houses on the land.

[5] The defendant also gave evidence and relied on his statement filed in Court dated 27<sup>th</sup> July 2011. In that statement, he said that when the land was registered in 1958, he was in class 4 and the plaintiff was in class 5 Mutige Primary School and that his father was given a piece of land KABARE/MUTIGE/160 measuring 3 acres which he caused to be registered in the names of the plaintiff as a trustee for himself and the defendant in equal shares. He explained that he has always resided on that land since then and he has a semi-permanent wooden house, a kitchen and chicken coop and that his children have built a residential house thereon, and that he has 220 coffee trees, 3 miringa trees, 9 avocado trees and several other trees demonstrated in the statement. He also stated in his statement that they had a case in Land Disputes Tribunal where he had been awarded one acre out of the suit land by that Tribunal.

[6] I have considered the submissions filed by the learned counsels for the parties and I have also considered the authorities filed with the submissions herein. I have also considered the evidence of the parties to this suit and have come to the following conclusions:

The plaintiff having admitted on cross-examination that he was born in 1948, that meant that he was 10 years old by 1958. This is in the

defendant's evidence that when this land was registered, he was in standard five and the plaintiff's sibling was in standard four Mutige Primary School. Both of them were minors. That their father was alive and he was not given any land himself but Clan land was registered in his elder son. Further, that all of them have built on the suit land since this land's registration in 1958 to date. The parties' parents lived and died on the suit land. They were all buried on the suit land. Though this land was registered in the names of the plaintiff, it always remained a family land inherited from their clan. In *MUMO VS MAKAU (2004) I K.L.R 13*, it was held that:

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

Even if there is no indication on the title document to show that this land was held in trust, it is quite clear from the evidence that it was so held.

[7] I therefore make an order as follows:

- (a) The suit land was held in trust by the plaintiff on behalf of himself and his brother the defendant in equal shares.**
- (b) I hereby determine that trust and the land KABARE/MUTIGE/160 will now be sub-divided into two equal shares one for the plaintiff and the other for the defendant.**
- (c) I dismiss the plaintiff's case for eviction and allow the defendant's counter-claim as prayed in the statement of defence.**
- (d) Since the parties are brothers, there will be no order as to costs.**

It is so ordered.

**S.N. MUKUNYA**

**JUDGE**

**6<sup>TH</sup> JULY, 2018**

6/7/2018

Before

S.N. Mukunya – Judge

Okatch – C/A

Plaintiff

Defendant

Mr. Muchira for the Defendant

Mr. Macharia Muraguri for the Plaintiff not present but Plaintiff is present.

Judgment read in open Court at Kerugoya before Mr. Muchira and the Plaintiff.

**S.N. MUKUNYA**

**JUDGE**

**6<sup>TH</sup> JULY, 2018**