



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 95 OF 2005

RIUNGU M' IKILIMA.....PLAINTIFF

VERSUS

STEPHEN KIRIINYA.....1ST DEFENDANT

JOHN GIKUNDA.....2ND DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff filed this suit against the defendant seeking an order for a declaration that L.R No. ABOTHUGUCHI/IGANE/727 is trust land and that he has acquired rights and interest over the suit property owing to his considerable long time and development thereon and that the land should be sub-divided into two equal portions between him and the 1st defendant. The plaintiff also wants the 1st defendant to transfer half of the suit property in his favour failing which the Executive officer of the Court be directed to sign all transfer forms/documents to effect the said transfer. The plaintiff also wants an order directing the District Land Registrar Meru Central to cancel the registration of the 1st defendant in the suit land and thereafter register half share in his name. By way of a rejoinder, the 1st and 2nd defendants filed a joint statement of defence and counter-claim in which they deny that the 1st defendant is registered as proprietor of the suit property in trust for the plaintiff or at all. The defendants also deny that the plaintiff has occupied, cultivated, developed and/or utilized half share of the 1st defendant's land un-interrupted since 1958. The defendants also averred that the plaintiff has filed other suits relating to the same cause of action in HCCC No. 126 of 2003 (OS) and CMCC No. 377 of 2005 (Meru). The defendants further averred that the plaintiff entered into the 1st defendant's suit property upon request awaiting the sub-division of land parcel No. ABOTHUGUCHI/GAITA/157. The defendants contend that despite the sub-division of the said land parcel No. ABOTHUGUCHI/GAITA/157, the plaintiff has refused to vacate the 1st defendant's land despite the 1st defendant's notice to do so.

PLAINTIFF'S CASE

The plaintiff gave sworn testimony and stated that the 1st defendant is his elder brother while the 2nd defendant is the son to the 1st defendant. He said that the suit property registration No. ABOTHUGUCHI/IGANE/727 is registered in the name of the 1st defendant. It was registered in the year 1967 during gathering stage. The plaintiff stated that they agreed with the 1st defendant that they will sub-divide the land later. He stated that he was on that land together with his family. He said that John Gikundo who is the 2nd defendant and also the 1st defendant's son came to the suit land and he sub-divided the land to him. The plaintiff stated that his late father had another land parcel No. 757 which was sub-divided between him, Stephen Kiriinya Riungu M'Kirima and Kinoti M'Kirima. He stated that he was born in 1940 and that his brother Stephen Kiriinya is older than him. The plaintiff stated that the suit land is an ancestral land which belonged to their late father who died in 1951. The plaintiff also stated that he lives on 3 acres of that land while the 1st defendant lives on the remaining 3 acres. He has built four semi-permanent rooms. He has also planted coffee trees and got registered as a member of Nkando Society. He has also connected power and made application for connection of water which is in the process.

PW1 was Mukwanduru Kathitu M'Ikirima who is the plaintiff and the 1st defendant's mother. She stated that the suit land is situated in Keerigua area. She stated that the land is an ancestral land. The land is occupied by Riungu (plaintiff) and Kiriinya. She stated that the land does not have a title as the same has not been sub-divided. She stated that the land should be divided equally between M'Magiri and John Gikunda. On cross-examination, the witness stated she was not aware the land is registered in the name of Kiriinya.

PW2 was Collata Karimi. She is the plaintiff and the 1st defendant's sister. She stated that she has seven siblings. Four (4) sisters and three (3) brothers. The brothers are Stephen Kiriinya Agostino Kinoti and M'Magiri Riungu. She is the eldest in the family. She stated that M'Magiri Riungu lives in Keerigua area. She does not remember the land parcel he occupied but the same is measuring 6 acres. He lives in 3 acres while Kiriinya's son John Gikunda lives on the remaining 3 acres. She said that the plaintiff has bananas, coffee and timber in the suit land. She said that the land is ancestral and that he was told to share with Riungu. She said that their father told him to share. She said

that each of them has his own portion of the land as sub-divided by the clan.

SUBMISSIONS BY PLAINTIFF

The plaintiff through the firm of Kiogora Ariithi & Associates submitted that the suit land was registered in the names of the 1st defendant to hold in trust for himself and the plaintiff and that a trust arose from the plaintiff's occupation and possession of his father's said land and that the same is protected by Section 28 of the Land Registration Act No. 3 of 2012. He relied on the following authorities:

- (1) Mbui Mukangu Vs Gerald Mutwiri Mbui C.A No. 281 of 2000 (Nyeri) unreported.*
- (2) M'Imanyara M'Murithi Vs Nkanata Murithi & Another C.A No. 151 of 2007*
- (3) M'Ikiungu M'Mwirichia & Another Vs Esther Nthiira M'Ikiugu & 2 others C.A. No. 95 of 2009*
- (4) Wilson Kenyenga Vs Joel Obwori C.A. No. 96 of 1998*
- (5) Mwangi & Another Vs Mwangi C.A. No. 2306 of 1980*
- (6) Mumo Vs Makau C.A (2002) 1 E.A 170*
- (7) Limuli Vs Marko Sabayi (1979) K.L.R 251*
- (8) Francis Munene & Another Vs Mulka Wanoe Vs Paul Muthaita & Another C.A. 12 of 1982*
- (9) Maria Nduru M'Turuchiu H.C.A No. 21 of 2011*

SUBMISSIONS BY THE DEFENDANT

The firm of F.K. Gitonga & Co. Advocates for the defendants did not file any submissions despite consent to do so within stipulated time lines.

ANALYSIS AND DECISION

The subject of the dispute between the plaintiff and the defendants is a parcel of land registered as ABOTHUGUCHI/IGANE/727 registered in the name of Stephen Kiriinya (1st defendant). The plaintiff is seeking to be given half of that land on grounds that the 1st defendant was registered to hold in trust for him. The plaintiff also alleges that the land is an ancestral land which was gathered by the 1st defendant to hold in trust for himself and the plaintiff as the 1st defendant is his elder brother. Those averments are denied by the defendants in their statement of defence and counter-claim dated 29th October 2005. On the contrary, the 1st defendant averred that the plaintiff entered into a portion of his land upon an undertaking that he shall locate upon sub-division of land parcel No, ABOTHUGUCHI/GAITU/157. The 1st defendant further contends that after the sub-division and issuance of title deed were complete, the plaintiff has refused/neglected and/or ignored to vacate his land. He then sought an order to have him evicted from the suit land.

I have heard the testimony of the plaintiff and the defendants together with their witnesses. I have also considered their evidence and the submissions and the applicable law. It is trite law that he who alleges must prove. The plaintiff's claim is based on breach of trust. He gave six particulars of breach of trust as follows:

- (a) Failing to recognize the plaintiff's rights of occupation and development of half portion of the suit land in spite of the same being of considerable long time.**
- (b) Failing to transfer the plaintiff's share to them.**
- (c) Seeking to transfer the land to the 2nd defendant's secretary.**
- (d) Dealing with the whole land without the consent of the plaintiff and clan elders.**
- (e) Failing to respect the Customary Law norms pertaining to ownership of the said family and trust land.**
- (f) Inciting the 2nd defendant to invade the portion occupied by the plaintiff.**

The plaintiff has not produced any records from the adjudication office showing that the 1st defendant had gathered the suit property as an ancestral land. The plaintiff did not also call any clan elders to show that the suit property is a family land. The plaintiff called his mother and sister as witnesses. His mother could not say how the suit property was acquired by the plaintiff. She was not even aware that the suit property was registered in favour of the plaintiff. Her testimony that the suit property is a family land was not supported by any documents. The sister (PW2) was not also of much assistance. She stated that the suit property is an ancestral land without elaborating. She stated that their father told the 1st defendant (Kiriinya) to share it with the plaintiff. However, she did not say when the conversation took place. She

also alleged that each of them has his portion as sub-divided by the clan. There is no clan member called to confirm the alleged sub-division and minutes of such a meeting produced if any.

The 1st defendant was candid in his evidence. He stated that he was given the suit land as an inheritance by his late father. He said that his two brothers were also given land by their father and that non except the plaintiff is laying claim to his inheritance. The 1st defendant stated that his brother Augustino Kinoti M'lkirima was given land in Kirirwa and another in Gaitu. The plaintiff was also given land in Gaitu measuring 6½ acres but he sold 3 acres. He explained that the plaintiff had requested to live with him because his children were attending school nearby. He agreed on conditions that he leaves once the children finish school.

I find the evidence by the 1st defendant truthful. I find that the plaintiff has not proved his case against the defendants to the required standard. Consequently, I dismiss the plaintiff's suit for lack of sufficient evidence. In the alternative, I find the 1st defendant has proved his counter-claim against the plaintiff to the required standard.

In the upshot, I enter judgment for the 1st defendant against the plaintiff as follows:

- (1) The plaintiff be and is hereby evicted from the plaintiff's land parcel No. ABOTHUGUCHI/IGANE/727.*
- (2) The OCS Meru Police Station to supervise the said eviction.*
- (3) In view of the family ties, each party to bear his own costs.*

DATED AND SIGNED THIS 18TH DAY OF OCTOBER, 2018.

E. C. CHERONO

ELC JUDGE - KERUGOYA

DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF OCTOBER, 2018

LUCY N. MBUGUA

ELC JUDGE - MERU

In the presence of:

Maamu H/B for Kiogora Arithi for plaintiff

Miss Rimita H/B for Miss Mutinda for defendant

Both defendants present