



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.88 OF 2017

MUTUNGI NJUGUNA.....PLAINTIFF

VERSUS

ELIUD GACHEMA NJUGUNA.....DEFENDANT

JUDGMENT

By a *Plaint* dated 24<sup>th</sup> August 2007, the Plaintiff herein *Mutungu Njuguna* sought for Judgment against the Defendant for:-

- i. *Damages for trespass.*
- ii. *An order for the eviction of the Defendant from the suit premises.*
- iii. *Costs of the suit.*

In his *Plaint*, he alleged that the Plaintiff and the Defendant are brothers who have been residing at the suit premises known as *Loc.5/Kabati/641*. Further that their late mother *Njeri Njuguna* in her lifetime distributed her Estate on/or before 1989 and bequeathed it as gift to her offsprings. In the said distribution, *Njeri Njuguna* bequeathed and registered parcel *No.Loc.5/Gitunguri/44*, to the Defendant and *Loc.5/Kabati/641*, to the Plaintiff.

Plaintiff further averred that the family continued to reside on the suit premises, but after the death of their mother in 1992, the Plaintiff requested the Defendant to vacate the suit premises and occupy his land

*Loc.5/Githunguri/44*, but he declined to do so. Further, that in the year 1994, the Defendant filed a suit against the Plaintiff claiming ½ share of *Loc.5/Kabati/641*, from the Plaintiff but the said suit was dismissed on 18<sup>th</sup> May 2005. However, the Defendant continues to trespass and remain in occupation of a portion of the Plaintiff's suit property without any colour of right. Therefore the Plaintiff has been deprived of the use and enjoyment of the said suit property and has thereby suffered loss and damages.

Further that even with *Demand* and *Notice of Intention to Sue* having been given, the Defendant has failed and/or neglected to vacate the said suit property thus necessitating this suit.

The Defendant filed his Defence and *Counter-claim* on 11<sup>th</sup> September 2007, and denied all the allegations levelled against him by the Plaintiff. He averred that he has all along been residing and utilizing half of the land parcel *No.Loc.5/Kabati/641*, which measures 2.2 acres. Further that the Defendant utilizes 1.1 acres out of this parcel of land from 1965 (immediately after demarcation) and that this suit property was initially registered in the name of their father *Njuguna Mutungi*. It was his contention that after the demise of *Njuguna Mutungi*, the said suit property was registered in the name of their mother *Njeri Njuguna* after a Succession Cause. Thereafter in 1989, *Njeri Njuguna* transferred the whole land to the Plaintiff with understanding that the Plaintiff would hold half share of this parcel of land in trust for the Defendant. It was further contended that the Defendant continues to live in his half share of land and has fully developed the same including erecting two permanent residential houses. Further that both the Plaintiff and Defendant have each cultivated mature coffee bushes on their respective and distinct portions.

It was his contention that *Loc.5/Githunguri/44*, has never belonged to *Njuguna Mutungi* or *Njeri Njuguna* as it was first registered after demarcation in the name of the Defendant and it measures 1.0 acres and the said land has never been a family land. It was the Defendant's claim that the Plaintiff changed this mind after the death of their mother and alleged that the suit land *Loc.5/Kabati/641* solely belonged to him. However, the Plaintiff claims that he has a beneficial interest over ½ share of the land parcel *Loc.5/Kabati/641* and has utilized it since 1965 and has settled thereon with his family as of right and not a trespasser. Therefore the Defendant denied occasioning the Plaintiff any loss and/or damage.

In his *Counter-claim* the Defendant averred that the Plaintiff holds 1.1 acre out of *Loc.5/Kabati/641*, specifically where the Defendant has

developed and settled in trust and for the beneficial ownership of the Defendant. Therefore, the Defendant asked the Court to dissolve the said trust and direct the Plaintiff to transfer **1.1 acre** of land out of **LR.No.Loc.5/Kabati/641**, to him. Further the Defendant urged the Court to enter Judgment against the Plaintiff for orders that:

a) **The Plaintiff do transfer 1.1 acres out of land parcel No.Loc.5/Kabati/641 to the Defendant.**

b) **Costs of the Counter-claim.**

The matter commenced hearing on **23<sup>rd</sup> October 2017**, wherein the Plaintiff **Mutungu Njuguna** gave evidence for himself and called no witness. He reiterated the contents of his **Plaint** and testified that the suit property **Loc.5/Kabati/641**, was given to him by their mother **Njeri Njuguna** and therefore the title is registered in his name. However the Defendant who is his brother, has trespassed on his land and has declined to give him vacant possession. He further testified that after the demise of their mother, the Defendant sued the Plaintiff demanding for  $\frac{1}{2}$  **share** of the suit land. However, the said suit was dismissed. It was his contention that the Defendant was aware of the transfer of the suit land by their mother in **1981** but he did not object. Further that the Defendant was given his parcel of land **Loc.5/Githunguri/44**. Therefore the Plaintiff denied that he is holding the land in trust for his brother, the Defendant herein, since their mother gave the Plaintiff the suit land with the knowledge of the Defendant.

He contended that the Defendant has encroached on the suit land and he did put up structures thereon during the pendency of this suit. He urged the Court to allow his claim and order that the Defendant vacate the suit property or be evicted. He produced a copy of the title deed in his name as exhibit in court and a copy of the green card together with photographs of the Defendant's houses on the suit property. He urged the

Court to allow his claim.

The Plaintiff admitted in cross-examination that the suit land initially belonged to their father and it is about **2.2 acres**. However, their mother was registered as a proprietor after the death of their father. He also admitted that both the Plaintiff and Defendant have built their respective homes on the suit property and have planted coffee on their respective portions of land and that they have shared the parcel of land equally. Further that they occupied their respective portions of land during the lifetime of their father.

It was his further evidence that the Defendant has put up a permanent house on his portion of land and the said permanent house was built during the lifetime of their mother. It was his further testimony that the Defendant's children have also built houses on the suit property. The Plaintiff further testified that their mother did not transfer the suit land to him fraudulently. It was his testimony that the Defendant had sued him in **Civil Case No.756 of 1994**, which was filed in **Thika** and he wanted  $\frac{1}{2}$  **share** of the suit land. However, the said suit was dismissed because the Magistrate did not have jurisdiction to deal with the matter.

On his defence, the Defendant **Eliud Gachema Njuguna** did not testify but two witnesses testified on his behalf.

**DW1-Joel Karanja Njuguna** stated that the Plaintiff and Defendant are his step-brothers and their father was known as **Njuguna Mutungi**. It was his testimony that the suit land initially belonged to their father and after his death, it was divided into two to accommodate the two houses. The **house of Muthoni** was given land parcel **No.640** measuring **2.2 acres** and the **house of Njeri** who was the mother to the Plaintiff and Defendant was given parcel **No.641**, the suit property measuring **2.2 acres**. Initially parcel **No.641** was registered in the name of **Njeri Njuguna** the mother to the parties herein. Further that each of the party herein cultivates his portion of land on the suit property and they have each built permanent houses thereon. It was his testimony that the suit land **Loc.5/Kabati/641** is an **ancestral land** and he did not understand why **Njeri Njuguna** caused the land to be registered in the name of the Plaintiff herein. That even after various arbitrations, the elders ordered that the parties should subdivide the land equally between the Plaintiff and the Defendant. He confirmed that the Defendant built his permanent buildings even before the death of their mother.

**DW2 – Gidraf Wanyoike**, the son to the Defendant testified that he lives on the suit property **Loc.5/Kabati/641**, with his father the Defendant. He also stated that the suit land is **2.2 acres** and his father has built on one side of the land which is **1.1 acres**. That the Defendant has built permanent houses which were built during the lifetime of their grandmother, **Esther Njeri Njuguna**. Further that he has lived on the suit property since he was young. He also testified that the land parcel in **Githunguri** being **Loc.5/Githunguri/44**, was registered in the name of their father in **1962**. It was his testimony that the Plaintiff and the Defendant have each built on their respective portions of land but the title is in the name of the Plaintiff herein. He also testified that the Defendant (his father) inherited the land from his father (DW2's grandfather)

The parties herein thereafter filed their respective written submissions which this Court has carefully read and considered. The Court has further considered the pleadings in general and the annexures thereto. Further, the Court has considered the available evidence, the relevant provisions of law and the cited authorities and makes the following rendition:-

There is no doubt that the Plaintiff and the Defendant herein are biological brothers. Their father was one **Njuguna Mutungi** and their mother was **Njeri Njuguna**, both deceased. There is also no doubt that the suit property is a subdivision of **Loc.5/Kabati/423**, which was initially owned by the father to the parties herein, **Njuguna Mutungi**. However after the demise of **Njuguna Mutungi**, the land parcel **No.Loc.5/Kabati/423**, was subdivided into two portions and shared between the two houses of the two wives of the said **Njuguna Mutungi**.

The **house of Muthoni** who was the mother of DW1 was given **Loc.5/Kabati/640**, which is **2.2 acres** and it is inherited wholly by DW1. The suit property **Loc.5/Kabati/641** was registered in the name of **Njeri Njuguna** on **18<sup>th</sup> March 1981**, and a **Certificate of title** was issued to her on **13<sup>th</sup> July 1981**. Therefore from the above history, the suit property **Loc.5/Kabati/641** is an ancestral land.

However, on **9<sup>th</sup> October 1981**, the suit land was transferred to the Plaintiff, **Mutungu Njuguna** allegedly for a consideration of

**Kshs.20,000/=**, a land **Certificate** was issued to him on **9<sup>th</sup> October 1981** and a **title deed** was later issued on **22<sup>nd</sup> May 2008**.

From the available evidence, it is evident that the Plaintiff and the Defendant have lived on the suit property all their lifetime, that is during the lifetime of their father and their mother. It is also evident that each of the party herein uses and lives on their respective portion of land. The above arrangement existed even during the lifetime of their mother **Njeri Njuguna**. There is evidence that each of the parties herein, that is the Plaintiff and the Defendant uses **1.1 acres** from the suit land which suit land is **2.2 acres**. So the parties herein share the said land equally in utilization. Further, even after the land was registered in the name of **Njeri Njuguna**, in **1981**, the parties continued utilizing their respective portions of land.

There is also no doubt that even after the said **Njeri Njuguna** transferred the suit property to **Mutungu Njuguna** the Plaintiff herein, the Defendant continued to utilize his portion of land. However, things changed when their mother died in **1992** and the Plaintiff requested the Defendant herein to give him vacant possession since the Plaintiff was the registered proprietor. Due to the above demand, the Defendant filed a **Civil Suit No.756 of 1994** seeking for **½ portion** of the suit land. However, the **Magistrate's Court** dismissed the said suit on the ground that the court had no jurisdiction to deal with the said suit as the claim was over land.

Thereafter the Plaintiff filed this suit which is contested by the Defendant and who has also filed a **Counter-claim**.

The issues now for determination are:-

**i. Whether the Plaintiff is entitled to the full parcel of land.**

**ii. Whether there exists a trust between the Plaintiff and the Defendant and if so, whether the Defendant is entitled to his Counter-claim.**

**iii. Who is entitled to costs of the suit and Counter-claim?**

**i) Whether the Plaintiff is entitled to the full parcel of land?**

There is no doubt that the suit property is now registered in the name of the Plaintiff herein. The said registration was done in **1981**. The Plaintiff alleges that the said registration was done with the knowledge of the Defendant herein. However, the Defendant has denied that and stated that he only knew that their mother **Njeri Njuguna** had fraudulently transferred the ancestral land in favour of the Plaintiff after her death and when the Plaintiff demanded vacant possession from him.

On the face of it, the Plaintiff is the registered proprietor of the suit property and as provided by **Section 26(1)** of the **Land Registration Act**, he is deemed to be the **absolute** and **indefeasible** proprietor. However, the said proprietorship can be challenged if the said registration was acquired fraudulently or through misrepresentation. See the exceptions in **Section 26(1)(a) & (b)**, of the **Land Registration Act**, which provides:-

**“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-**

**(a) On the ground of fraud or misrepresentation to which the person is proved to be a party: or**

**(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

Further the said registration is subject to overriding interests as provided by **Section 28** of the **Land Registration Act**. The suit property was registered in favour of the Plaintiff in **1981** under the **Registered Land Act Cap 300 (now repealed)** and was subject to the overriding interest set out in **Section 30** of the said **Registered Land Act (now repealed)**. **Section 30 (G)** dealt with customary trusts, which would therefore affect the right of a registered proprietor. **Section 30(g)** of **Registered Land Act Cap 300 (now repealed)** states as follows:-

**“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –**

**(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.**

It is evident that the suit property was initially owned by the father of the Plaintiff and Defendant. After the demise of the parties' father, the suit property devolved to their mother. However, the parties continued living on the suit land and each has been utilizing equal portion of land. That being the case, it was therefore the intention of the family that each was to obtain **½ share** of the suit property being **1.1 acres**. However, their mother **Njeri Njuguna**, later transferred the suit property wholly to the Plaintiff. Even with the said transfer, the Defendant continued to live on the suit property and utilize the **1.1 acres**. He even built a permanent house during the lifetime of their mother. If it was the intention of their mother **Njeri Njuguna** to have the Defendant move out of the suit land, and occupy **Loc.5/Githunguri/44**, she would have done so during her lifetime.

The Plaintiff only demanded vacant possession from the Defendant after the demise of their mother in **1992**. The Court finds that even if the suit property is in the name of the Plaintiff, the right of the Defendant who has been on the suit property all his lifetime cannot be wished

away. The Defendant's occupation falls securely as an overriding interest and since the suit land is an **ancestral land**, then the Plaintiff is deemed to be holding the same in trust for his brother the Defendant who has been utilizing a  $\frac{1}{2}$  **portion** of the suit property. See the case of **John Simiyu Ndalila...Vs...Francis Soita (2014) eklr**, where the Court cited with approval the holding in the case of **Mwangi & Another...Vs...Mwangi (1986) KLR 328**, where it was held that:-

**“...the rights of a person in possession or occupation of land are equitable rights which are binding on the land”.**

Though the Plaintiff alleged that the Defendant was given a parcel of land in **Githunguri**, being **Loc.5/Githunguri/44**, the said registration was allegedly done in **1962** and it was a first registration. The said property in **Githunguri** was never dealt with during the **Succession Cause** of their late father and DW1 who is a step-brother to the parties herein, testified that if **Githunguri** land was an ancestral land, then it could have been shared or distributed during the distribution of the **Estate of the late Njuguna Mutungi**. The Court will therefore find that the **Githunguri** land has no relationship with the suit property which is an **ancestral land**. The Defendant is equally entitled to a share of his father's property just like the Plaintiff. Even if the Plaintiff is the sole registered proprietor of the said suit property, the Court finds that the said registration can be challenged as it was either registered in his favour through **misrepresentation, illegally or unprocedurally**. Therefore the Court finds that the **Plaintiff is not entitled to the full parcel of land** as a sole proprietor.

**ii) Whether there existed a Trust between the Plaintiff and the Defendant and if so, is the Defendant entitled to his Counter-Claim?**

As the Court has found that the suit land is an **ancestral land**, then the Plaintiff is holding the same in trust for the Defendant and the Plaintiff's proprietorship is affected by the overriding interests as provided by **Section 30(G)** of the **Registered Land Act (now repealed)** and **Section 28(b)** of the **Land Registration Act**, which provides:-

**Section 30(g) of the Registered Land Act**

**“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -**

**(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;**

**28(b) of the Land Registration Act.**

**“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—**

**(a) .....**

**(b) trusts including customary trusts;**

**.....**

The Court finds and holds that there exists a customary trust due to the fact that the Defendant and the Plaintiff have lived on the suit land all their lifetime. The parties herein have been utilizing their respective portions of land even during the lifetime of their mother **Njeri Njuguna** who became the registered owner of the suit property through transmission. The Defendant has built a permanent house, planted coffee bushes and even allowed his children to build on the suit property. If the said land was solely for the Plaintiff, then **Njeri Njuguna** their mother could not have allowed the Defendant to build permanent houses on the suit property or even plant coffee bushes. The Defendant has carried the above activities on the suit property because he was entitled to  $\frac{1}{2}$  **share** of the suit property. Therefore, the Plaintiff is holding the suit property in trust for the Defendant herein as the land in question is an ancestral land.

Having found that the suit property is an ancestral property and the fact that the Plaintiff is holding the same in trust for the Defendant, the Court finds that the Defendant is entitled to the prayers sought in his **Counter-claim**.

This Court having dissolved the existing trust, the Court finds that the **Defendant is entitled to 1.1 acres** from the suit property and that **1.1 acres is to be curbed from the portion that the Defendant is currently occupying and utilizing**.

For the above reasons, the Court finds that the **Plaintiff's title deed should be cancelled and the suit property herein should now be subdivided equally between the Plaintiff and the Defendant** so that each of the party herein should obtain **1.1 acres** respectively being the portion of land that they are utilizing and occupying. Therefore the **Land Registrar Murang'a is directed and/or ordered to rectify the register, cancel the title in favour of the Plaintiff and cause the suit property Loc.5/Kabati/641 to be subdivided equally between the Plaintiff and the Defendant so that each of the party herein should get 1.1 acres respectively**. This is in line with **Section 80(1)** of the **Land Registration Act**, which provides:-

**“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”.**

**iii) Who is entitled to costs of the suit and Counter-claim?**

Ordinarily costs are awarded at the discretion of the court. However, it is trite that costs do follow the event and are awarded to the successful litigant. The ***Court finds that the Plaintiff's suit is not merited*** and the ***Defendant's Counter-claim is merited***. Therefore the ***Defendant is the successful litigant and he is entitled to costs of the suit and Counter-claim***.

Having now carefully considered the available evidence, the Court finds that the Plaintiff did not prove his case against the Defendant on the required standard of balance of probabilities. Consequently, ***the Plaintiff's suit is dismissed entirely with costs to the Defendant***. Further, the Court finds that the Defendant has proved his Counter-claim on the required standard of balance of probabilities. Therefore ***Judgment is for the Defendant against the Plaintiff as prayed in prayers No.(a) of the Counter-claim***. The ***Defendant is also entitled to costs of the Counter-claim***.

It is so ordered.

***Dated, Signed and Delivered at Thika this 19<sup>th</sup> day of November 2018.***

**L. GACHERU**

**JUDGE**

**19/11/2018**

In the presence of

Plaintiff in person present and in absence of his advocate.

Mr. Kamiro for the Defendant/Counter-claimant

Lucy - Court clerk

**Mr. Kamiro** – I will take the Judgment.

**L. GACHERU**

**JUDGE**

**Court** – Judgment read in open court in the presence of the Plaintiff in person and Mr. Kamiro for the Defendant/Counter-claimant.

**L. GACHERU**

**JUDGE**

**19/11/2018**