



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE 26 OF 1990

MURUNGI NKAMBI.....PLAINTIFF

versus

DAVID M'ABURI.....DEFENDANT

23/1/1991

Coram: SO Ojuk – judge

Plaintiff in person

Mr Mithega for the defendant

JUDGMENT

The plaintiff's claim against the defendant is for the transfer of a portion of land measuring 4½ acres out of Title No South Mugumango/940 measuring 3.64 hectares (approximately 9.23 acres or thereabouts) registered in the name of the defendant. It is the plaintiff's case that although the defendant is registered as the proprietor of this parcel of land as shown in a certified copy of the register in respect of this land which was produced in evidence during the trial (Exhibit 1), he holds half of this land in trust for him and his younger brother Mbae Nkambi. It is his case that this was a family land belonging to his grandfather known as Riria. The said Riria had two sons, namely, the plaintiff's father Nkambi who was his eldest son from the house of his eldest wife and the defendant who was his son from the youngest wife.

The plaintiff testified that his father, Nkambi died in the year 1948 while he was still very young as he was born in 1945 and his follower brother, Mbae Nkambi was about 1 year old having been born in 1947. Thereafter, his grandfather, Riria also died and they remained with the defendant to care for them. Afterwards, the defendant chased them away with their mother, Alice Maitha and they went to live with their maternal uncles in Igoji. Since then they have continued to live with their maternal uncles at Igoji.

He testified that as he had no land where he could build a house, his maternal uncle, Murithi Gatuathuku gave him a small portion of his land measuring 0.95 of an acre to build a house. That portion of land has since been transferred to him. His younger brother, Mbae has also been given a small place enough for only a house by a good Samaritan, Samuel Irambo where he has built a house.

The plaintiff's case is that after the defendant had chased them together with their mother, he remained alone on the family land which he consolidated during the land adjudication process and registered in his name as land parcel No south Magumango/940. He testified that had his father Nkambi been alive, he would have got his share of the family land. Now that his father is deceased, the plaintiff testified that he is entitled to get from the defendant his father's rightful entitlement of the family land. He is therefore claiming from the defendant half of the suit land to be transferred to him to share with his brother Mbae.

The defendant in his evidence admitted that the plaintiff is the son of his deceased brother, Nkambi. He further agreed that the said Nkambi died but in the year 1943 of Tuberculosis (TB) and was survived by the plaintiff as his only son. He stated that the plaintiff's brother, Mbae, was born after the death of his father and he is therefore their child according to Kimeru customs although not of their blood.

The defendant testified that their father, Ririra died later and he remained alone as the head of the family. During land adjudication and registration process, he gathered the seven pieces of land which his father had left, but there were several objections raised and he landed into multiplicity of suits over such lands. In the end, he lost almost the whole parcels of land to one Tiras Mutunga and he remained only with approximately one (1) acre of the family land.

He produced a copy of the decision of the African Court of Review presided over by Mr T.A Watts which dismissed his case against Tiras Mutunga – i.e. Meru District Registry Case No 13/G/62.

This judgment shows that the defendant had lost the previous suits over land to Tiras Mutunga both before the African Court at Muthambi in Civil Case No 198/62 and before the Meru Land Consolidation Arbitration Board in 1959. He produced a letter dated 21st of December, 1964 (Exhibit A) indicating that his attempt to re-open his 1959 case with Tiras could not be allowed.

That the defendant lost almost the whole of his family land to Tiras, is further confirmed by one Patrick Kubai Muchiuru (DW3), who testified that he was the Vice-Chairman of the Land Adjudication Committee and that a part from about one (1) acre of family land which the defendant retained he lost the rest of the land to Tiras in case before them.

The defendant testified that after he had lost almost the whole of their family land save for about (1) acre, he decided to buy some land. He then bought from one Muchiri Kithaka (DW 2) some 8.05 acres of land for Shs 2,500/-. This was on the 15th of February, 1966. He produced a copy of this sale agreement in an exercise book (Exhibit C). That the defendant bought the said parcel of land was not only confirmed by the said Muchiri Kithaka but also by Patrick Kubai Michuru (DW 3) who was the Vice-Chairman of the Land Adjudication Committee. As the defendant bought the said land from Kithaka before the adjudication and consolidation process was completed, this portion of land measuring 8.05 acres was consolidated with one (1) acre of family land that the defendant had retained after his dispute with Tiras. The two pieces were now registered as land parcel No South Mugumango/940, now in dispute.

The defendant testified that he does not refuse to sub-divide to the plaintiff the small portion of the family land measuring approximately one (1) acre that he had retained. However, in order for the plaintiff to benefit from that land, he has first to relinquish the present parcel of land where he is now living as he is the one who had helped him to purchase it. It was his case that in the year 1970, the plaintiff came to him to assist him buy some land. He then gave him Shs 1,500/- to use in buying some land and later the plaintiff confirmed to him that he had bought some land from one Philip Kanampiu. The defendant says that since he had bought the said land for the plaintiff, he cannot now come back to him to claim the family land, but if he wants to do so, he should surrender back to him the parcel of land that he had helped him to purchase where he is now living.

The defendant called a witness, Isaac Nkonge (DW 1) who stated that sometimes in the year 1970, he happened to have gone to the home of the defendant to collect some milk and cattle fodder. He then found the plaintiff and the defendant seated down and thereafter he saw the defendant giving the plaintiff some money. The defendant told him that it was Shs 1,500/- to enable the plaintiff to buy some land. He however, agreed with the plaintiff, that when this dispute was being heard by clan members before it was filed in court, he was among the elders who had decided that the defendant should give the plaintiff some land. The plaintiff produced a copy of the said proceeding before members of their clan which was presided over by the Area Assistant Chief (Exhibit 2). It was heard by a total of 20 clan members and their decision was that the defendant should give the plaintiff and his brother a share of the family land.

From the evidence that was adduced before me as stated above, there is no dispute that the plaintiff's father was the elder brother of the defendant. They were both the sons of one Riria. The plaintiff's father was the son of Riria's elder wife while the defendant was of the younger wife. The plaintiff's father died while he was still quite young. The defendant has a younger brother, Mbae Nkambi but from the evidence adduced, it is not certain whether he was born before his father's death or after his father had died. It is however, admitted by the defendant that even if he was born after the death of his father by another man, he is still a member of their family according to Kimeru customs.

It is admitted by the defendant that the plaintiff and his brother are entitled to a portion of their family land. I am satisfied from the evidence of the defendant and his witnesses that what remained of their family land after several claims by other people during the land adjudication and consolidation process, was only about (1) acre. I am equally satisfied with the evidence and that of his witnesses supported by documentary evidence (Exhibit C), that after he had lost most of his family land, he decided to buy some land and he then bought some 8.05 acres of land from Muchiri Kithaka (DW 2). This land was later consolidated with the one acre of land he had retained from his family and the same was now registered in his name as land parcel No South Mugumango/940. Having found as I have done, that the defendant had bought some 8.05 acres of land which were subsequently consolidated with the family land and registered as parcel No South Mugumango/940, I hold that the plaintiff and his brother Mbae are not entitled to any portion of the 8.05 acres of land that the defendant had brought as this was not family land. Their entitlement, if any, is limited to the one (1) acre of land which I have established that the defendant had retained after numerous disputes during the land adjudication process.

The defendant's contention is that the plaintiff is not entitled even to any portion of the one (1) acre that he had retained of the family land. He argues that he had assisted the plaintiff to buy some land in Igoji area in 1970 where he is now staying by giving him some Shs 1,500/-. The plaintiff on the other hand vehemently denies that he has bought any land and that the defendant ever gave him Shs 1,500/- to buy any land as alleged.

He says that the piece of land where he is presently staying measuring 0.95 of an acre, was given to him by his maternal uncle Murithi Gatuathuku to enable him to have somewhere to build a house. It is significant to note that the plaintiff's father died while he was less than 5 years or so old. He was brought up together with his brother by their maternal uncle after the defendant had allegedly chased them with their mother after the death of their father. Under these circumstances, it is quite possible that his uncle could rightly give him a small piece of his land to build a house instead of turning him away after he had grown up.

I think that the plaintiff's story that the land where he is presently staying was given to him by maternal uncle is to be preferred to that of the defendant and his witness Isaac Nkonge. This man, Isaac Nkonge, did not impress me at all that he actually saw the defendant giving the plaintiff some money. Here is a

man who was among the clan elders who first heard this dispute and decided that the defendant should give the plaintiff some land. Nowhere in the proceedings before the clan members under the area Asst Chief did Nkonge come up to say that he witnessed the defendant giving the plaintiff some Shs 1,500/-. I do not believe the defendant that he had ever bought for the plaintiff or even assisted him to buy any piece of land. I find that the only piece of land that the plaintiff has, is only that small piece of land measuring 0.95 of an acre which in my judgment I find to have been given to him by his maternal uncle.

The conclusion to which I have reached, is that the plaintiff is entitled to get a piece of land from the defendant. I believe that the defendant as the head of his family had fought for and obtained approximately one (1) acre of family land which he should have shared to the sons of his deceased brother. Indeed in paragraph 4 of his statement of defence which he later amended, he had clearly stated that the dispute before the court had been arbitrated by the local chief and clan elders who decided that the plaintiff should go to his home so that he could show him where to build like other brothers. He went on to say in paragraph 7 of the said defence that he is still waiting for the plaintiff to go to him and join his other brothers only to find that he was suing him to court (see paragraph 6 of his defence). He even refers to the plaintiff in that defence as his "true son".

In my judgment, I have come to the decision that the defendant is to give the plaintiff and his brother Mbae one half ($\frac{1}{2}$) of an acre out of land parcel No South Mugumango/940. He should excise a portion of this land measuring half an acre and transfer the same to the plaintiff to share with his brother Mbae. I find that he is holding this portion of land as a trustee for the plaintiff and his brother Mbae who are the sons of his deceased brother Nkambi. The defendant will sign all the necessary documents for subdivision and transfer of the said half acre of land to the plaintiff who should meet all such charges for subdivision, survey and transfer. Should the defendant refuse or fail to sign any such documents as may be required to give effect to this judgment, then I empower the Executive Officer of this Court to sign all such documents on his behalf.

I find that this is a suitable case where I should not burden the defendant with payment of costs to which the plaintiff was no doubt entitled due to the relationship between them and the fact that he will now take the portion of land that has now been given to him together with all developments therein which forms part of the land. I may add that care should be taken while excising the said portion of land so that it does not include any house of the defendant or his sons. I believe that both parties can mutually agree on the location of the half acre of land which is to be excised for the plaintiff.

I order that each party shall meet his own costs of this suit.

Order accordingly.

Dated and delivered at Meru this 23rd day of January, 1991.

SO OGUK

JUDGE



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