



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 22 OF 1998

WILLIAM MUREITHI S/O KIMARU 1ST PLAINTIFF

DIOCESE OF NYERI TRUSTEES (REGISTERED) 2ND PLAINTIFF

VERSUS

1. GEOFFREY NJOGU

MURIUKI

2. MICHAEL KAGWAMBA GACHARI

3. SIMONE KABIRU MUCHIRI

4. JOSEPH WAMAI GITHAIGA

5. ESTHER WANJIRU MAGONDU

6. JANE NYARUI IRERI

7. I. K. TONU DEFENDANTS

J U D G M E N T

The first Plaintiff WILLIAM MUREITHI KIMARU is the registered proprietor of land Parcel Number RUGURU/KIAMARIGA/685 which is situated in Mathira Division of Nyeri District (hereafter referred as the suit property). The Defendants also reside in Mathira Division. By a Plaint dated 28-1-1998 and filed in Court on the same date the Plaintiffs seek, among other prayers, an order of permanent injunction to restrain the Defendants their agents or servants from encroaching or in any way interfering with the suit property and an order to remove the caution registered against title to the suit property. The plaintiffs case is that on or about 13th day of January 1998 the first six Defendants unlawful broke and entered the suit property and have refused to vacate. The Plaintiffs applied for a temporary injunction to restrain the Defendants from trespassing on the suit property till the determination of this suit. That application was allowed by Hon. Justice Juma on 17th December 1998 with costs to the Plaintiffs. Standing on the suit property is a nursery school. The Defendants contention is that the nursery school is a public project having its own committee and back Account.

They aver that the local community never surrendered its activities relating to the Nursery School to the second plaintiff, who according to the Defendants has merely been assisting in the day to day affairs of the school. Three (3) witnesses testified in support of the Plaintiffs case. The first Plaintiff (PW1) testified that in about the year 1979 elders of the Catholic Church requested him for land on which they could put up a nursery school after the proprietor of the land on which the nursery school previously stood asked the church to move it. He later signed transfer documents in favour of the second plaintiff. Consent for the transaction was obtained from the local Land Control Board. He had given the suit property to the second plaintiff for free. The transfer of the suit property to the second plaintiff could not sail through as the first, second and fourth Defendants registered a caution on the title to the suit property on 9-6-97. PW1 denied that he even agreed to exchange the suit property for another piece of land that was to be given to him by Nyeri County Council. Reverend Father Peter Kariuki (PW2) testified on behalf of the second plaintiff. He ministers at Kiharaini Parish. He reported there in 1996. He stated that the Catholic Church owns the school and pays the teachers. The school admits children from any denomination.

The school is utilized as a church on Sundays. According to PW2 the school has been built by donations from well wishes and from harvests and not through harambees. Simon Wahome Kimaru (PW3) is a brother to PW1 and is chairman of Nyana Catholic Church. He testified that in 1967 a nursery school was built on land belonging to Kimaita Njogu. In 1973 the Local Community requested the Catholic Church to run the school. The church then took over the running of the school. When Kimaita Njogu refused to part with the portion on which the school stood the church looked for alternative land. They then got the land which PW1 gave the church to put up the school. He stressed that the school was built with donations from harvests and from friends. He pointed out that the Defendants are neither members of the Catholic Church nor do they run the school. The Defendants case was supported by the evidence of 3 witnesses. Geoffrey Njogu (DW1) is the first Defendant in the suit. He stated that he is a secretary and Committee member of Nyana Nursery School. He denied that the school is run by the Catholic church. He stated that the school on the suit land was put up through harambee. He testified that the caution registered against the title to the suit property was lodged when the Defendants learnt that the first Plaintiff was in the process of transferring the same.

According to DW1 the school is registered with the Department of Social services. He produced D Ex. 1 a certificate of registration in respect of the school. When cross examined by Counsel for the Plaintiffs DW1 answered that the dispute over the suit property started in 1996 and the school was registered in 1997. He disclosed that there is a nursery school on his land called Nyana Nursery School. The same was put up in 1998. He never knows who pays the teachers in the school put up on the suit land. On reexamination by his lawyer DW1 stated that the only school known as Nyana is the one put up in his land and that D Ex. 1 relates to the school on his land. He added that he does not know how the financial affairs of the school in the suit land are run/conducted. The second Defendant Michael Gachari (DW2) claims to be the chairman when this suit commenced. He gave evidence that the suit land belongs to the community. He belongs to the church of Christ. The community's claim to the suit property is on the basis that the first Plaintiff was compensated.

The evidence of Godfrey Kinyua (DW3) who works with Nyeri County Council was that the Council in the year 1981 resolved to allocate plot Number RUGURU/ KIAMARIGA/1550 to PW1 so that PW1 would surrender the suit property to be used as a public Nursery School. The deal never went through as PW1 failed to first transfer the suit property to the community as a condition for the County Council allocating Parcel No. 1550 to him. In my assessment of the entire evidence adduced by the parties to this suit I am unable to conclude that the Defendants have established their claim to the suit property. The first Plaintiff cannot in any way be holding the suit property in trust for the Defendants when the Defendants failed to lay a basis for the trust alleged. The first Plaintiff had no agreement either with the Defendants or Nyeri

County Council regarding the suit property. The Defendants provided no consideration in return for the suit property. I find the evidence of PW1 inconsistent and wanting in seriousness. Either unwittingly or in an attempt to create a story that would make their defence credible. DW1 stated that the only Nyana Nursery School he knows of is the one built on his piece of land. The certificate of registration of the school relates to that school and not to the school on the suit land. The Defendants admitted they have no role in the running of the school in the suit property. It is apparent that the Defendants set up the school on the land belonging to DW1 when the Coup Detat staged by them on the suit property on 13-1-98 aborted. I find their claim to the suit property both misconceived and misplaced. The structure and the objectives of Nyana Community headed by DW2 was not elaborated to this court. Its membership was not disclosed.

Although the Defendants claim the suit property belongs to them they did not raise a counter claim in their statement of Defence. And even if a counterclaim was raised I find no material before me from which I could found for the Defendants. In paragraph 10 of the statement of Defence the Defendants aver that the transaction between the first and second Plaintiff was fraudulent. No particulars of the alleged fraud were pleaded by the Defendants. Under O. VI r. 8 it is mandatory that a party pleading fraud provides particulars thereof. Without particulars of the alleged fraud this court is unable to consider whether any fraud was committed. The allegation is ignored. I am convinced that the Defendants unlawfully and without any sled of excuse of authority trespassed on the suit property. The lodging of the caution against the title to the suit property was without any just cause. The first Plaintiff is free to deal with the suit property in any manner he deems fit including parting with the same for free. His title to the suit property is indefeasible unless there is evidence that there are rights to which his registration as proprietor thereof are subject. The Plaintiffs have proved their case against the Defendants No. 1 – No. 6 on a balance of probabilities. I enter judgment in favour of the plaintiffs against the Defendants in terms of Paragraphs (a), (b) (c) and (d) of the Plaint. Damages suffered by the Plaintiffs were not proved. The plaintiffs will have the costs of the suit.

Dated this 27th day of June 2002.

J. K. MITEY

JUDGE



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