



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**ELC CASE NO. 309 OF 2015**

**DANSON NJIRU JACOB.....PLAINTIFF**

**VERSUS**

**JOSEPH NJERU JACOB.....DEFENDANT**

**JUDGMENT**

As is clear from the parties' names, the two are siblings with the defendant being the elder of the two. It is the plaintiff's pleading that the defendant was registered as the owner of land parcel No. GATURI/WERU/576 to hold in trust for the two of them and it had been agreed that the defendant would transfer five (5) acres to the plaintiff and retain ten (10) acres. However, the defendant has refused to do so and has instead sub-divided the land into five portions namely:-

***GATURI/WERU/3445***

***GATURI/WERU/3446***

***GATURI/WERU/3447***

***GATURI/WERU/3448 and***

***GATURI/WERU/3449*** and proceeded to sell parcel No. GATURI/WERU/3447 to one **JAMLIC MWANIKI**.

The plaintiff therefore moved this Court vide his "**home-made**" plaint filed on 29th October 2004 seeking the following reliefs:-

1. ***A vesting order of such equal shares out of portions No. GATURI/WERU/3445, 3446, 3447, 3448 and 3449 into the plaintiff's names.***
2. ***Costs of this suit.***
3. ***Such other relief as the Honourable Court may deem just and expedient.***

The defendant filed a defence and counter-claim on 1st December 2004 denying all those averments and in particular that he holds the land parcels No. GATURI/WERU/3445, 3446, 3447, 3448 and 3449 in trust for the plaintiff adding that he is the registered proprietor thereof and had only allowed the plaintiff, through his "**natural affection and love**" to temporarily stay on the land parcel No. GATURI/WERU/576. The defendant therefore sought to determine the licence granted to the plaintiff to stay on the land and prayed for an order to evict him from the portion that he is occupying.

The hearing commenced before **KARANJA J** (as she then was) on 10th November 2010 when the

plaintiff told the Court that land parcel No. GATURI/WERU/576 had been given to them by their clan but registered in the names of the defendant as the elder brother and that the two have been residing thereon since 1978. In 1981, they decided to sub-divide the land and went to the Lands office to collect the relevant forms. However, the defendant has refused to give him his share and in 1994, the plaintiff went to the Lands office and discovered that the defendant had sub-divided the land into five (5) portions and registered them in his names and sold one. So the plaintiff placed a caution on the remaining four (4) portions. The plaintiff moved to this Court and was referred to the Gachoka Tribunal which ordered that he be awarded five (5) acres.

The plaintiff called one witness **JOHN NJUE NYAGA** (PW1) a village elder who testified that he was part of the panel of elders who ordered the defendant to give the plaintiff five (5) acres of the land.

Thereafter, the plaintiff closed his case.

The suit came before me on 10th December 2015 when I started visiting **EMBU HIGH COURT** to handle Environment and Land cases and I gave directions that the case do proceed from where it had reached. The defence case was therefore set for hearing on 3rd February 2016 but on that day, it could not proceed because the defendant's advocate, though present in the morning when the case was allocated for hearing at 11 a.m. disappeared when it was called out at 11.50 a.m. The Court nonetheless gave the defendant the last adjournment to 29th March 2016. Come that day, Mr. Mwaniki advocate for the defendant told the Court that he wished to put in an application to cease acting for him. The plaintiff objected reminding the Court that it had allowed the defendant the last adjournment and even his costs had not been paid as directed on 3rd February 2016. The Court up-held the objection, marked the defendant's counter-claim as dismissed for want of prosecution and closed the defendant's case.

The plaintiff's case is based on trust. It is his evidence that the original land parcel No. GATURI/WERU/576 was clan land registered in the defendant's names to hold in trust for both of them but the defendant has now abused that trust, sub-divided the land into five (5) portions being GATURI/WERU/3445, 3446, 3447, 3448 and 3449 (the suit land) and transferred the same into his names. According to the plaintiff's own pleadings, land parcel No. GATURI/WERU/3447 has since been transferred to one JAMLIC MWANIKI (paragraph 9 of the plaint). The Green card for the parcel was not produced. However, among the documents in this file are a copy of the register in respect of parcel No. GATURI/WERU/3445 showing that it has since been transferred to one NJUE IRERI. Since the said **JAMLIC MWANIKI** and **NJUE IRERI** are not parties to this suit, it would not be proper for this Court to make any adverse orders affecting those portions of land without affording them a hearing as to do so would be a breach of their Constitutional rights. This Court will therefore not make any orders regarding those two portions of the suit land.

As indicated above, the plaintiff's suit is based on trust and his evidence is un-controverted since the defendant did not turn up for trial. The plaintiff's evidence is that the original land GATURI/WERU/576 was given to the parties by the clan and that he has lived there all along since 1978. In his un-prosecuted defence, the defendant concedes that indeed the plaintiff resides on the suit land but that it is with the permission of the defendant who has now cancelled that licence and seeks to evict the plaintiff. But the defendant has not told us why he has waited until this suit was filed to purport to seek the plaintiff's eviction from the suit land. Although the suit land was registered in the names of the defendant, it is well settled both from the law and judicial authority that such registration does not defeat the claim of a party entitled to such land in trust nor does it take away the registered proprietor's duty as a trustee – **KANYI VS MUTHIORA 1984 K.L.R 712** and also **MWANGI VS MWANGI C.A CIVIL APPEAL No. 245 of 2004 (NYERI)**. **Sections 27 and 28 of the Registered Land Act** (now repealed) under which the suit land was registered are clear that whereas the registration of a person as proprietor of land vests in him the absolute ownership of that land, there is a proviso to this effect:-

***“Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee”.***

Similar provisions are found in **Sections 24 and 25 of the new Land Registration Act**...

Bearing in mind that the parties herein are brothers with the defendant being the elder of the two and that the suit land was given to them by the clan and was not purchased by the defendant, and further, that the plaintiff has lived on it since 1978, this Court is satisfied that the defendant holds the suit land in trust for both himself and the plaintiff. That also explains why he was prepared to give the plaintiff five (5) acres before reneging on the promise. This Court is also bound to take note of **EUGENE COTRAN'S RESTATEMENT OF AFRICAN LAW (LAW OF SUCCESSION) SWEET & MAXWELL, LONDO 1969** where it is stated that under Kikuyu Customary Law the eldest son inherits land in trust for the other sons. This Court therefore finds as proved that the defendant held the suit land in trust both for himself and the plaintiff.

Having found that land parcels No. GATURI/WERU/3445 and 3447 have since been transferred to third parties who were not enjoined in this suit, this Court can only make orders with respect to land parcels No. GATURI/WERU/3446, 3448 and 3449.

Ultimately therefore, upon considering the plaintiff's un-controverted evidence, this Court finds that he has proved his case against the defendant as required in law. Judgment is accordingly entered for the plaintiff against the defendant in the following terms:-

- 1. The defendant holds five (5) acres out of land parcels No. GATURI/WERU/3446, 3448 and 3449 in trust for the plaintiff.*
- 2. That trust is determined and a vesting order is made that five (5) acres out of the land parcels No. GATURI/WERU/3446, 3448 and 3449 be transferred to the plaintiff.*
- 3. The plaintiff to meet the costs of the sub-division and transfer which should as far as possible take into account the portion now occupied by the plaintiff.*
- 4. The Deputy Registrar of this Court is authorized to sign any transfer documents on behalf of the defendant to facilitate such transfer.*
- 5. As parties are siblings, each to meet their own costs.*

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> JUNE, 2016**

Judgment delivered, dated and signed in open Court this 9th day of June 2016.

Mr. Andande for Mr. Kariithi for Defendant present

Plaintiff absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> JUNE, 2016**