

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 163 OF 2009

STEPHEN MBUTHIA GICHURU & 2 OTHERS....PLAINTIFFS

VERSUS

JACKSON NJOGU GICHURU & ANOTHER....RESPONDENTS

RULING

The Plaintiffs herein, namely **Stephen Mbuthia Gichuru**, **Michael Muriuki Karia** and **Christopher Kaburia Gichuru** took out the Originating Summons dated 6th day of November 2009 in which they sought for the following orders:

1. **THAT the 1st defendant holds land parcel no.Iriaini/Chehe/1446 in trust for the Plaintiffs.**
2. **THAT the 2nd defendant holds 0.5 acres on land parcel no.Iriaini/Chehe/1445 in trust for the Plaintiffs.**
3. **THAT the trusts in relation to land parcels no.Iriaini/Chehe/1445 and Iriaini/Chehe/1446 be determined.**
4. **THAT the 1st defendant be ordered to transfer land parcel no.Iriaini/Chehe/1446 to the Plaintiffs and that the 2nd defendant be ordered to transfer 0.5 acres from land parcel no.Iriaini/Chehe/1445.**
5. **THAT the defendant do pay the Plaintiffs costs of this suit.**

The Plaintiffs swore a joint affidavit which they filed in support of the Originating Summons. **Jackson Njogu Gichuru** and **Sammy Mwangi Gichuru** the 1st and 2nd Respondents herein, each filed a Replying Affidavit to oppose the Originating Summons. Before the Originating Summons was filed for hearing, Mr. Karweru who appeared for the 2nd Respondent successfully convinced this court that there was no case which was sustainable as against the 2nd Defendant, since his title was protected under **Section 93** of the **Law of Succession Act**, hence this judgment relates to the case against the 1st Defendant. When this suit came up for hearing, learned counsels recorded a consent order to have the Originating Summons disposed of by affidavit evidence and by written submissions.

I have considered the material placed before me and the rival written submissions. It is the Plaintiffs' case that at the conclusion of the said cause the estate of the deceased comprising of the parcel no. L.R.no.Iriaini/Chehe/576 vested in the 1st Defendant in trust for himself the Plaintiffs. The Plaintiffs argued that Gichuru Kaburia, deceased prior to his death had indicated that two acres which fell on his grave would be family land to be held by four (4) trustees one from each of his four (4) houses. It is said that the 1st Defendant had L.R Iriaini/Chehe/576 was sub-divided into L.R.no.Iriaini/Chehe/1081-1090. The parcel of land known as L.R.Iriaini/Chehe/1085 measures two acres (2) and fell on the deceased's grave. It is alleged that the 1st Defendant registered L.R.no.Iriaini/Chehe/1085 in his name. The Plaintiffs argue that the 1st Defendant should now be ordered to subdivide the aforesaid parcel into 0.5 acres and then transfer each to the four (4) houses. In the Replying Affidavit, the 1st Defendant depones that he does not hold the land in dispute in trust for anyone but the same is his inheritance. He denied having heard his father direct that the land surrounding his grave be held in trust for the family. The Plaintiffs have argued that the 1st Defendant managed to inherit five (5) acres i.e.L.R.no.Iriaini/Chehe/1086 just like the other beneficiaries. There was therefore no justification for

him to give himself two (2) acres i.e L.R.no.Iriaini/Chehe/1085. The 1st Defendant has not disputed that the land falls on their deceased father's grave. He has not also disputed that he has subdivided the same into two i.e L.R.no.Iriaini/Chehe/1445 and 1446. The 1st Defendant sold and transferred L.R.no.Iriaini/Chehe/1446 to Sammy Mwangi Ruhara, the 2nd Defendant. After carefully considering the rival arguments, I am convinced that the Plaintiffs claim cannot be sustained against the 1st Defendant. The 1st Defendant has clearly explained that in 1985 vide Nyeri H.C.S.C. no.251 of 1983, all the beneficiaries to the estate of Gichuriu Kaburia, deceased consented to have L.R.no.Iriaini/Chehe/576 subdivided and distributed to them. Sub-division was completed in 1998 and transmitted to the 1st Defendant and there was no protest lodged to the Plaintiffs until 2001 when they registered a caution which caution was removed by the land registrar after hearing both sides. It is also important to note that L.R.no.Iriaini/Chehe/1445 falls on the grave of Gichuriu Kaburia, deceased. The Plaintiffs should have raised their objections when the deceased's estate was being distributed. This court can only infer that indeed there was no agreement that the 1st Defendant would hold the aforesaid parcel I.eL.R.no.Iriaini/Chehe/1085 in trust for anyone. If that was the position the issue of trust could have been expressly stated during confirmation of grant and a note of an existing trust would have been indicated in the land register. In the circumstances, of this case I find that the Plaintiffs have failed to establish their claim to the required standards i.e on a balance of probabilities. The Originating Summons dated 6th November, 2009 is dismissed. Because the dispute involves members of the same family, I order that each one of them meet his own costs.

Dated, Signed and delivered in open court this 21st day of February, 2014.

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J.K.SERGON

JUDGE

In the absence of parties but with Notice