



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEAL NO. 92 OF 2001**

EUNICE WAMBUI MBOGO.....1ST APPELLANT

GIDRAPH MBOGO BABU.....2ND APPELLANT

**VERSUS**

ESTHER NYAMBURA MBOGO.....RESPONDENT

*(Being an appeal from the Judgment made on 8th March, 1995 by the Hon. Miss. Ndungu, Senior Resident Magistrate, in Kangema S.R.M.C Civil case No.33 of 1994, between Esther Nyambura Mbogo=Vs= Eunice Wambui Mbogo and Gidraph Mbogo Babu)*

**JUDGMENT**

On 8th March 1995, Hon. Ndungu H.N., learned Senior Resident Magistrate, delivered Judgment in favour of **Esther Nyambura Mbogo**, the Respondent herein and against **Gidraph Mbogo Babu**, the 2nd Appellant herein. The Judgment was in the following terms:

1. **Parcel no. Loc.12/Sub-Loc.4/1166 be shared equally between Esther Nyambura Mbogo and Gidraph Mbogo Babu.**
2. **Eunice Wambui Mbogo the 1st Appellant to have life interest over the aforesaid parcel.**
3. **A declaration that Loc.12/Sub-Loc.4/1166 is held in trust for Esther Nyambura Mbogo, Gidraph Mbogo Babu and Eunice Wambui Mbogo.**
4. **Costs given to the Respondent.**

Both appellants were aggrieved by the decision hence they preferred this appeal in which they put forward the following grounds:

1. **The learned Magistrate erred in law when she held that land parcel No. Loc.12/Sub-Loc 4/1166 is a trust land when no evidence was adduced to that effect.**
2. **The learned Magistrate erred in law and in fact in finding that the Respondent was not married.**
3. **The learned Magistrate erred in law and in fact in finding that the Respondent was entitled to half the share of land parcel No.Loc12/Sub-Loc 2/1166 which is 2.7 acres whereas in her pleadings she was claiming for 3 acres and not half a share.**

4. **The learned Magistrate erred in law and in fact when she failed to ascertain the actual acreage of the suit land and proceeded to give the Respondent half share.**
5. **The learned Magistrate erred in law and in fact when she ignored the Kikuyu customary law of inheritance for married women.**
6. **The learned Magistrate erred in law and in fact when she ignored the award of the elders whereby the Respondent had already been given 0.7 acres of the suit land.**
7. **The learned Magistrate erred in law and in fact when she held for the Respondent on an uncorroborated evidence on her marital status.**
8. **The learned Magistrate erred in law when she gave the 2nd Respondent life interest over the two parcels to be carved out of the suit land in total disregard of the pleadings.**

When the appeal came up for hearing learned counsels for the Appellants and the Respondent in person successfully applied for the appeal to be disposed of by written submissions.

I have reconsidered the case that was before the trial court by way of re-evaluation and the rival submissions. From the evidence tendered, it is obvious that the parties involved in this dispute are members of the same family. The Respondent is a sister of the 2nd Appellant while the 1st appellant is their mother. It also emerged from the evidence that the Respondent and the 2nd Appellant had other siblings namely: Miriam Njoki and Irene Waithera. Their late father Mbogo Wanjama passed away in 1939. It would appear the 1st Appellant remarried to one Simion Gichare. The Appellants have indicated through the written submissions of their advocate Mwaniki Warima & Co. Advocates that they were abandoning grounds 2,4,5 and 7 of the Memorandum of Appeal. It is the submission of the appellants that the trial Magistrate did not, before delivering the Judgment determine the question as to whether or not Miriam Njoki and Irene Waithera were entitled to share the land in dispute. The appellants urged this court to make a determination on the issue. It is the submission of the appellants also that since the dispute was not succession proceedings, then the decision of awarding the 1st appellant life interest did not hold water. The Respondent on her part urged this court to dismiss the appeal on the basis, the trial court was right to award her half the land.

The Respondent did not address in her submissions the issue as to whether or not her two sisters should have been also given a portion of the land. In her evidence, it is clear that her sisters namely: Miriam and Irene are happily married. The duo did not participate in the proceedings neither were they enjoined as parties to the suit. However, the Respondent's prayer is for the land to be declared as being held by the appellants in trust of the family. It would appear from the record that the Respondent felt entitled to have land because she was unmarried. She seemed to infer that because her two sisters were married they were not entitled to share. The 1st appellant told the trial court that the land in dispute was her property and that he had transferred the same to her son, the 2nd Defendant since the Respondent and her sisters were married. It is said the Respondent left her matrimonial home and came back home when a dispute arose between her and her husband. Both appellants agree that the Respondent should not get a share of the land because she was married. The issue now being raised on appeal was never put to the attention of the trial court by the parties. It was not even left to the trial court to decide. However, it is an issue which cannot be wished away. If indeed, the land is family land then the other siblings should have been involved. If the decision of the trial court is left to stand, then it means the other children namely Miriam and Irene will be left out. The trial court's finding that the land is held by the 2nd appellant in trust for the family cannot be faulted. Though Miriam and Irene were never involved, I think they should have been heard. For the above reason, the appeal partially succeeds. I allow the appeal by setting aside the order awarding the Respondent  $\frac{1}{2}$  of Loc.12/Sub.Loc.4/1166. I direct that the issue relating to the sharing of the aforesaid land be heard afresh before Hon. Ndungu H.N., now Chief Magistrate, Garissa. The Registrar Magistrates' Courts to make arrangements for Hon. Ndungu H.N., to travel to Kangema Court to specifically rehear the portion of the case. In so doing, she should hear Miriam Njoki and Irene Waithera and thereafter proceed to share out the land accordingly.

Since the dispute involves members of the same family, I direct each party to meet his or her own costs.

**Dated, signed and delivered this 16th day of December 2013.**

**J.K.SERGON**

**JUDGE**

In open Court in the absence of parties but with notice.