



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Suit 92 of 1991

KIARIE NJOROGE WAINAINA.....PLAINTIFF

VERSUS

MUNGAI NJOROGE.....DEFENDANT

JUDGMENT

Both Plaintiffs and the first Defendant are brothers; they are sons of the late Njoroge Wainaina. They are involved in a very protracted land dispute over a parcel of land known as **Gatamaiyu/Nyanduma/203** measuring about 9.40 acres. This dispute has been raging for almost three decades. The record shows that a suit was filed before the Kiambu Resident Magistrate Court being **RMCC NO. 51 of 1985** in 1985. That dispute was refereed to the elders and after the elders made a determination, the elders award was adopted as the order of the court. The Defendant in this case, Mungai Njoroge, appealed in the High Court being **Civil Appeal NO. 249 of 1988**. By a judgment of **Aluoch, J** (as she then was), issued on 19th December, 1990, the decision by the elders was set aside. The appeal was allowed and parties were advised to file their case before a court of competent jurisdiction.

That probably is the genesis of this suit which was filed in July 1991. By the amended plaint dated 17th September, 1991, the Plaintiff's claim is that land parcel **Gatamaiyu/Nyanduma/203**, was purchased by his father, the **late Njoroge Wainaina** from one Kamau Makumi. The suit land was registered in the name of the Defendant, Mungai Njoroge to hold in Trust for himself and the two plaintiffs.

In recognition of that Trust sometimes in 1988, Mungai Njoroge appeared before the Githunguri Land Control Board and obtained consent for the subdivision of the said piece of land in order to bring the Trust to an end. However, he changed his mind, and thus this present suit where the Plaintiffs are seeking for orders *inter alia*:

“a. A declaration that the defendant hold land reference number Gatamaiyu/Nyanduma/203 in Trust for the Plaintiff and the Defendant in earned shares.

b. That the said Trust be brought to an end and each party be registered as the proprietor of $\frac{1}{3}$ share in the suit land.”

In response to that claim, Mungai Njoroge denied the Plaintiff's claim in particular; he states that the subdivision of LR Gatamaiyu/Nyanduma/203 was subsequent to a decree in Kiambu RMCC NO. 51 of 1985, which decision was set aside by the High Court in HCCC NO. 249 OF 1988.

On 18th August, 1992, parties filed a statement of agreed issues and the following issues were identified for determination:

1. *Was the suit land, namely Gatamaiyu/Nyanduma/230 purchased from the late Kamau Makumi?*
2. *Was the suit land registered in the name of the Defendant to hold the same in Trust for the Plaintiffs and the Defendant?*
3. *Was the suit land subdivided into three portions pursuant to RMCC NO. 99 of 1991 or in recognition of the Trust?*
4. *Are the Plaintiffs' entitled to the suit land?*
5. *What orders should be made as to costs?*

Subsequently, on 23rd October, 2001, Nganga Wainaina joined in this suit as a second Defendant. He filed a defence and counter claim seeking for a share of two acres from Gatamaiyu/Nyanduma/230. Nganga Wainaina claims that he purchased the two acres from Mungai Njoroge in the year 1983 and because the subdivision was not effected, the two Defendants were registered as joint owners. The claim by Nganga is not disputed either by Mungai Njoroge or the plaintiffs.

This matter was partly heard by other Judges and I took it over on 29th November, 2011. Both Plaintiffs testified that Kiarie Njoroge, the first plaintiff and Mungai Njoroge are brothers by the same mother, while Mungai Muhindi, the second Plaintiff is their step brother but they are all sons of the late Njoroge Wainaina.

It is their late father, who purchased the suit property from Kamau ^{s/o} Makumi according to a hand written agreement dated **5th March, 1965**. The original sale agreement is written in *Kikuyu* but a translated version reads:

“Today fifth day of March one thousand nine hundred and sixty five I, K Kamau ^{s/o} Makumi and my step brother have sold to Njoroge Wainaina our piece of land Gatamaiyu/Nyanduma/203. We have sold to him nine acres and forty points (9.40 acres) at a price of Kenya Shillings two thousand two hundred and fifty shillings (KShs.2,250/-). Each acre at a price of Kenya shillings two hundred and fifty. We have received one thousand six hundred fifty and the balance is Kenya shillings six hundred (KShs.600/-).

Signed

*Vendors: Kamau Makumi
David Thiaka Kungu*

Purchaser: Njoroge Wainaina

*Witnesses: Paul Njihia
Kinage Njau.”*

Subsequently, the first Plaintiff paid a balance of KShs.200/- which was outstanding and this was received by Kamau Makumi as per the acknowledgement note dated 20th April, 1965. Kinage Njau gave evidence that he witnessed the first plaintiff pay the KShs.200/- to Kamau being the balance of the purchase price on 24th April, 1965.

According to the Plaintiffs' their father died a month later in May 1965 and the land could not be transferred to them because by that time, the Plaintiffs had not obtained identity cards so they agreed with Mungai Njoroge that he be registered as their Trustee.

They had agreed that Mungai Njoroge would take 3.4 acres while the Plaintiffs would take 3 acres each. Each of the plaintiffs took possession of their respective portions and started cultivating. For some time, the first Defendant disappeared in Tanzania and when he returned in 1969, they agreed to subdivide the land formally so as to obtain their separate titles. They even contributed KShs.50/- for the transfer but by that time, the first Defendant wanted to change his name from Karanja Kimani to Mungai Njoroge, thus he asked the Plaintiffs to wait.

When the first Defendant finally managed to change his names on the identity card they agreed to subdivide the land, the parties attended the Land Control Board and were issued with consent. Later, the first Defendant sold 1¹/₂ acres out his share. The first Plaintiff bought 1¹/₂ acres from this third party. That is why in that proposed mode of subdivision that was upset by the High Court; the 1st plaintiff was to get 4.5 acres. The suit land was divided into three portions:

1. *Gatamaiyu/Nyanduma/1376 - 1st Plaintiff*
2. *Gatamaiyu/Nyanduma/1377 - 2nd Plaintiff*
3. *Gatamaiyu/Nyanduma/1378 - Stephen Mugo, Nganga Wainaina & Mungai Njoroge*

However, the subdivision was set aside because the elders had no jurisdiction to determine the dispute. The plaintiffs are now asking this court to make the orders sought in the amended plaint.

Mungai Njoroge, the first Defendant gave evidence; he denied that the agreement that was produced in court was written by his late father. He gave a chronology of events, how this dispute has been before the court in Kiambu, the elders award was set aside because the Plaintiffs had no claim against him. He claimed that he purchased the land with his own money from Kamau Makumi. He also told the court that his late father did not die in 1965 but in 1968. Although he claimed that he had a document to show his father died in 1968, none was produced before this court.

The first Defendant claimed he single handedly bought the suit land and the Plaintiffs did not help him. On the other hand, the Plaintiffs sold their portions of land which they inherited from their father and that is why they are after his property. The first Defendant dismissed all the documents that were produced as fake.

Nganga Wainaina, the second Defendant in the counter claim also gave evidence. His claim is for 2 acres which is not all denied by the first Defendant.

The evidence on record that the suit property was purchased from Kamau Makumi is not challenged. What is in dispute is whether it was bought by the first Defendant or it was bought by the late Njoroge Wainaina, who paid the lion share of the purchase price and the first Plaintiff paid the balance of KShs.200/-.

I agree with the first Defendant that this suit has been in court for many years. This suit alone without mentioning the years the dispute was before other courts/ tribunal has been in court for over twenty years. At first, when the suit was filed, all the parties were represented by counsel. As time went on, all counsel withdrew and the parties were all self representing themselves when I heard the matter. The record shows that documents especially the so called agreements were filed in court and the list of documents were exchanged.

If the first Defendant's claim that the agreements were fake is correct, he should have proved that by adducing evidence either from witnesses or from a hand writing expert to show that the documents were

fake. As the matter stands, it is more probable than not that the suit land was brought by the late Njoroge Wainaina and the 1st Plaintiff completed the payment of the balance of KShs.200/-towards its purchase. The 1st plaintiff thus nursed a legitimate expectation that he would get a share of that land which he has tenaciously pursued.

It is also more probable than not that the land was registered in the name of the 1st Defendant to hold in Trust for the Plaintiffs because they did not have identity cards in 1965 when the sale was concluded. This finding is reinforced by the fact that when the matter was referred to the elders, they arrived at a similar finding but their decision was set aside by the High Court for want of jurisdiction.

The 1st Defendant was registered as a Trustee and that is demonstrated by the various attempts the parties made including seeking and obtaining the Land Control Board consent. The Plaintiff's produced the consent that was issued after all the parties appeared before the Land's Control Board. Although the 1st Defendant denies that he attended the meeting that was a mere denial that is not supported by any evidence.

The 2nd Defendant's claim is not denied. Accordingly, the orders that seem just in the circumstances is that the 2nd Defendant should be awarded 2 acres because he purchased the land and the entire parcel of land is registered jointly with him and the 1st Defendant so as to secure his interests. The balance of the land being 7.4 acres should be shared by the Plaintiffs getting 2 acres each and the first Defendant getting 3.4 acres for reasons that he has born the burden of holding the land in trust. The land title Gatamaiyu/Nyanduma/230 be divided accordingly and each part to bear their own costs of subdivision, transfer and the costs of this suit.

It is so ordered.

Judgment read and signed this 17th day of February, 2012.

MARTHA KOOME
JUDGE OF APPEAL

Note:

This application was heard and concluded on 29th November, 2011, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed a Judge of the Court of Appeal. I proceeded to write and append my signature thereto in my new capacity.