



## TRUST

- Ancestral land under African customary law is held in trust for succeeding generations.

### REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA

### AT MERU

### HIGH COURT CIVIL CASE NO. 74 OF 2001

**DANIEL M’KIRERA ..... PLAINTIFF**

**VERSUS**

**WILFRED MUTONI ..... DEFENDANT**

### JUDGMENT

The plaintiff Daniel M’Kirera M’Baichiu (**Daniel**) is the father of the defendant Wilfred Mutoni (**Mutoni**). Mutoni is his youngest sons. He has two other sons Jackson Nyomoo Kirera first born and Joseph Muthee. Daniel has three daughters. Two of those daughters are married but one is unmarried and lives at the family land. That land is *Abothuguchi/Kithirune/1863* (suit property). It is registered in the name of Daniel. Daniel in his plaint in this case pleaded that he has since his birth lived on that land where he has carried out extensive development. In the plaint, he further pleaded thus:-

- 7. The defendant (Mutoni) is now seeking to occupy by force the whole of the plaintiff’s (Daniel’s) said land and is also inciting his members of the family to do likewise and cause violence upon the plaintiff.***
- 8. The plaintiff states that unless the defendant and his agents and servants are prevented by an order of temporary injunction they will also pluck the plaintiff’s tea bush without any justification whatsoever as the plaintiff has already given the defendant a portion of land and 684 tea plants.***
- 9. The plaintiff prays for an order of permanent injunction to restrain the defendant from trespassing into main portion of the plaintiff’s said land L.R. No. Abothuguchi/Kithirune/1863 and an order to prevent the defendant from picking the plaintiff’s tea bush.***

He finally prayed for orders that Mutoni be stopped from sub dividing the suit property and also sought an injunction to stop Mutoni his servants or agents from picking his tea or interfering with the suit property. Mutoni filed a defence and counter claim. He denied interfering with the suit property but stated that he occupies 0.74 ha. of that land and utilizes 1,200 tea bushes growing on that land. He counterclaimed for the court to declare that Daniel holds that portion of 0.74 ha. in trust for him and that the court do register that portion in his name. He prayed for the court to excise that portion from the suit

property. Daniel in evidence stated that the suit property was inherited by him and his father. That he lives on the land with his family. He has planted on that land subsistent crops and 40,000 tea bushes. He said that these tea bushes were planted when Mutoni was a school going boy. Daniel stated that he also has built semi permanent houses. He said Muthee his 2<sup>nd</sup> son had planted his own tea bushes on the land. He said he had given each of his sons 4,000 tea bushes but later in evidence he said that he had given Mutoni, who is one of his sons, 884 tea bushes. He narrated how one day he was at his homestead and the local chief with other government officials came onto the suit property. On coming on the land, the chief without consulting him allocated some more tea bushes to Mutoni. This was done without reference to him or his other sons. In summary he stated as follows in his evidence:-

***“I am asking the court to order the defendant (Mutoni) to stop interfering with my land so that I can distribute it as I wish. I also wish the court to order the defendant to stop pestering me and give me respect as his father.”***

On being cross examined, he denied that he intended to evict Mutoni from the suit land. His evidence was supported by his first son, Nyomoo. He too stated that Mutoni arrived at the homestead with the chief and about 50 other people who included the District Officer (D.O) and begun to sub divide the suit property and allocated Mutoni more land than had been given to him by their father Daniel. PW3 Garishon Mugaa is a neighbor of the parties. He testified that he saw the chief and the D.O demarcating Daniel’s land. Along with them was 30 other people. Mutoni in evidence stated that the case is brought against him by his father Daniel because he had defiled his father’s commands to divorce his wife who had failed to bare him children. That since he had refused to divorce his wife in order to marry another who could bare him children, Daniel wanted him out of the suit property. He said that Daniel had previously allocated given all of his children to their use 0.74 ha. of land on the suit property. He prayed that the court would order that his portion be excised out of the suit property. DW2 was a nephew of Daniel. He confirmed that Mutoni’s problems with Daniel started when he failed to get children with his wife. As a result, Daniel hived off Mutoni’s portion of land and allocated it to his first son. That PW2 and DW2 with other village elders tried to arbitrate over the matter but Daniel had failed to heed to their counsel. Plaintiff’s counsel in his submissions laid emphasis to the rights of the registered owner under the Registered land Act (RLA). He relied on section 27 of the RLA which provides as follows:-

***“27. Subject to this Act –***

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;***
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.***

The defendant in turn relied on authorities which upheld the claim of intergenerational equity in land. The defendant relied on the case **Mukangu vs. Mbuyi** KLR [E&L] 1 where the Court of Appeal held as follows:-

***“Rights under Customary Law are subject to rights under written law and are excluded under the clear language of sections 27 and 28 of the Registered Land Act. Customary Law rights in land are extinguished upon registration of that land under the Act and rights under customary law are not overriding interests under section 30 of the Act.***

***However, since the same registration recognizes trusts in general terms without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Act with he relevant instrument of an acquisition either describing him or not describing him by the***

***fiduciary capacity, that registration signifies recognition, by the Registered Land Act, of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Act because, according to the provision to section 28, such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee.”***

The evidence that was adduced before court demonstrated that the suit property is ancestral land. Daniel inherited it from his father. The evidence shows the concept of intergenerational equity where the land is held by one generation for the benefit of the succeeding generation. See the case **Mbui Mukangu vs. Gerald Mutwiri Mbu** HCCA 281 of 2000. In view of that evidence before court, is Daniel entitled to the orders to stop Mutoni sub dividing the land or an order to stop Mutoni interfering with that land? Daniel clearly stated in his testimony that he did not wish to evict Mutoni. That being so, the order of injunction will not be granted. There was no clear evidence before court that Mutoni had subdivided the suit property. Daniel should have summoned the chief or the D.O to prove such subdivision. In all the evidence adduced by Daniel and his witnesses, one gets the impression of people ganging up against Mutoni. It is for that reason that the prayer sought in the plaint will not be granted. Similarly, the prayer in Mutoni’s counterclaim was not proved not because intergenerational trust does not exist here but, because Mutoni has siblings who were not parties to this cause and to order that his portion be excised may be unjust to such parties. All in all, the order I will grant is that the plaintiff’s suit and the defendant’s counterclaim be and are hereby dismissed with no orders as to costs. The interlocutory order granted herein in favour of Daniel M’Kirera are hereby vacated and discharged.

***Dated, signed and delivered at Meru this 13<sup>th</sup> day of April 2011.***

**MARY KASANGO**  
**JUDGE**