



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION

HCCC SUIT NO. 3610 OF 1991(O.S)

MWANGI MBOTHU.....PLAINTIFF

V E R S U S

MARTHA WANGARI NJUGUNA.....DEFENDANT

J U D G M E N T

This suit has had a rather unfortunate history. It was fully heard by **Hayanga, J** (who retired about October, 2003) between 9th July, 1996 and 5th June, 2003. By an order entered by the learned Judge on 22nd July, 2003, written submissions were to be filed before 16th September, 2003. The Plaintiff's submissions were filed on 9th September, 2003 while those of the Defendant were filed on 16th September, 2003. Hayanga, J retired before he prepared judgment. The Plaintiff had died and had been substituted before hearing commenced. Subsequently the matter was mentioned before a number of judges.

On 21st January, 2009 the case was placed before me. I directed that I would prepare judgement and deliver it on notice. Unfortunately thereafter the court file was misplaced and could not be found for some time. In the meantime I was transferred to another station. Eventually I was transferred back to Nairobi in March, 2011. The matter was then brought to my notice in April, 2011.

The above explains the delay in preparation and delivery of this judgment which is regretted.

The Plaintiff sought two main orders in his **originating summons dated 11th July, 1991:-**

1. A declaration that the Defendant holds land parcel number **Kiganjo/Gachika/533** (herein called the **suit land**) in trust for the Plaintiff **Mwangi Mbothu** and the heirs of **Njuguna Mbothu, Nahason Njuguna Mbothu, Gitata Mbothu, and Ngae Mbothu.**
2. An order that registration of the suit land in the name of the Defendant be cancelled and substituted with the names of Mwangi Mbothu and the heirs of Njuguna Mbothu, Nahason Njuguna Mbothu, Gitata Mbothu, and Ngae Mbothu.

The Plaintiff's case as set up in his affidavit sworn in support of the originating summons is as follows:-

1. That his father, Mbothu Njuguna, died in 1935 and was survived by 5 sons as follows:-

(i) Njuguna Mbothu

(ii) Nahashon Njuguna Mbothu

(iii) Ngae Mbothu

(iv) Gitata Mbothu

(v) Mwangi Mbothu (Plaintiff)

2. That the Plaintiff's grandfather, Njuguna, had bought land which was inherited by the Plaintiff's father Mbothu Njuguna. The said land was situated in Gachika sub-location, Kiganjo location of Thika District.

3. That during land demarcation in 1958 the Plaintiff and his brother Gitata Mbothu were in detention; that his other brother Ngae Mbothu was in Mathare Mental Hospital; that another brother Nahashon Njuguna Mbothu had died in 1943 leaving some children surviving him; and that his eldest brother Njuguna Mbothu travelled from the Rift valley where he was residing to Kiambu to oversee the demarcation exercise.

4. That upon demarcation the Plaintiff's father's land which amounted to 20 or so acres was consolidated into two parcels, namely the suit land (11.1 acres) and **L.R. Kiganjo/Gachika/534** (8.84 acres).

5. That Njuguna Mbothu who oversaw the demarcation exercise caused the suit land to be registered in his name as trustee for all the sons of Mbothu Njuguna.

6. That Njuguna Mbothu similarly caused parcel L.R. Kiganjo/Gachika/534 to be registered in the name of Gitata Mbothu as trustee for and on behalf of all the sons of Mbothu Njuguna.

7. That other than Ngae Mbothu who lived in a permanent house on the suit land and planted tea therein, the other sons did not live on that land or in L.R. Kiganjo/Gachika/534 but cultivated and developed their portions as agreed upon by the entire house of Mbothu Njuguna.

8. That after the Plaintiff was released from detention, he and Gitata Mbothu called a family meeting which was chaired by the eldest brother Njuguna Mbothu at which meeting Njuguna Mbothu stated that both pieces of land were held in trust for all the five sons by Njuguna Mbothu and Gitata Mbothu.

9. That at the time of filing suit the Plaintiff was the only surviving son of the five sons of Mbothu Njuguna.

10. That in 1981 a meeting chaired by the Chief of Kiganjo location was held, and both parcels of land, the suit land and L.R. Kiganjo/Gachika/534 were subdivided into equal portions to go to all the sons of Mbothu except for the house of Njuguna Mbothu which got one extra acre upon the premise that Njuguna Mbothu was the eldest son. Boundary plants called *mikungugu* were planted and that the boundaries existed at the time suit was filed.

11. That the Defendant is the wife of Njuguna Mbothu.

12. That without the knowledge of the Plaintiff or his living brothers she reported the death of her husband to the Public Trustee in 1990 who thereby became the administrator of the estate of Njuguna Mbothu.

13. That on 9th April, 1991 the Defendant was registered as proprietor of the suit land in trust only for her sons Joseph Ndung'u, Stephen Wainaina Njuguna and Johnson Gitata Njuguna, and title was issued to her.

14. That parcel the suit land did not belong to the house of Njuguna Mbothu alone but to all the five sons of Mbothu Njuguna.

15. That all the deceased members of the family of Mbothu Njuguna are buried in the suit land.

16. That the Defendant has applied to the Public Trustee to have the suit lands shared amongst her sons only, an action that will disinherit the other sons of Njuguna Mbothu and their families.

The Defendant opposed the originating summons as set out in grounds of opposition and replying affidavit filed on 27th September, 1991. The defence that emerges from those two documents is as follows:-

1. That Mbothu Njuguna had two wives, namely:-

(i) **Maiga Mbothu** who had **one son**, Johana Njuguna Mbothu, the Defendant's late husband. Johana Njuguna Mbothu had the following sons:-

- Joseph Njuguna Mbothu
- Stephen Wainaina Njuguna

- Michael Roman G. Njuguna
- Johnstone Gitata Njuguna

(ii) **Wangari Mbothu** who had **four sons**, Nahashon Njuguna Mbothu (deceased), Ngae Mbothu (deceased), Gitata Mbothu (deceased) and Mwangi Mbothu (Plaintiff).

(iii) That the sons of Johana Njuguna Mbothu named in (i) above are the beneficiaries of the suit land.

2. That Mbothu Njuguna had one whole parcel of land which upon land demarcation was split into two parcels and registered as follows:-

- (i) The suit land registered in the Defendant's husband's name (and later in the Defendant's name in trust for her and her sons).
 - (ii) L.R. Kiganjo/Gachika/534 registered in the name of Gitata Mbothu in trust for the house of Wangari Mbothu.
4. That all clan members had been involved in the adjudication process, and each family was given its share of land.
 5. That the Plaintiff was a beneficiary in the house of Wangari Mbothu in respect to L.R. Kiganjo/Gachika/534.
 6. That the Plaintiff and his brothers have no interest at all in the suit land.
 7. That whereas the Plaintiff was in detention in 1958, Gitata Mbothu was never in detention and during land demarcation Ngae Mbothu was not in mental hospital. He was present at the demarcation. Nahashon Njuguna Mbothu was dead. Njuguna Mbothu was living in the Rift Valley but had been called by clan members to represent Maiga's house and was present when the clan elders demarcated their father's land.
 8. That Ngae Mbothu is a trespasser in the suit land and built his house there by force, and the Defendant has demanded that he moves from the land.
 9. That there was no agreement of the entire family of Mbothu Njuguna regarding both parcels of land as alleged by the Plaintiff.
 10. That Hezekiah Gitata had been severally warned not to cultivate the suit land.
 11. That the Plaintiff was aware of the administration of the Defendant's husband's estate by the Public Trustee and did not raise any objection.
 12. That there is no trust of any kind attaching upon the suit land in favour of the Plaintiff and his brothers.
 13. That only Ngae Mbothu is buried in the suit land, and this happened only because he had illegally constructed a house thereon, and his brothers (including the Plaintiff) buried him there by force.

An agreed statement of issues dated 5th December, 1991 duly signed by advocates for both parties was filed on 11th February, 1992. It contains the following issues:-

- 1. Does the Defendant hold land parcel Kiganjo/Gachika/533 in trust for the Plaintiff Mwangi Mbothu and the heirs of Njuguna Mbothu, Nahashon Njuguna Mbothu, Gitata Mbothu and Ngae Mbothu?**
- 2. Should registration of land parcel Kiganjo/Gachika/533 be cancelled and rectified to read that the Defendant holds the land in trust for the Plaintiff and the heirs of Njuguna Mbothu, Nahashon Njuguna Mbothu, Gitata Mbothu and Ngae Mbothu?**
- 3. Who should bear the costs of this suit?**

As already pointed out, I did not myself hear this case. But I have read the testimonies of the witnesses as recorded by Hayanga, J (as he then was). I have also considered the written submissions filed on behalf of the parties, including the cases cited.

The Substituted Plaintiff, Stephen Njuguna Mwangi, a son of the original Plaintiff, testified as PW1. He

called 5 other witnesses as follows:-

- **PW2: MARTHA WANGARI WA NJUGUNA**, the daughter by an elder wife of Njuguna Mbothu, one of the five sons of the **family patriarch**, MBOTHU NJUGUNA.
- **PW3: MIRIAM WANGU NGAE**, the wife of Ngae Mbothu, another son of the family patriarch.
- **PW4: EX-SENIOR CHIEF FRANCIS KARIUKI NJIHIA**, a retired senior chief of Kiganjo Location, Thika District, where the suit land is situated.
- **PW5: MILKA WANJIKU GITATA**, wife of Gitata Mbothu, one of the five sons of the family patriarch.
- **PW6: KIMOTHO KURIA**, a non-family member.

The Defendant testified as DW1 and called other witnesses as follows:-

- **DW2: KARAGO KIMANDU**, a non-family member but one-time senior head-man of Gachika sub-location where the suit land was situated. He was also the vice-chairman of the local adjudication committee at the time of land demarcation.
- **DW3: JOSEPH NDUNG’U NJUGUNA**, a son of the Defendant with Njuguna Mbothu, one of the 5 sons of the family patriarch.
- **DW4: STEPHEN WAINAINA NJUGUNA**, another son of the Defendant and Njuguna Mbothu. He sat in court while all the witnesses, except DW3, testified. In this regard his testimony is tainted though it did not differ materially from the testimonies of the Defendant and her other witnesses. The testimonies of the substituted Plaintiff and his witnesses were in line with his case as stated in the affidavit sworn by the original Plaintiff in support of the originating summons. Similarly, the testimonies of the Defendant and her witnesses were in line either with her case as stated in her affidavit sworn in opposition to the originating summons.

But certain facts have emerged which are not in serious contention by the parties. These facts are as follows:-

1. MBOTHU NJUGUNA was the family patriarch who died in the 1930s or thereabouts.
2. The family patriarch’s first wife, MAIGA MBOTHU, had only one son, JOHANA NJUGUNA MBOTHU, the Defendant’s husband. This wife was abducted by raiders after the birth of that son, and she disappeared forever.
3. The family patriarch then married a second wife, WANGARI

MBOTHU, who bore him four other sons as follows:-

NAHASHON NJUGUNA MBOTHU (deceased)

NGAE MBOTHU (deceased)

GITATA MBOTHU (deceased)

MWANGI MBOOTHU (Plaintiff, since deceased)

4. The first son of the patriarch by his subsequently abducted wife, Johana Njuguna Mbothu, was brought up in the household of the second wife, Wangari Mbothu, as he was young when his mother disappeared.
5. Before land consolidation and registration the family patriarch owned one parcel of land in Gachika sub-location of Kiganjo location in Thika District.
6. At land demarcation the patriarch's land was split into two separate parcels of land, the suit land measuring 11.1 acres (registered in the name of the patriarch's son by his abducted first wife, Johana Njuguna Mbothu) and L.R. Kiganjo/Gachika/534 measuring 8.2 acres (registered in the name of Gitata Mbothu, one of the four sons of the second wife of the patriarch).
7. Apart from Ngae Mbothu who built a permanent house his father's land, none of the other sons of the patriarch lived on the land. They lived at various other places and all appeared to have done well by themselves in those other places and owned other properties. But they all, or some of them, cultivated portions of the land.
8. The patriarch's land, as already seen, was registered as two separate parcels of land, the suit land and L.R. Kiganjo/Gachika/534. The available evidence does not show in which parcel the permanent house of Ngae Mbothu is standing, or in which parcel the various other sons of the patriarch or their descendants cultivated.

The main issue in this suit, of course, is **whether Johana Njuguna Mbothu was registered proprietor of the suit land in trust for himself and the other four sons of the family patriarch.**

If this is so, then his successors in title, who are his widow (the Defendant) and his sons in whose names the land is now registered must similarly hold the land in trust for their family and the families of the other four sons of the family patriarch.

All the witnesses who testified (both for the Plaintiff and for the Defendant) were in agreement that in the old days a deceased Kikuyu man's land was, if he had more than one wife, shared between the households as represented by the wives. In this case it was also agreed that it did not matter how many sons each wife might have.

Each household would then divide its share of land equally among its sons, except that the eldest son might get a slightly larger portion.

All the witnesses were also in agreement that in the case where the deceased Kikuyu man had only one wife, his land was shared equally between his sons, except that the eldest son might similarly get a slightly larger share.

Kikuyu customary law was of course applicable at the time of registration of the family patriarch's land into the two parcels, the suit land and L.R. Kiganjo/Gachika/534.

Customary law is a matter of fact. The two or three points of Kikuyu customary law stated above regarding the devolvement of a deceased Kikuyu man's lands are not in dispute. They are also borne out by the authorities cited by both parties.

Did the family patriarch, Mbothu Njuguna, have one household or two households?

As already seen, he had two wives, Maiga (who was abducted and was lost to raiders after bearing him one son) and Wangari (whom he subsequently married and who bore him four more sons).

The Plaintiff's case is that because the first wife was abducted and disappeared for ever, apparently prompting the family patriarch to marry a second wife, and the fact that her young son was brought up by the second wife together with her own four sons, the patriarch must be deemed to have had only one house-hold.

The Defendant's case on the other hand is that the family patriarch had two households as represented by his two wives, and it matters not that the first wife was abducted and lost to raiders forever, or that her only son was brought up by the second wife in her own household.

The question that immediately comes to mind is this. If Mbothu Njuguna had only one household, why was his land, which was one piece, split into two at the time of registration? Surely it would have been more logical for it to be registered as the one piece it already was because there was only one wife and her five children to share it?

The Plaintiff's case is that the land was divided into and registered as two pieces because there were then only two sons available, one being already deceased, one in detention and the third one mentally incapacitated and in mental hospital. But I find that hard to believe. Could the two available sons not be jointly registered as proprietors of the one whole parcel in trust for the others? What was the impediment to this being done? I find none!

Mbothu Njuguna's one piece of land could only have been divided into two parcels which were registered separately because, as everyone concerned knew, he had two households as represented by his two wives. The fact that his first wife had been abducted and lost to raiders does not detract from this fact. That wife left him a son and some daughters who comprised that household. It matters not that this son was brought up by the second wife.

As already seen, it mattered not under Kikuyu customary law the number of sons each household might have.

In the case of Mbothu Njuguna, one parcel resulting from the splitting and registration of his land as two parcels, the suit land, was registered in the name of the only son of the first household. He was clearly registered as proprietor of that land for his own benefit and that of his children. I am not satisfied that he was so registered in trust for himself and his four step-brothers in equal or any shares.

Gitata Mbothu on the other hand was registered proprietor of L.R. Kiganjo/Gachika/534 in trust for himself and his three brothers in equal shares. Johana Njuguna Mbothu (and his sons) did not have any interest in this parcel, just as his four step-brothers and their sons did not have any interest in the suit land.

I also do not find any significance in the fact that the suit land is larger than L.R. Kiganjo/Gachika/534 by one or so acres. The suit land went to the senior household. It was not contrary to Kikuyu customary norms that the senior household would get a slightly larger portion of land; and as already seen, it matters not that the senior household had only one son when the second household had four sons. There are cultures in this world where all the land goes to the eldest son while the rest, no matter how many they may be, get no share of the land at all.

A lot was made by the Plaintiff about the fact that at some point the chief of the area, in apparent execution of a purported agreement of the entire family, purported to sub-divide the two parcels of land as one piece into five portions. The Defendant and her witnesses have disputed that there was such consensus and that the Plaintiff and his brothers' families were merely imposing their will.

There is a further practical problem. The two parcels of land were not, and have never been, consolidated into one. How could anyone purport to sub-divide them (as one) into five portions?

And if there was family consensus that the two parcels of land be subdivided (as one) into five portions, why have not any orders been sought in this suit in respect of L.R. Kiganjo/Gachika/534?

No trust was registered in the title of the suit land. A trust will not be implied except in the case of absolute necessity. I do not find such necessity in this case.

The first issue for determination is this suit was framed as follows by the parties:-

Does the Defendant hold land parcel L.R. Kiganjo/Gachika/533 in trust for the Plaintiff Mwangi Mbothu and the heirs of Njuguna Mbothu, Nahashon Njuguna Mbothu, Gitata Mbothu and Ngae Mbothu?

I find not for the reasons already given.

The second issue as framed is:

Should registration of land parcel L.R. Kiganjo/Gachika/533 be cancelled and rectified to read that the Defendant holds the land in trust for the Plaintiff and the heirs of Njuguna Mbothu, Nahashon Njuguna Mbothu, Gitata Mbothu and Ngae Mbothu?

I find not for the same reasons already given.

Having considered all the evidence before the court, I find that the Plaintiff has not proved his case on a balance of probabilities, and it must fail. The same is hereby dismissed.

Regarding costs, the same must follow the event unless for good reason to be recorded I order otherwise. I find no such good reason. The Defendant shall have costs of this suit.

Those shall be the orders of the court.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 15th DAY OF JULY, 2011.

H.P.G. WAWERU
JUDGE

