



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU Civil Case 85 of 1996**

**JOSPAT KARANI ..... PLAINTIFF**  
**VERSUS**  
**AGNES THIRINDI ..... DEFENDANT**

**JUDGMENT**

The plaintiff pleaded in his plaint that he is the registered owner of parcel number *Nkune/Uruku/1258*, (the suit property). He averred in his plaint that the defendant was in possession of that land and had refused to vacate despite demands from the plaintiff. He therefore prayed for an order for the defendant to give vacant possession and for a permanent injunction stopping her from trespassing on the suit property. The defendant denied the plaintiff's claim and pleaded that the registration of that property into the plaintiff's name was effected illegally and fraudulently between the plaintiff and the defendant's husband. The defendant further pleaded that the suit property was family land and the plaintiff had through fraud sought to defraud her family of that family land without their consent. The defendant counterclaimed for a declaration that the said land it is family trust land and could not be dealt with in any adverse way without consent of the family members. The defendant finally prayed for cancellation of the registration of the plaintiff as the owner of the suit property. In evidence, the plaintiff stated that he and the defendant's husband M'Kirigia M'Nchiru (M'Kirigia) entered into an agreement whereby they were to exchange their properties. That the plaintiff was to transfer his property *Nkuene/Nkumari/499* to M'Kirigia and in turn M'Kirigia was to transfer ½ an acre of his parcel number *Nkuene/uruku/1008*. This parcel number 1008 was eventually sub divided and the two portions that came out of that sub division were parcel number 1258 and 1259. In addition, it was provided in that agreement that the plaintiff would pay M'Kirigia Kshs. 10,000/=. This transaction took place in January 1993. On the suit property being transferred to the plaintiff, the other portion that came out of the subdivision that is, parcel number 1259,

was to be retained by M’Kirigia. In the end, he said that he carried out the transfer as per the agreement. The defendant who is the wife of M’Kirigia relocated from the suit property together with the rest of the members of the family. After relocating, the defendant reported the matter of the transfer of the suit property to the plaintiff, to the District Officer (D.O.). She informed the D.O. that she wanted the plaintiff to retransfer the land back to M’Kirigia. The basis upon which she sought the retransfer was that the land was family land. The plaintiff said that at that time the defendant uprooted his crops that he had planted on the suit property. He reported the matter to the police and the defendant was arrested and prosecuted for the offence. The plaintiff in evidence said that the transfer between him and M’Kirigia was not a secret and that part of the purchase money was used to pay school fees for the children. The plaintiff said that M’Kirigia following that transaction separated from the defendant and remarried and now resides in Timau. M’Kirigia gave evidence and confirmed that the defendant is the wife. He also confirmed that in January 1993 he and the plaintiff entered into the transaction narrated by the plaintiff. He applied for Land Board Consent where he went with the defendant and when the consent was granted, the defendant did not object. M’Kirigia was categorical that he could not have obtained consent from the Land Control Board in the absence of the defendant, his wife. He then stated:-

***“The defendant did not object to the transfer as we had discussed. The problem arose when she uprooted the plaintiff’s tea bushes. I cannot understand why she suddenly became hostile. Nkuene 1259 was left after transfer to the plaintiff of 1258. 1259 is occupied by the defendant. She planted tea bushes.”***

M’Kirigia said that when he sold the suit property to the plaintiff, he then purchased 3 acres at Timau and the defendant was welcome to join him there. He also purchased another parcel of land *Ntakira/1594* on which property the defendant now resides. He said that he was willing to surrender that parcel of land to the defendant. On being cross examined, he stated that parcel number 1008 was family land, that is, it was his father’s land. He also repeated that the defendant attended the Land Control Board when consent was obtained for the transaction between him and the plaintiff. He said that they attended the Land Control Board twice. The first time was when the subdivision was carried out. The second time was when the

transfer was made to the plaintiff of the suit property. On both those occasions, the defendant did not raise any objection. He further stated that although he had remarried and lives with his second wife in Timau, the defendant was also welcome to join him there. The defendant in evidence said that the plaintiff had taken their family land without her knowledge. She said that she regarded the land as family land because it belonged to M'Kirigia's father. She said that on the suit property, she had planted two thousand tea bushes, fruits, arrow roots, avocado trees and other trees. She further stated that M'Kirigia had left her with their 3 children and had remarried another wife but that the marriage between her and M'Kirigia had not been dissolved. She said that she resides in Magundu near Meru town. She denied that she attended the Land Control board with M'Kirigia. She prayed for the suit property to be transferred from the plaintiff's name into her name for her to hold the property in trust for the children.

The defendant relied in her submissions in the case of **Esther Nthira M'Ikiugu & Others Vs. M'Ikiugu M'Mwirichia & Ano**. Civil Case No. 44 of 2005. The facts of this case are almost similar to the ones pertaining to this case. The husband in this case carried out an exchange of land which the wife claimed was family land. The wife in evidence stated that the land which was given away in exchange was the only land the family had. She stated that it was clan land and in evidence carefully traced the history of that land. She stated that it had devolved to her husband from being family land. That was passed on to her husband's great grand father who in turn passed it on to the father of the husband and finally it was transferred to her husband. She gave evidence of the land being owned by three generations. In order to understand the decision reached by the Justice Ouko who decided this case, I will quote from that judgment as follows:-

*“Applying these principles to the matter before me, I come to the conclusion that although the suit property was registered in the name of the 1<sup>st</sup> defendant under the Registered Land Act, the land being ancestral land and the plaintiffs being family members of the 1<sup>st</sup> defendant who have been in occupation and actual possession for over thirty (30) years, the 1<sup>st</sup> defendant held the suit property in trust.*

The following lines from **Makangu V. Mbui** case are apt:-

**“.....the land registered in the name of Mbui was ancestral land that devolved to him on the death of his father. It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations..... Gerald in this case was in possession and occupation of the land with the consent and knowledge of Mbui since his birth in 1956. He has constructed a five-roomed permanent house and has planted coffee in the suit land.”**

**“It was incumbent upon the 1<sup>st</sup> defendant in view of his fiduciary relationship with the plaintiffs that he sought their concurrence before committing to exchange the suit property with the Timau land”**

Justice Ouko made a finding that the land in that case was family land and that the husband held the property in trust for the family. In his decision he cancelled the transfer that had been carried out between the husband and the purchaser on that basis. In my consideration of the evidence adduced before court in this present case, I find that this case can be distinguished from the above quoted case. In this present case, the defendant did not give a history of ownership as was in the case she relied on. She did not claim that the land was clan land. She also stated that she does not reside on the suit property. She cultivates both the suit property and parcel number 1259 which are bordering each other. Although the defendant alleged that the exchange done by the plaintiff and M’Kirigia was fraudulent in her counterclaim, but in evidence she did not give the particulars of such fraud. The defendant had the evidential burden to prove that the land was family land and to prove that the transfer was carried out fraudulently. She also had a burden to prove that M’Kirigia held that land in trust and that she did not consent to the transfer. In the book *Principles of Evidence second edition by Alan Taylor* the author in discussing evidential evidence stated:-

**“In truth, evidential ‘burden’ is something of a misnomer. Although it defines the need to adduce sufficient evidence for a particular issue to be made worthy of consideration by the tribunal of fact.....”**

The *Wikipedia Encyclopedia* defines evidential burden as follows:-

***“The burden of proof is often associated with the Latin *Maxim Semper necessitas probandi incumbit ei qui agit, the best translation of which seems to be: ‘the necessity of proof always lies with the person who lays charges.’****

Similarly, our Section 107 of the Evidence Act places the burden of proof on the person who alleges. In this case, the defendant had a burden to prove that the land was family land. It was not enough to state that the land came from M’Kirigia’s father. It may well be that M’Kirigia’s father purchased the land which then M’Kirigia inherited. What I find is that the defendant failed to show the existence of intergenerational trust. Having failed to do so, there was no impediment on the transfer of that property by M’Kirigia. A case in point is **Jacinta Wanjiku Kamau Vs. Isaac Kamau Mungai & Ano** Civil Appeal No. 59 of 2001. In this case, the appellant sued her husband the first respondent and the purchaser the second respondent in the high court seeking a declaration that the land sold by her husband to the second respondent was family land. When the High Court heard the matter, it dismissed the appellant’s claim. In dismissing the appellant claim the High Court had this to say:-

***“Until recently, it has never been the practice and certainly not a legal requirement that before the legal proprietor of a piece of land disposes of it he/she should consult any third party be it his/her husband or wife.”***

Being aggrieved with that decision, the appellant appealed to the Court of Appeal. In summarizing the case, the Court of Appeal stated thus:-

***“In a nutshell, it was the appellant’s case that the first respondent who was (and still is) her husband held the suit land in trust for herself and the children of their marriage and that he had no authority to sell any portion of it without consent from her and other members of the family. The first respondent on his part took the stand that as the registered proprietor of the suit land he had the right to subdivide it and sell any portion of it to any other willing buyer without necessarily seeking consent from his wife the appellant herein.”***

The Court of Appeal after quoting the finding of the High Court stated:-

***“That being the position, the first respondent was perfectly entitled to subdivide his land and sell it to any willing purchaser. The second respondent came in as a purchaser and the transaction was conducted in accordance with the law.”***

The Court of Appeal upheld the finding of the High Court. In this case, the plaintiff has proved that he is the registered owner of the suit property. Since the defendant failed to prove the existence of a trust, the plaintiff’s registration is unimpeachable. That is what Section 27 (a) of the Registered Act provides. That Section is in the following terms:-

***“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.”***

Accordingly I find that the plaintiff has on a balance of probability proved his claim and I enter judgment for the plaintiff as follows:-

1. ***I order the defendant to give the plaintiff vacant possession of parcel number Nkuene/Uruku/1258 forthwith.***
2. ***If the defendant fails to give vacant possession an order of eviction is hereby issued for the eviction of the plaintiff from parcel number Nkuene/Uruku/1258.***
3. ***An order is issued of permanent injunction restraining the defendant, her servants, agents or employees from trespassing on the plaintiff’s parcel number Nkuene/Uruku/1258.***
4. ***The defendant shall pay the plaintiff Kshs. 20,000/= being general damages for wrongfully occupying the plaintiff’s land.***
5. ***The defendant’s counterclaim is dismissed with costs to the plaintiff.***
6. ***The plaintiff is awarded the costs of his suit.***

Dated and delivered at Meru this 28<sup>th</sup> day of May 2010.

**MARY KASANGO**  
**JUDGE**