REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 204 of 2002

PETER MACHARIA WANUGU :: APPELLANT

VERSUS

NGANGA WANUGU & SIX OTHERS ::::::::::::::::::::::::::::RESPONDENTS

JUDGMENT

A perusal of the record reveals that there exists success cause No. 97 of 1981 in the District Magistrates Court at Kigumo. The applicant is indicated as the Land Registrar Muranga. The deceased was Isaac Kabui Karanja. There is a judgment on record dated 21st December 1983. At page 1 of the said judgment line 15 from the bottom the learned District Magistrate Mr. B.M. Kinithi, has this to say "*witnesses for both sides have indicated that the land in question was bought by the two sides. This land cannot therefore be shared by one side just because it was registered in the name of a son of one side.*"

Having come to the above conclusion I find that parcel loc 2/Kinyona/486 of 10.00 acres be shared equally by the following in the following manner:-

(1) Manasseh Karanja Kabaila 5.00 acres.

(2) Wanugu and his son Macharia Wanugu – 5.00 acres - Total 10.00 acres.

Certificate of succession to issue accordingly, 30 days R.A.I. B.N. Kanithi D.M. III 21st December l983"

From the records the history of parcel Fort Hall loc 2/Kinyona 486 is as follows.

Entry No.1 reads that one Manasseh Kahia Kabuy was registered as owner. On 30.8.72 a caution was registered in favour of one Isaac Gathuita Ngiabi of P.O. Box 243, Muranga claiming a purchaser's interest. On 23.10.72 there is a change to Isaac Gathuita Ngiabi on 8.6.74 the title moved to Isaac Kabui by way of gift. On 31.1.91 title moved to one Manasseh Karanja K. with an interest of 5.00 acres on the hand. On the other hand is one Paul Wanugu kabui and Peter Macharia Wanugu jointly owning 5.00 acres. On 9.5.91 the title deed was closed on partition giving rise to two parcel number 2170 & 2171.

The register for parcel number loc.2/Kinyona/2171 was opened on 5.3.91 and indicates that it is as a result of sub-division of parcel number 486. When the register was opened, it was opened in the joint names of Peter Macharia Wanugu and Paul Wanugu jointly. The title deed was issued on the same date. On 21.12.98 title passed to one Peter Macharia Wanugu. The title deed was issued the same date. It is

not indicated how the title changed from joint ownership.

The proceedings leading to this appeal was initiated on 20th May 1999. The proceedings were instituted as land dispute case No. 17th of February, 1999 in Maragwa Districts Land tribunal. The subject matter was land parcel number loc 2/Kinyona 2171= 5.00 acres. The plaintiff is indicated as Nganga Wanugu and the defendant is indicated as Peter Macharia Wanugu. The claim indicates that the Plaintiff Nganga Wanugu Kigo had filed that case on behalf of himself and on behalf of 6 other brothers named as:

(1) Johana Kanini Wanugu

(2) Manasseh Nganga Wanugu

(3) Julius Thuu Wanugu

(4) Kabui Wanugu and Phelis Nduta Kabui

(5) Bernard Mwangi Njoroge

(6) Peter Macharia Wanugu

The salient features of the dispute are:-

(a) All the Plaintiffs are beneficially entitled to the land in question by virtue of it being ancestral land.

(b) The land originally belonged to their grandfather called Kabui Thiongou who had two sons Wanugu Kabui their father and Manasseh Karanja.

(c) Their father and uncle had a succession dispute in Kigumo Magistrates Court whereby the said land previously loc.2/Kinyona/486 was subdivided into two with each getting 5 acres each following parcel No. loc.2/Kinyona 2170 and 2171, with Manasseh getting parcel number 2170 while their father got parcel number 2171.

(d) Their father had two wives namely Wairimu Wanugu and Mrs Wanjiru Wanugu.

(e) The Plaintiffs are all sons of Wairimu Wanugu while the defendant is son of Wanjiru Wanugu.

(f) After the death of their father, they demanded a share of this land when their half brother Peter Wanugu claimed to have spent more than 5.8 m which he claimed refunded before the Plaintiffs could get a share of the said land.

(g) It was contended by them that before that they were not aware of Peter's demands until they lodged their claim.

(h) The matter was taken to the area Chief and elders for Peter to explain how the issue of money arose as they all the seven brothers wanted the elders to share out the land among 7 persons.

The salient features of the defendant's case which defendant is the appellant herein are as follows:-

(a) The land had been a subject of succession proceedings in Kigumo District Magistrates Court which proceedings resulted in the land being subdivided equally between his late father and uncle with each getting 5.0 acres each.

(b) It was his evidence that his name was included in the title because he is the one who gave evidence in the succession proceedings firstly and also because he had hired an Advocate for the case as

his late father had no means to pay the advocate who was defending his late father in the succession proceedings.

(c) The case started in l981 and got finalized in l984. There was an appeal to Thika Resident Magistrates Court which was how ever rejected because it was time barred.

(d) He recalled having asked his brother Manasseh Nganga to help in meeting the cost of litigation but his request was turned down.

(e) That he was given the land by his late father although there was nothing in writing to that effect.

After due deliberations, the elders gave a verdict to the effect that "*The land in dispute land parcel No. loc.2/Kinyona/2171 which is at present moment is registered in the name of Peter Macharia Wanugu to be shared in the following manner:-*

(1) Ng'ang'a Wanugu to get – 0.7 acres

(2) Johana Kanini Wanugu to get – 0.7 acres

(3) Manasseh Ng'ang'a to get 0.7 Acres

(4) Julius Thuu Wanugu to get – 0.7 Acres

(5) Phelis Nduta Kabui to get 0.7 Acres

(6) Peter Macharia Wanugu to remain with 0.8 Acres

We have recommended Peter Macharia to remain with 0.1 acre more than others on the ground that he is the one who has been with the land for a long time since their father died. In November, l984 – up to date. Further more he had spent some money during the hearing of their father succession case as mentioned above while all his brothers were away when stating Peter Macharia had mentioned that he does not want the case any more and therefore demanded to be given a piece of land. In lieu of money he had produced while a companying his father at Kigumo Court. To avoid future causes the tribunal has asked Macharia Wanugu to execute this our recommendation as soon as possible. All interested parties including Peter himself to pay for chairing and surveying cost signed.

(1) Mathew Kiarii Kamau

(2) Justine Ngugi Gitau

(3) Eustus Wanyoike Mbuthia"

The current appellant became dissatisfied by that decision and he filed Nyeri Provincial Land Disputes Appeal Committee No. 84 of 2000.

The parties are indicated as Peter Macharia Wanugu, indicated appellant and Ng'ang'a Wanugu Kigo as respondent.

A total of 8 grounds of appeal was put forward and these are that the panel erred in law and in fact:

(1). In ordering the subdivision and transfer of the appellants land parcel no. loc.2/Kinyona/2171 since the tribunal has no jurisdiction in law to deal in a matter touching on or concerning the title to land.

(2). Section 3 of the Land Disputes Tribunal Act only allows the tribunal to deal with cases of trespass to land, land use and boundary disputes but not any issues concerning title of land.

(3). The said land was originally registered as parcel No. loc.2/Kinyona/486 but it was later subdivided into two portions i.e. loc.2/Kinyona/2171 and Kinyona/2170 (copies of abstracts annexed).

(4). The said parcel No. 486 was the subject of a Court succession case at Kigumo (D.M. Succession Case No. 97 of 1988).

(5). The said succession case gave me and my father the said land (see copies of the proceedings and judgment).

(6). The respondent did not object to the said succession case at all and he is now coming to claim the said land after 18 years.

(7). That I have already filed a civil case in Muranga Court to restrain the respondent and his kin from interfering with my said land (copy of the plaint attached).

(8). The decision of the Kigumo Land Disputes Tribunal should therefore be set aside"

The decision of the provincial appeals committee reveal that the appellant's complaint was that he was sick during the proceedings before the Maragwa District Land Tribunal. He had gone to Court for succession and that the elders did not follow the law. The respondents on the other hand indicated that they were satisfied with the ruling at Maragwa land Tribunal. The appeals Committee made observations to the effect that Peter Wanugu was never made the Administrator by the 6 others. That Peter could have done things without consulting his brothers. That he had not even consulted them when the land in dispute came under his name. The ruling made Read:

"*Rule*

We have upheld the ruling by Maragwa Land Tribunal that the land registered under Macharia be shared as:-

(1) *Ng'ang'a Wanugu to get - 0.7 Acre*

(2) *Johana Kanini Wanugu to get - 0.7 Acre*

(3) *Manasseh Ng'ang'a to get - 0.7 Acre*

(4) *Julius Thuo Wanugu to get - 0.7 Acre*

(5) *Peris Nduta Kabui to get - 0.7 Acre*

(6) *Peter Macharia Wanugu to get - 0.8 Acre*

(7) *Bernard Mwangi Njoroge to get - 0.7 Acre*

Total 5.0 Acres

The aggrieved is given 60 days to appeal in a Court of Law but on a point of Law. The Land office and Court executive officer are requested to facilitate transaction.

(1) *D.M. Murage*

(2) *J.K. Mugi*

(3) *K. Njihia*

Signed on 10th of April year 2001"

Armed with the decision from the provincial Appeals Committee vide a memo of appeal dated 7th day of May 2002 the appellant appealed to this Court. He put forward 6 grounds of appeal to the effect that the tribunal erred in law and in fact.

(1) In failing to recognize that the issues raised in the case were res judicata the same having been dealt with in D.M. succession Cause No. 97 of 1981.

(2) There is a substantial error and defect on record in that the tribunal failed to appreciate that the land Disputes tribunal had no jurisdiction to deal with the matters touching on or concerning title to land

(3) That the Tribunal Misdirected itself when it found that the appellant had agreed to share the disputed property when in fact he did not agree which misdirection caused the Tribunal to arrive at an erroneous award.

(4) That the Tribunal erred in law and in fact in finding that the Respondents were beneficially entitled to a share in the disputed property.

(5) That the Tribunal erred in law and in fact in treating the disputed property as if it was ancestral of property when it was not.

(6) The Tribunal erred in law and in fact in not finding that the Appellant held the disputed property directly entirely as a result of matters determined by the Court in DMS Succession Cause No. 97 of 1981.

In his oral submissions Counsel for the appellant stressed the following points.

(1) Both the District Lands Tribunal and the Provincial Appeals Committee had no jurisdiction to adjudicate over the matter as it dealt with rectification of title which is already registered in the name of the appellant.

(2) Even if the tribunal had jurisdiction the whole issue had been adjudicated upon in Kigumo District Magistrates Court Case No. 97 of l981 and a decision delivered on 21.12.83.

(3) The land adjudicated upon was loc.2/Kinyona/486 which was sub divided into two equal parts of 5 acres each with one portion going to Manasseh Karanja and the other half going to Wanugu Kabui and Macharia Wanugu who is the appellant herein.

(4) It is their stand that the issue of ownership had already been decided by the succession court and anybody with a complaint has to direct it to the succession Court.

(5) The issue having been adjudicated upon by the succession court in l981, the tribunal had no business revisiting it. On this account the Court was urged to allow the appeal.

In response the respondents made oral submissions.

(1) Ng'anga Wanugu Kigo stated that according to him the tribunal and the appeals committee had a mandate to rule on the issue because they are government institutions and they were now surprised to be told that these two institutions had no mandate to deal with the issue.

(2) They agree there were succession proceedings which were between their uncle, and father, who were shared the ancestral land, with each getting 5 acres, each but it is not known how their brother the appellant got registered jointly with their father and when their late father died they did no succession processes for the land to be registered solely in the name of the appellant.

(3) It is the sole registration of their land in the name of the appellant which made them take the matter to the elders for them to be explained how the appellant came to have the land registered solely in his name.

(4) That when asked before the elders the appellant stated that it was because of the expenses he incurred in hiring a lawyer for the succession case and he could only share the land to his brothers if they agreed to refund the expenses incurred by him in the court cases.

(5) That he was asked to produce the receipts showing the amount required which amount the respondents were willing to refund but the appellant failed to produce the same.

(6) That on failing to produce the same, is when the elders decided to give him a portion bigger than the rest as compensation for the expenses incurred during the succession proceedings.

(7) It is their stand that the appellant is taking them round in circles just to deny them their rightful share of their ancestral land since he is the only one who uses it.

(8) They also contend that the appeal had been dismissed and they do not understand why or how it came to be reinstated once again.

Johanna Kanini Wanugu urged the appellete court to end the dispute and let each person access his portion for use as it is the appellant who is using the entire land to the detriment of others.

Manasseh Ng'ang'a reiterated that the land is ancestral land, that they did not all attend the succession proceedings because they trusted their brother Macharia to process every thing on their behalf and are now surprised that he is claiming to be the sole owner. To him the sole reason for going to the elders was because the appellant had refused to give them their rightful share of ancestral land. They stand by the decision of the elders both at the District level and the appeals committee level. It is their stand that Peter Macharia did not buy the land and he simply joined himself in the title jointly with their father so that the land could become his. They also contend that the land was irregularly registered in his name as he did not do any succession proceedings. They maintain appellant is doing them disservice because they are supposed to use that land and on that account we ask the court to grant them use of the said land.

Benard Mwangi on the other hand urged the Court to pay much attention to the award both in Maragwa and the appellate committee at Nyeri. In both proceedings he was asked on how he managed to acquire the land but he failed to explain. He alleged he spent money on the succession proceedings being a proceeds from a loan he had acquired and when he was asked to produce documents to prove he failed to do so. On failing to prove the money for the expenditure is when he asked the elders to enhance his portion as compensation which was acceded to and that is why his portion was enhanced and he now has a bigger share than the rest of them. He joins the others in appealing to this court to peruse the record of the tribunal and the appellate committee and then confirm that they are speaking the truth and give them their share of the land so that they can also start using the same.

On case law Counsel for the appellant referred the court to a decision in the case of **MBOGO MWATHI VERSUS JOHN CHEGE MBOGO, NAIROBI HCCCA NO. 531 OF 2000.** The scenario in this case seems to be similar to that prevailing in this appeal. It is gathered from the facts on record in the cited case that one John Chege Mbogo filed a statement of claim at Gatanga Divisional Land Disputes Tribunal as case No.2 of 2000 over parcel numbers l0c.16/Kimandi – Wanyaga/82, 79 and 23/registered in the names of Mbogo Mwathi, the appellant and two others namely Mwathi and Gichihi Mwathi who were also the defendants in the Tribunals case.

It is noted at page 2 of the said judgment at line 6 from the top that the elder's award read "*John Chege Mbogo to be given 10 acres out of land parcel loc.16/Kimandi Wanyaga/231 the property of Mbogo Mwathi. The cost of the transaction to be met by John Chege Mbogo*".

It is further noted that Mbogo Mwathi who apparently was the owner of the parcel of land Loc.16/Kimandi/Wanyaga/231, was not satisfied with that decision and he appealed to the provincial land Disputes Appeals Committee through his son Daniel Kamau Mbogo through a power of Attorney sworn on 12th July 2000. In the process of hearing the appeal one Lucy Wanjiru was introduced as a second appellant and yet she had not been a party to the case at the Divisional Land Disputes Tribunal nor was

she called as a witness to make her claim there. It was not known under what provision of the law the said Lucy was joined to the proceedings.

At page 3 of the judgment line 1 from the top the learned trial judge noted that although the claim in the land Disputes Tribunal was between the claimant John Chege Mbogo, Mbogo Mwathi, Gachuki Mwathi and Mwathi Mbogo, the appeal turned out to be between Mbogo Mureithi and Gachuhi Mwathi instead of it being between Mbogo Mwathi and John Chege Mbogo who had worn the case at the Divisional Land Disputes Tribunal. It is further noted on the same page that the provincial land Disputes Committee heard the parties on 30th August, 2000. Those who gave statements were Daniel Kamau Mbogo and Geoffrey Gachuhi. The beneficiary of the award before the land Disputes Tribunal namely John Chege did not testify.

The observations of the provincial land Appeals Committee as at page 3 of the judgment line 7 from the bottom. It reads "*From the evidence adduced by the parties it is true that Mbogo Mwathi was given extra land so that when John Chege grows up he could share some land to him. The clan also in their meeting of 25th March 2000 was of the opinion that Mbogo Mwathi should share 10 acres to Chege but then the acreage in the official document is less than 50 acres as alleged by the clan*".

The award and the order from the provincial appeals committee are found at page 4 of the judgment line 2 from the top and 10 respectively. These read "*In the circumstances, the provincial land Disputes Appeals tribunal has set aside the award of Gatanga Land Disputes Tribunal, Land Title no Loc.16/Kimandi/Wanyaga/81 of 4 acres of Mbogo Mwathi should be cancelled and the same transferred to John Chege Mbogo within 60 days from the date of this verdict. John Chege to meet the costs of the transaction. The executive officer of Thika Principal Magistrates Court to sign the documents to cause the transfer and issuance of the necessary certificates. The Aggrieved party to appeal in the high court on a point of law within 60 days*". It is further noted by the learned Judge that it was not known how land parcel number loc.16/Kimandi/Wanyaga/81 was dragged into the Appeals Committee proceedings when the dispute in the Tribunal was on loc.16/Kimandi/Wanyaga/79,82 and 231 and the decision of the tribunal was that John Chege was given 10 acres out of land parcel number loc.16/Kimandi/Wanyanga/231 and not 81. It was further noted that there had been no application either at the land Disputes Tribunals level or the appeals land Disputes Committee to award the subject matter of the proceedings.

At page 5 of the judgment line one the learned judge set out the mandate of the land disputes tribunal as per the provisions of the land Disputes Tribunal Act No.18 of 1990 thus "*Section 3(1) of the land Disputes Tribunal Act No.18 of 1990 gives jurisdiction to land Disputes Tribunals in all cases of a civil nature involving disputes to:-*

(a). *The decision of or the determination of boundaries to land including land held in common.*

(b). *A claim to occupy or work land.*

(c). *Trespass to land*"

At page 6 of the said judgment at line 2 from the bottom the learned judge quoting **OBIERO VERSUS OPIYO AND OTHERS (1972) E.A.277** observed that this Court ruled that registered parcel of land cannot be subject to customary law rights since these are extinguished on registration and that if the legislature intended that rights of a registered proprietor were to be subject to rights of any other person under customary law, nothing could have been easier than it to say so. In **ESIROYO VERSUS ESIROYO AND ANOTHER (1972) E.A 338.**

At page 7 of the judgment line 9 from the bottom the learned judge ruled "*But the tribunal had no power to adjudicate over the issue of title to land since the jurisdiction is vested in the High Court and/or the Resident Magistrates Court depending on the pecuniary value of the subject matter – See Section 159 of the Registered Land Act*".

Carrying out the orders of Gatanga Land Disputes Tribunal and that of the Provincial Land Disputes Appeals Committee would result in the rectification of the register which would go against the spirit of Section 143 of the registered land Act when conditions set in that Section for such an order to be made were not shown to exist in this case.

The dispute to the Gatanga Divisional Land Disputes Tribunal was not over boundary or trespass but over a portion of the above mentioned lands registered in the names of Gachuhi Mwathi, Mbogo Mwathi and Mwathi Mbogo in l961.

These proceedings in the tribunal were instituted in the year 2000 well over 39 years later, which to me offends the provisions of Section 7 of the Limitation of Actions Act Cap.22 laws of Kenya.

In the case subject to this appeal, the elders both at the Divisional and appellate levels awarded the claimant John Chege either 10 or 4 acres from either rloc.16/Kimandi-Wanyaga/231 or loc.16/Kimandi – Wanyaga/81 under the pretext that Mbogo Mwathi held those portions in trust for the said John Chege, but here to the land Disputes Act 18 of l990 does not vest jurisdiction in them to adjudicate over disputes relating to trusts.

On the basis of the foregoing learned Judge allowed the appeal.

On the Courts assessment of the facts of this appeal in the light of representations made by both sides and case law the court makes findings that indeed the history of the dispute stretches back to the succession proceedings in the Kigumo District Magistrates Court succession case No.97 of l981. The salient features of the proceedings and the judgment are already set out else where in this judgment. The evidence captured in the judgment is that the son of Wanugu kabui who is the appellant Macharia Wanugu testified that "*Wanugu Kabui during land demarcation collected the fragments of the land in question and registered in the name of the deceased plus other lands in the names of other members of the applicant in view that they may share them later when they come from Rift Valley*". Further in the same judgment the Court made a finding that the land in question was bought by Manasseh Karanja Kahia and Wanugu Kabui" The Court went on to state that it did not agree that either of the two bought the land individually and further that witnesses on both sides had indicated that the land in question was purchased by the two of them. On the basis of that finding the land was ordered to be shared between the two Manasseh Karanja Kahia to get 5.00 acres and Wanugu Kabui and his son Macharia Wanugu to get 5 acres.

Counsel for the appellant has submitted that on the basis of that finding the issue of ownership of that land was settled. Indeed ownership was settled in so far as the sharing of the land into two was concerned. But ownership of the land given to Wanugu Kabui and his son Macharia Wanugu was not settled by that succession proceedings Res Judicata is defined in Section 7 of the Civil Procedure Act. It states "*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between parties under whom they or any them claims, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court*". As noted earlier on, the issue in succession case number 97/1981 in Kigumo concerned the father of the disputants and his brother their uncle. It did not concern the claims of the disputants to a share of land given to their late father and the appellant. On that account it is the finding of this court that the issue is not Res judicata.

As for it being settled in so far as the ownership of the appellant is concerned, it is clear that him appellant having not claimed to have been a joint purchaser with his father, it means that he can only claim ownership thro ugh beneficial ownership. This is borne out by the fact that the Court simply ruled that Wanugu Kabui was to be registered jointly with his son Macharia Wanugu. There is no mention that these were to be the only owners of the said suit property. Having not been shown to be a contributor to the purchase price, he appellant cannot claim sole ownership of the suit land to the exclusion of the rest of his brothers. This is borne out more particularly in a statement before the District land disputes tribunal, where the appellant did not claim to have contributed to the purchase price of the suit land. He stated

truthfully that the purchasers were his late father and uncle and that each was to get 5 acres. He added that his name was included because he was the one who was always with the father and he is the one who gave evidence in Court. He dos not say that the inclusion of the name perse entitled him to share out the entire land to the exclusion of his brothers. His complaint was that his brothers did not contribute towards legal fees although they were aware of the proceedings. Of relevance is the statement at page 3 of the proceedings line 2 from the bottom which reads "*I was given this land by our father before his death. He mentioned this to me although he had not written any record in connection with the matter. His statement is proof that the appellant recognizes the fact that this claim in respect of the said land does not arise as of right from the succession proceedings. His attempt to exclude his brothers stems from the mention that his late father had mentioned to him appellant that he would give him the land but did not make it public. This assertion alone does not entitle the appellant to exclude the brothers from their late father's estate. It is also on record that the title now has only one name. The appellant did not explain the process he took after the late father's death to remove his late fathers name from the title deed and leave his own. It is clear that he did not assert sole ownership of the said land.*

Before the Appeals Committee the Appellant simply mentioned that the elders did not follow the law and that he had gone to the succession Court. There is no mention that he ever took out succession proceedings to change the title from the joint ownership to single ownership.

The foregoing assessment reveals that:-

(i) Land parcel number loc.2/Kinyona/486 was adjudged to have been purchased jointly by one Wanugu Kabui the appellant's late father and his brother Manasseh Karanja.

(ii) The said parcel of land was shared into two equal portions with each side getting 5 acres each.

(iii) The share that went to Wanugu Kambui the late father of the appellant was ordered to be registered in the joint names of Wanugu Kabui and Macharia Wanugu. Macharia Wanugu is the appellant herein.

(iv) The appellant Macharia Wanugu gave evidence in the succession proceedings but at no time did he claim to have been a joint purchaser of the said suit property. The presumption therefore is that his joint registration with the late father was not based on account of him appellant having contributed to the purchase price as this was not given as a reason.

(v) The appellant having been registered as a joint owner on account of his late father cannot assert exclusive rights to the said parcel of land.

(vi) This is confirmed by the fact that when he gave his evidence before the District land Disputes Tribunal he never asserted that he was a joint purchaser. All the appellant said was that he had incurred litigation costs to the exclusion of his brothers, in respect of which the elders compensated him with a bigger portion of land.

(vii) Before the provincial Appeals Committee is where he alleged that the late father had given him the land but it was not put in writing. This is same sort of oral will. This should have been tested during the succession proceedings in respect of his late father. In the absence of that determination the appellant cannot claim sole ownership of the said property. Neither can he claim refugee under the doctrine of Rejudicata. Since a claim of sole proprietorship in favour of the appellant having been ruled out, this creates an avenue for the other brothers to claim a share of the said land. They are entitled to refer to it as ancestral land as the sole means of acquiring it is traceable to their late father Wanugu Kabui. Further the appellant has not stated that they are not his brothers and are not entitled to the father's property.

Having ruled as above the next question to be asked and answered by this court is a determination as to whether the Respondents followed the correct procedure in trying to get the rightful share of the suit land. It's on record that the claim was initiated before the District Land Disputes Tribunal. The mandate

of the land Disputes tribunal has been set out in the cited case of MBOGO MWATHI VERSUS JOHN CHEGE MBOGO (SUPRA) at page 5 of the judgment. These includes:-

(a) The division of, or the determination of boundaries to land including land held in common.

(b) A claim to occupy or work on land.

(c) Trespass to land

These exclude situations were the land is to be subdivided amongst beneficiaries arising from inheritance claims. As noted by the learned Judge in the cited case, it also excludes claims arising from trusts. By laying a claim to the land registered solely in the name of the appellant on account of it having been their late fathers land is in effect a claim based on trust. All that the Respondents seem to be saying is that the appellant holds the said land in trust for himself and them in terms of the proportion that the elders shared it to them.

The land being registered under the RLA it is subject to the provisions of that Act (Cap.300 Laws of Kenya) relating to trusts. Section 28 of the said Act provides "*The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever, but subject –*

(a) *to leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register and,*

(b) *unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee"*

This provisions was construed and or interpreted by Contran J. in the High Court at Kisumu in the case of **LIMULI VERSUS MARCO SABAYI [1979] KLR 251**. The brief facts were that the respondent Marko Sabayi is the uncle of the applicant, Edward and is the registered proprietor of parcel No. Butsotso/Ngotse/298 (the area was 20 acres). It is not in dispute that this was a first registration which therefore cannot be rectified or cancelled by the court pursuant to section 143 of the registered land Act. However by his originating summons Edward did not seek rectification but a declaration that Marko holds part of plot 298 on trust for him and an order that Mark transfer to him half of the plot.

The history of the matter was that Edwards' father, Samuel was the older half –brother of Marko the respondent. When Samuel died in 1947, he left 2 young sons Edward and an older brother (Isaak). Their mother died shortly after their father and according to them was buried in the plot now known as 298. Marko also lived on what is now known as plot 298. According to Edward and Isaak, plot 298 was family land which their father (Samuel) and their uncle Marko had inherited from their father. They also claimed that their father Samuel had a smaller plot nearby which he had bought himself personally. It was not disputed that at the time of land adjudication and registration both Edward and Isaak were minors and both the larger family plot 298 acres and the smaller plot now known as plot 217 measuring 4.5 acres were registered in the name of Marko on 7th October l968. When Edward and Isaak achieved majority they naturally went to Marko and demanded what they regarded as their land. Marko agreed to give Isaak plot 217 by way of gift and registered in his favour on 21st July l976. Edward then demanded half of plot 298 to which more agreed and they signed an agreement, filed mutation forms and obtained consent, land physically subdivided into two but Marko refused to sign the transfer forms.

It was held inter alia that " *There is nothing, in the registered land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration and there is nothing to prevent giving effect to such a trust by requiring the trustees to execute the transfer documents"*

Section 143 of the registered land Act provides:

“43(1) *Subject to subjection*

(2). The court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration other than a first registration has been obtained made, or omitted by fraud or mistake

(1) The register shall not be rectified so as to affect the title of proprietor who is in possession and acquired the land lease or charge for valuable consideration unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default”.

Applying the above case law and provisions of Section 28 and 143 of the registered land Act Cap.300 Laws of Kenya it is clear that in the absence of proof that the appellant contributed to the purchase of land parcel number loc.2/Kinyora/486 leaving that role to the exclusion of his late father and uncle, the resultant half share to the sole benefit of his late father jointly registered in the joint names of his late father and himself became family property. Since the mode of joint holding was not specified, it mean that the two were so registered for the benefits of themselves and the other brothers of the appellant. It also follows that when the late father died and the appellant became the sole proprietor of the said land in un explained circumstances to the exclusion of the brothers who are respondents, it means that the said appellant became a registered proprietor under the provision of Section 28 of the registered land Act as a trustee for himself and his brothers the respondents. It matters not that the title does not read trust.

The courts appraisal of the entire proceedings right from the District Lands Tribunal all through the provincial appeals committee up to the current proceedings in the High Court by way of appeal reveals that all that the respondents wanted from the appellant was to get their rightful share of their inheritance from their late father. As at the time they moved to the court the land was already registered and therefore subject to the provisions of the registered land Act. Being so registered, the land falls outside the provision of the land tribunals Act No.18 of l990 and becomes subject to the provisions of Section 28 and 143 of the registered Act. By seeking to get a share of their late fathers land the respondents were in essence seeking a rectification of the register. The power to do so is vested in the Courts subject to the monetary value of the land which determines whether the relief is to be sought from the subordinate court or the High Courts since the claim is one based on trust then, the same would be by way of a declaration for the trust to be brought to an end to pave the way for individual titles to be issued to each of the claimants inclusive of the appellant, a role the tribunal has no jurisdiction to play.

For the reasons given in the foregoing assessment this court is inclined to allow the appeal and set aside the order of the Nyeri Provincial appeals Committee confirming the decision of the Maragwa Land Disputes Tribunal on the following terms.

(1). Kigumo Court succession proceedings vide succession case No.97/l981 settled the succession issues between the late father of the disputants herein Wanugu Kabui and his late brother Manasseh Karanja. As such issues as relates to the claims of the sons of Wanugu Kabui is so far as ownership of the said parcel of land is concerned were not adjudicated and determined in those proceedings and so the issue of res judicata does not apply to shield the appellant from lawful claims lodged by his brothers in respect of the suit land.

(2). Indeed the appellant is now the current sole registered proprietor of land parcel number loc.2/Kinyona/2171 in circumstances which he has not explained clearly in all the three proceedings inclusive of those of the appeal. In the absence of such an explanation the appellant cannot be heard or be justified to resist the lawful and rightful claims of his brothers the respondents.

(3). In the absence of proof of a right based on contribution of the purchase price and in the absence of proper succession proceedings vesting him with sole proprietorship to the exclusion of his brothers the respondents, the appellant holds the said land subject to the provisions of Section28 of the registered land

Act. He thus holds the said title in trust for himself and his brothers, the respondents.

(4). Being thus ruled to be held on trust, it follows that the respondents were entitled to initiate proceedings to get a share of the same.

(5). The initiation of the said proceedings before the Maragwa Land Disputes tribunal was void abinito as the tribunal had no jurisdiction to entertain the claim over the registered land.

(6). The proceedings having been void abinitio right from the time of the inception at the tribunal's stage, they became tainted with in validity, which invalidity goes to affect the appeal proceedings before the Nyeri appeals committee.

(7). No 5 and 6 above being the case, it follows that the only correct procedure by which the respondents could get their rightful share is by may of them moving the court by way of a declaratory suit seeking to terminate the appellants trusteeship of land parcel number loc.2 Kianyona/2171, have the same, subdivided and new titles be issued in the names of the appellant and the respondents.

(8). Since the respondents have a genuine and justified claims to pursue and which claim has only been faulted because they took it to a wrong forum, and since the appellant is the one who necessitated the initiation of the said proceedings by registering himself as sole proprietor of the suit family property to the exclusion of his brothers, the respondents who are rightful and lawful claimants without following proper succession proceedings, the court finds it fit to order that this is a proper case for ordering that each party do bear its own costs of the proceedings at all the three forums the matter has been handled.

DATED, READ AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2008.

R.M. NAMBUYE

JUDGE