



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

Civil Appeal 12 of 2004

JOHN WAMBUGU KIHARA.....APPELLANT

VERSUS

ESTHER NJERI KIRAGU.....1ST RESPONDENT

ZAKAYO KIARIE KIRAGU.....2ND RESPONDENT

GEOFFREY WANJOHI KIRAGU.....3RD RESPONDENT

JUDGMENT

The appeal arises out of Judgment of the lower court Hon. Nditika Senior Resident Magistrate in the **SRM's Court Civil Suit No. 53 of 2003 at Wanguru.** The Appellant was the plaintiff in the lower court where he was claiming of Respondent from Rice Holding No.3200 and a permanent injunction from interfering with the said Rice Holding 3200.

After a full trial the learned Trial Magistrate dismissed the appellant's suit with costs. The appellant has filed 10 grounds of appeal:-

Firstly it is to be noted that his land being a rice holding is under the management of the Irrigation Board under the Irrigation Act. It is the board which grants licences to tenants to work and grow the rice on the rice holding. It appears that the original licences on her death nominated the Appellant to succeed her as a licensee holder of the Rice Holding. The Respondent says that the Appellant was holding the Rice Holding in trust for all the Respondents who claim right under the original licence their deceased mother.

Therefore looking at the grounds of appeal as amended, the Trial Magistrate leaned on Kikuyu Customary Law and found that what the Respondents said was credible. The deceased mother could not have intended to throw the other members of the family out of land. There is no reason why she should have preferred to benefit the Appellant alone out of her other relatives. Therefore it was correct for the Trial Magistrate to find that the Appellant held the land (rice holding) for himself and in trust for the other members of the family. From the uncontroverted evidence the Appellant does not utilize the land but lets it out to other people.

On ground 2 A the Trial Magistrate exercised his discretion by setting aside the exparte Judgment no appeal was preferred. At this stage this court cannot interfere with that order.

On ground 3 thereof the issue was not the production of licence. The Respondents accepted that he

was nominated as successor but that he was holding as trustee for them.

Regarding ground 4 A and 4B and 5A the Trial Magistrate held that the Appellant did not hold the land absolutely since the land was under Irrigation and therefore customary rights of defendant were to be protected. The record does not show that the issues of rotavating expenses were raised either in the plaint or in evidence by the plaintiff therefore ground 6 is without merit.

On ground 7 and 8 the Appellant obtained land through his mother who nominated him to succeed her as tenant after her death. This was family land from the mother's side. There was no contrary evidence that the mother was not the original licensee.

After considering all the above, it is my finding that the Trial Magistrate correctly applied the law and the Judgment is based on sound evidence.

I find the appeal with no merit and the same is dismissed. No order as to costs, the parties being members of the same family.

Dated this 11th of February, 2008.

J. N. KHAMINWA

JUDGE

11/2/2008

Khaminwa – Judge

Njue – Clerk

Mr. Utuku HB for Kagio

Respondent in person.

Read in open court.

J. N. KHAMINWA

JUDGE