

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 243 of 1991

ROBERT MURIUKI MUGO 1ST PLAINTIFF

GEOFFREY WANJOHI MUGO 2ND PLAINTIFF

VERSUS

MOSES MBUGI GICHU DEFENDANT

JUDGMENT

The Plaintiff initially filed the Plaint on 19th November 1991. Subsequently the plaintiff filed an amended plaintiff which was filed on 2nd June 1992. I have looked through the record of this file and more particularly the proceedings and I have not been able to confirm whether the plaintiff was granted leave to file that amended plaintiff. I will however give the plaintiff the benefit of doubt because it does seem that there are some pages of the proceedings missing.

The plaintiff's claim according to that amended plaintiff is that the defendant during the period of demarcation illegally caused title *Magutu/Gathehu/112* to be registered in his name thereby denying the plaintiffs their entitlements through their late father. The plaintiffs therefore prayed for a declaration that the defendant holds that property in trust for them. They further prayed that the court will direct the defendant to transfer half of that land to them.

The 1st plaintiff in evidence before court stated that the defendant was involved in the consolidation of the family property in 1958. He carried out the consolidation by collecting different portions of land and consolidating the same into what is now the suit property. He sub-divided the suit property which resulted in parcel number *Magutu/Gathehu/111* and *Magutu/Gathehu/112*. Parcel Number *Magutu/Gathehu/112* is registered in the defendant's name. Parcel number *Magutu/Gathehu/111* was in the 1st plaintiff's name. 1st plaintiff stated that the whole portion of land originally was 9.75 acres. That the defendant got 3.75 acres whilst 3 acres were registered in the 1st plaintiff's name. The 1st plaintiff said that the property was purchased by his deceased father. His deceased father had bought that land together with the defendant for Kshs.1004/=. At the time when the defendant consolidated the property 1st plaintiff said that he was 13 years old. In carrying out that consolidation the defendant allocated to himself 3.75 acres which 0.75 acres should have been in the 1st plaintiff's title. The 1st plaintiff in 1963 and again in 1990 did request the defendant to return to him 0.75 acres. The defendant agreed but never did so. Hence the plaintiff filed the present case. The plaintiff stated that property *Magutu/Gathehu/111*

he sub-divided it equally between himself and his brother. On being cross examined he accepted that during the subsistence of this case he and another person called Mwai made an offer to the defendant to purchase parcel number *Magutu/Gathehu/112* from him for the price of Kshs.200,000/-. An agreement was drafted to that effect and he accepted that he signed the same. He also deposited Kshs.200,000 with the advocate representing the defendant. He however stated that the purchase was only in respect of 3 acres. That 0.75 acres was to be returned to him without payment.

PW 2 was the mother of both the plaintiffs. She stated that her husband died during the “MauMau” War. They got married during the Second World War. The land that she was cultivating when she got married is the same land that is on presently which is the subject of this suit. She said that during the “MauMau” War she had been detained and was therefore not there when the consolidation took place. On her being released she was shown her piece of land which was registered in the 1st Plaintiff’s name but she was of the view that the size was not compatible with her previous piece of land. She said that the difference was that the one given to her after the “MauMau” War was less by half an acre. That half acre is what is before court as the plaintiff’s claim against the defendant. On being cross examined particularly on being asked whether or not the land she and her sons reside on was not the father in law’s land she refuted that suggestion and further stated that the step brothers of her deceased husband sub-divided that land amongst themselves. On being re-examined by her advocate in what turned to be an about turn to her evidence she said that she questioned the defendant about the manner in which he consolidated the land.

The defendant in his defence said that his late father was called Gichu Mugo. Before demarcation his father had 9.5 acres. That he assisted his father in the undertaking of the consolidation and demarcation. This was because his father was not strong to do the exercise. However he said that it was his father who decided what portion of land each son was to get. That his father gave him 3.5 acres of that original land. That land he was to share with his two brothers namely; Simon Murage Gichu and Paul Mugare Gichu. That this case was instituted before he sub-divided the land as directed by his deceased father. His deceased father also gave 3 acres to the 1st plaintiff. That the 1st plaintiff was a son to his brother called Mugo Gichu. The 1st plaintiff was given that land to share the same with his brother the 2nd plaintiff herein. The remainder of 3 acres being parcel number *Magutu/Gathehu/140* was registered in his deceased father’s name. Later his deceased father gave that parcel of land to Joseph Kanyuira Gichu and Samuel Mugo Gichu. Those two are brothers to the defendant. Later after filing the present case the plaintiff sent someone called Christopher Mwai to the defendant to indicate that the plaintiff was willing to buy the defendant’s land for Kshs.200,000/-. Since this case was in court the defendant requested that such discussions be with the aid of their advocates. Consequently, a sale agreement was drafted which the plaintiff and Mwai executed. They also paid the money to the defendant’s advocate. When the transaction did not go through the money was refunded to the plaintiff.

DW 2 was a brother to the defendant. He confirmed that their late father sub-divided their land into three portions and in that regard reiterated the evidence of DW 1. That the parcel number *Magutu/Gathehu/111* was registered in the 1st plaintiff’s name because his father was deceased when the registration took place. In respect of the parcel number *Magutu/Gathehu/112* that the defendant was supposed to divide the same to him and his other brother. That although that sub-division has not taken place on the ground each person knows their portion. He also confirmed that their deceased father’s parcel number *Magutu/Gathehu/140* was to be divided between two of his brothers. He denied the plaintiff’s claim and stated that when the consolidation took place the plaintiff was a small child and their mother was still alive.

DW 3 was a brother to the defendant. He reiterated the defence case and stated that parcel No. *Magutu/Gathehu/112* was to also be divided to him. He confirmed that on the ground that each party does know their portion.

DW 4 was Joseph Kinyuira Gichu. He said that the defendant is his older brother. The plaintiffs are also children of his deceased elder brother. He confirmed that parcel No. *Magutu/Gathehu/140* was given

to him and Samuel Mugo Gichu by their late father. In respect of the case before court he was of the view that the plaintiffs should have asked his deceased father about the acreage of the disputed land.

As I begin to consider this judgment I see two issues that require my decision. The first is whether the defendant holds parcel No. *Magutu/Gathehu/112* in trust for the plaintiffs. The second issue is whether the plaintiffs are entitled to have half a portion of parcel No. *Magutu/Gathehu/112*. In the plaint the plaintiffs pleaded that the defendant was holding that land in trust which they were entitled to through their deceased father. In evidence the 1st plaintiff stated that the land in question was purchased by his late father together with someone else. In sub-dividing the land the defendant took away from him 0.75 acres. As it can be seen there is a conflict between the evidence given before court and the pleadings filed herein. The plaintiff gave as a reason why he was registered as proprietor of parcel No. *Magutu/Gathehu/111* was because his mother was at the time in detention. His mother PW 2 stated that the land in question was in her hands during Second World War. Her evidence is not compatible with the 1st plaintiff's evidence since the 1st plaintiff stated that the resultant parcels were from the consolidation exercise. What that would mean is that it cannot be the same land that PW 2 was cultivating during the Second World War. I find that the plaintiffs failed to prove that the defendant held the property in trust for them. In the plaint the plaintiffs claim half of parcel No. *Magutu/Gathehu/112*. In evidence the plaintiffs stated that their claim is 0.75 acres of that parcel of land. The plaintiffs did not seek to amend the plaint to conform to the evidence tendered. As a consequence in respect of the second issue I find that plaintiffs did not prove the same. It should be noted that the 2nd plaintiff did not give evidence in support of this case. Accordingly his case will fail. Having considered the evidence before court, I find that the plaintiffs failed to prove their case on a balance of probabilities. Accordingly the plaintiffs' case is hereby dismissed with costs to the defendants.

Dated and delivered at Nyeri this 11th day of March 2008.

MARY KASANGO

JUDGE