



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

**AT MERU**

**Civil Suit 96 of 2004**

**LYDIA KAIRIGO MWEBIA.....1<sup>ST</sup> PLAINTIFF**  
**WILLIAM MUGO JOHN.....2<sup>ND</sup> PLAINTIFF**  
**PETER MURIUKI JOHN.....3<sup>RD</sup> PLAINTIFF**  
**CHARITY KATHAMBI.....4<sup>TH</sup> PLAINTIFF**  
**JULIAH MPAKA.....5<sup>TH</sup> PLAINTIFF**  
**JENIFFER KINANU.....6<sup>TH</sup> PLAINTIFF**  
**SAMUEL KIBITI.....7<sup>TH</sup> PLAINTIFF**

**V E R S U S**

**JOSEPH MAGAMBO M'RAIBUNI.....DEFENDANT**

**SUCCESSION LAW**

**q Trust under the Registered Land Act, [cap 300] s.28**

**q Whether an elder son holds land on a first registration in trust for immediate family members.**

**JUDGMENT**

The Respondent herein was registered as sole proprietor of the parcel of land known as **NKUENE/KATHERA/5** comprising approximately 6.10 Ha (six decimal one zero hectares). He was first registered on 3.4.1963. His was therefore a first registration. That was also his evidence. As a first registration his title is not subject to defeat under Section 143(1) of the Registered Land Act except for fraud or mistake (and where the land has been purchased for valuable consideration again, his ownership cannot be defeated unless he had knowledge of the omission, fraud or mistake or contributed to it s.143(2).

In this case, the Plaintiffs do not allege any fraud or mistake on the part of the Defendant. They allege that even though the Defendant acquired the land by first registration, he did so with the knowledge and approval of their father and therefore in trust for them as brothers and sisters of one father but of different

mothers or houses. Although neither counsel for the Plaintiffs nor the Defendant specifically referred to them, sections 28 (proviso), and 30(g) of the Registered Land Act is the basis of the Plaintiffs' claim.

Section 28 of the Registered Land Act says:

**28 “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 the 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”**

And section 30 says-

**S. 30 Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without being noted on the register.**

**a-f not in issue.**

**(g). The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession, or occupation, save where inquiry is made of such person and the rights are not disclosed.**

**(h) Proviso (not in issue)**

The above provisions show that absolute proprietorship of land may be defeated **firstly** on the doctrine of trust (proviso to section 28) and **secondly** overriding interests such as possession or actual occupation (section 30(g)). Both claims, trust and possession or actual occupation is a question of evidence. It must be proved.

In this matter Plaintiff 7 says that he has business on the land. It is not clear from the evidence what business he has on the land. It is a vague claim, it does not qualify to be either possession or actual occupation to be an overriding interest as is envisaged by Section 30 of the Registered Land Act. In any event for the 7<sup>th</sup> Plaintiff Samuel Kibiti, he does not reside on the land, although the Defendant is willing to give him a portion. The second Plaintiff, Willam Mugo John gave up his claim on 16<sup>th</sup> January 2007. The 6<sup>th</sup> Plaintiff Jennifer Kinanu did not tender any evidence to prove her claim. In the circumstances her claim must fail flat on the ground. That leaves the claims of the 1<sup>st</sup>, 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> and 7<sup>th</sup> Plaintiffs on the Principal ground of possession or actual occupation under Section 30(g) of the Registered Land Act. The only question is how much of the land each one of them should get from the Defendant who has expressed in his evidence that he is willing to cede a portion of the land area occupied by those plaintiffs, each of whom wants a little more than what they currently occupy.

The total land area is said to be 6.10 Ha or approximately 14.82666 acres, or say 15 acres. The Defendant says that he is looking after 6 children of his own brother who look to the same land for inheritance. He has 7 seven children of his own. If the Plaintiffs' claims are met in full, there will be little land left for distribution or inheritance by his own and his brother's children. In the premises, his counsel Kiautha Arithi & Co Advocates suggested in their submissions dated 13<sup>th</sup> November 2007 that

the qualifying plaintiffs be each given or apportioned ½ acre of the suit land. I accept that proposition, and I reject the submission by the Plaintiffs' counsel which ignores the unchallenged evidence of the Defendant that he has 7 children of his own, and is also looking after 6 children of his late brother, Josephat Mbaya, who as I have already stated above look forward to inheriting a portion of the same land.

As point of fact therefore the total number of persons claiming current or contingent interest in the same piece of land is not only the plaintiffs but also the Defendant his wife, his 7 children and 6 children of his late brother Josephat Mbaya. That makes a total of some twenty (20) souls. If the entire land 6.10 Hectares, (as 14.82266 acres according to my conversion) were to be distributed today, none of those persons would get more than 0.74 acres, assuming that there were no roads or paths of access to the land which also take away available crop land.

Plaintiff No. 2, William Mugo John withdrew his claim per a Chamber Summons dated and filed on 27<sup>th</sup> November 2006 as having been improperly joined in the suit. The 6<sup>th</sup> Plaintiff Jennifer Kinanu did not tender any evidence to prove her claim on the grounds of either possession or actual occupation, or trust. She does not therefore qualify for any allocation under those heads.

Bearing the above considerations in mind, I would apportion said land to the remaining plaintiffs as follows: -

1. Lydia Kairigo Mwebia (1<sup>st</sup> Plaintiff) ½ acre
2. Peter Muriuki John (3<sup>rd</sup> Plaintiff) ½ Acre
3. Charity Kathambi (4<sup>th</sup> plaintiff) ½ acre
4. Julia Mpaka (5<sup>th</sup> plaintiff) ½ acre
5. Samuel Kibiti (7<sup>th</sup> Plaintiff) ½ acre

**Total 2 ½ Acres**

As there are generally no winners and losers in these land matters, I would commend each party to bear his/her own costs. The Plaintiffs shall each however bear the costs of survey/subdivision and obtention of their respective titles.

These shall be orders.

Dated and delivered at Meru this 25<sup>th</sup> day of April 2008

M. J. Anyara Emukule

**Judge.**