



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Civil Case 157 of 1989

REBECCA NYAMBURA.....PLAINTIFF

VERSUS

KIRAGU HARUN.....DEFENDANT

J U D G M E N T

Rebecca Nyambura Gakoi hereinafter referred to as the plaintiff by her plaint dated 26th October, 1989 and filed in court on 31st October, 1989 sought against Kiragu Harun, hereinafter referred to as the defendant the following prayers:-

- a) A declaration that the plaintiff is the sole registered and owner of land parcel No.Loc.2/Gacharage/1148.
- b) A permanent injunction restraining the defendant his servants and or agents from interfering and or trespassing onto the plaintiff's suit land.**
- c) An order that the defendant do remove whatever crops he has planted on the plaintiff's Suitland.**
- d) Costs of this suit with interest at court rates.**
- e) Any further or better relief this honourable court may deem fit to grant."**

On being served with the summons to enter appearance, the defendant through **Messrs Karuga Wandai & Co. Advocates** entered appearance to the summons and filed a defence and counterclaim to the plaintiff's suit. The defence was to the effect that though the plaintiff was the registered owner of the suit premises, she held half share of the land in trust for the defendant. The defendant therefore claimed half share out of the suit premises and Kshs.18,000/= being the balance of the purchase price of half share of the said parcel of land due from the plaintiff.

On 10th March, 1992 the case was by the consent of the parties referred to the District Commissioner, Murang'a for arbitration by **Justice P.K. Tunoi** as he then was. The award was to be filed in court within 150 days. It was not however until 20th June, 1994 that the award was filed and read out to the parties by **Justice Ang'awa**. However the award was found to be deficient in certain aspects and was returned to

the same arbitration panel for clarification. That was on 19th February, 1997. That clarification was not forthcoming and on 15th June, 2006 by consent of the parties the order referring the matter to arbitration was set aside as the award had been superceded. It was agreed that this suit be heard and determined by court.

The hearing then commenced before **Justice Okwengu**. It is only the plaintiff who testified in support of her case. She stated that the defendant was her only brother. That their father **Harun Njuguna**, who had passed on had several parcels of land that were consolidated and registered during land consolidation. One such land was **Loc.2/Gacharage/1148** which was registered in her name. That her late father gave her the land and caused it to be registered in her name. The father in return demanded Ksh.7,000/= which she paid him sometimes in 1971. Since 1964 she has been in occupation of the land, cultivating it and in 1979 she put up a house on the suit premises. Prior to that she was staying with her nephew **Elijah Njuguna Njoki** on land parcel **Loc.2/Gacharage/1129**. The parcel of land was registered in the name of her nephew aforesaid by the plaintiff's and defendant's father and who was his grandfather. She went on to testify that other parcels of land owned by her later father such as **Loc.2/**

Gacharage/1128, Loc.18/Gachochi/56, Loc.2/Gacharage/312 were registered in the names of her mother, **Munjiru Harun** and the remaining two in their father's name. That their mother had passed on but no one had been staying on the parcel of land registered in her name as aforesaid. However following succession proceedings in respect of the estate of their mother the land was subdivided and 3 acres went to **Njoki Harun**, 2 acres to the defendant and 2 acres to her sister **Zhilip Wangechi Harun**. As for **Loc.18/Gachochi/56** which measures about 2 acres and is still registered in the name of their deceased father nonetheless it is occupied by the defendant's son **Njuguna Kiragu**. Following the succession proceedings with regard to her father's estate, **Loc.2/Gacharage/312** which is 11 acres was given to the defendant as well as **Loc.18/Gachochi/56**.

The plaintiff went on to further state that the defendant entered her parcel of land in 1984 and started cultivating it. Prior to that she had been in exclusive possession of the same. Before 1984 she used to cultivate the suit premises with **Njoki**, her sister but **Njoki** later decided to leave the entire parcel of land to her. Her attempts to prevail upon the defendant to stop cultivating her parcel of land were fruitless. The plaintiff maintained that she was not registered as a proprietor of the land in trust for her brother, the defendant. The said brother was already an adult at the time and the suit premises could have been registered in his name instead. She also discounted the allegation by the defendant that she had agreed to buy out her brother's half share in the suit premises maintaining that the land was hers and could not have bought it again. She conceded however that she gave some money to the defendant. But that was out of coercion as the defendant had constantly harassed her and caused her to be locked up in police cells on 4 different occasions. She gave the money not as purchase price of the defendant's share but only to stop the defendant from harassing her further. The plaintiff therefore prayed that this court do declare that the suit premises belongs to her and direct the removal of the defendant from the suit premises.

Under cross-examination by **Mr. Mwangi**, learned counsel for the defendant, the plaintiff stated that she was married to one, **Mr. Gakoi**. That her father gave her the land as his child. That he also gave **Njoki's** son land on behalf of **Njoki** during demarcation. **Wangechi**, his daughter too was given land. She also confirmed that she paid her father Ksh.7,000/= in 1971. She also confirmed that she paid some money to the defendant but hastened to add that it was not for the purchase of the defendant's share in the suit premises. She was forced to pay the defendant so that the defendant could stop harassing her. She maintained that where she was married her husband had no land and that is why she came to her parents with her husband and settled on the land given to her by her father. She conceded that though the arrangement was peculiar, in the absence of any alternative one could stay with one's husband in her parent's home.

For the defence, only the defendant testified. In a nutshell, his evidence was that his late father had 5 parcels of land; **Block 2/Gacharage/32** registered in his father's name, **Loc.2/Gacharage**

/1128 registered in his mother's name, **Loc.2/Gacharage/1129** registered in the name of **Njuguna Njoki**, son of his sister, **Loc.2/Gacharage/1148** registered in the plaintiff's name and **Loc.18/Gachochi/56**

given to his father by a brother in law in lieu of dowry. He stated that the plaintiff got registered as the owner of the premises due to the practice during the land consolidation and demarcation era whereby a person could not be registered as a proprietor of more than one parcel of land. It was his evidence therefore that the plaintiff was registered as such in trust for him. He further testified that he has been utilizing the said land since independence and infact he was responsible for bringing the plaintiff to the parcel of land in 1978. He further testified that indeed the plaintiff in 1972 was in the process of giving back the land to the rightful owner (her father) but the latter died before the process was complete. Later on the plaintiff agreed to purchase the suit premises from him. She paid a deposit of Ksh.5,400/= leaving a balance of Ksh.18,500/=. In a nutshell it is the evidence of the defendant that the entire suit premises belongs to him but he has been ready and willing to sell half of it to the plaintiff. He therefore prayed that judgment be entered for him for half share in **Loc.2/Gacharage/1148** and payment thereof by the plaintiff of Ksh.18,500/= being the balance of the purchase price of the other half share of the suit premises.

Under cross-examination by **Mr. Njuguna**, learned counsel for plaintiff the defendant stated that the plaintiff was registered as a trustee as his father could not have been registered as proprietor of more than one parcel of land. That the land registered in the name of **Njuguna Njoki** was still in his name. He was registered in trust for his mother. That when their father was registering the land parcels he was in Nairobi. He denied that he caused the arrest of the plaintiff severally. He agreed that he was already an adult during the land consolidation. He also went on to agree that the land registered in the name of **Njuguna Njoki** was still in his name. That when his father was registering the land parcels he was not present as he was in Nairobi all the time.

At this stage the case was adjourned to 24th October, 2006 for further hearing. However the case could not be heard on that occasion for reasons which are not apparent on the record. It was left in abeyance until 5th July, 2007 when it came up for mention before me for directions. **Justice Okwengu** who hitherto presided over the case had left the station on transfer. The parties sought directions in the matter on the way forward. The directions I issued with the consent of the parties were to the effect that the case do proceed from where **Justice Okwengu** had left upon availing to the parties the typed proceedings before **Justice Okwengu**. The order was complied with and on 31st January, 2008, the case came before me for further hearing.

On that occasion, **Mr. Irungu**, learned counsel appearing for the defendant sought an adjournment on the ground that the defendant was indisposed and hospitalized at Kijabe Hospital. The plaintiff countered the application by stating that though the defendant had been admitted in the said hospital, he had been discharged home. He then left home. Nonetheless the plaintiff was willing to accommodate the defendant. I overruled the application for adjournment on the basis that the case was old and also because it was clear to me that the defendant was taking the court for granted.

At that juncture, the defendant opted to close his case. Parties thereafter agreed to put in written submissions which I have carefully read and considered together with respective authorities cited.

Issues for determination by this court on this dispute were settled by **Justice Okwengu** on 15th June, 2006 as follows:-

1. **Was land parcel No.Loc.2/Gacharage/1148 registered in trust for the defendant for ½ share.**
2. **Was the plaintiff sold the disputed land by her father.**
3. **Is the defendant entitled to inherit and has he inherited the estate of his father.**
4. **What happened to the other family land.**
5. **Did the defendant forcibly enter the disputed piece of land.**
6. **Was there an agreement for sale of a ½ share of the disputed piece of land wherein the**

plaintiff was to buy from the defendant.

7. Who should bear the costs of the suit.

On the first issue, there is common ground that the suit premises are currently registered in the plaintiff's name. According to the plaintiff, it was a gift inter vivos from her father. However in so far as the defendant is concerned, their father registered the land in the plaintiff's land in trust for defendant since their father could not have registered it in his name since he had already been registered as the proprietor of another parcel of land. That during land demarcation and consolidation a party could only be registered as a proprietor of one parcel of land.

The evidence of the defendant does not gel with me. He did admit under cross-examination by counsel for the plaintiff that at the time of land consolidation and demarcation, he was already an adult person. He was born in 1940 and indeed at the time he was staying in Nairobi presumably working. If he was an adult and the only son of their father as gathered from the recorded evidence, there was nothing to stop his father from registering the subject parcel of land in his name. After all the defendant had not been registered as the proprietor of any other parcel of land during land consolidation and demarcation. Considering how women were treated in those days it is hard to imagine that their deceased father would have been willing to have her daughter registered as the proprietor of the land in trust for the defendant. Nothing stopped the father from registering the suit premises directly in the name of the plaintiff.

It is also common ground that their father had many parcels of land which he consolidated and had them registered as he wished. At the time of registration in 1964 as already stated, both the plaintiff and defendant were adults. The defendant conceded that he was born 1940 and that the plaintiff had been married in 1951. It would appear that the plaintiff's father caused her to be registered as the absolute owner of the suit premises to secure the well being of her daughter as she had married into a family that did not have any piece of land. There is also uncontested evidence that the plaintiff's father later asked her to pay him Ksh.7,000/= as an appreciation or a sign of gratitude for what he had done for her. The money was paid. Surely if the intention of her father in registering the plaintiff as the proprietor of the parcel of land was for her to hold it in trust for the defendant, why again should he ask for payment of Ksh.7,000/=.

Njoki Harun, a sister to the parties herein, had a son called **Njuguna Njoki**. Their father at the same time caused land reference Loc.2/Gacharage/1129 to be registered in his name. It is still registered in his name to date. However the defendant has not seen it fit to claim the same based on trust why? Under cross-examination on the issue, the defendant stated that **Njuguna Njoki** was registered in trust for his mother. The said mother was a sister of the plaintiff. What then is the difference? That the same father who had caused his other daughter to be registered as a proprietor of land in trust for his son the defendant would allow a son of her other daughter to be registered as a proprietor of his other parcel of land in trust for his daughter only. I do not think that their father was prepared to treat his daughters in such discriminative manner. I must say in conclusion on this aspect of the matter that the defendant did not at all call any other witness to prove the alleged trust. It was his word against the plaintiff. On the basis of the evidence on record, I choose to believe the evidence of the plaintiff. She was consistent and honest. Ideally if any trust existed at all, it should have their father to make that claim and not the defendant. He never raised the issue during the lifetime of his father. In my view therefore **Harun Njuguna** distributed all his parcels of land the way he wanted and the defendant should not claim any on the footing of a perceived trust. Land parcel **Loc.2/Gacharage/1148** was therefore not registered in the name of the plaintiff in trust for the defendant for ½ share.

The second issue framed was whether the plaintiff was sold the disputed suit premises by his father. The answer to this issue is fairly obvious. Going by the evidence on record, it is an emphatic No. The father merely asked for ksh.7,000/= from the plaintiff as a sign of gratitude for what he had done for her. Indeed from the evidence, by the time the plaintiff parted with money in 1971, the plaintiff had been the registered proprietor of the suit premises, since 1964, a period of 7 years. I do not think that if truly her father was selling her the suit premises he would have consented to the suit premises being transferred and registered in her name before the purchase price had been fully paid. Further I do not think that he

would still have allowed her daughter and her husband to take occupation of the suit premises before the purchase price if any had been paid. It should be remembered that their father passed on sometimes in 1972.

From evidence on record, the defendant is the only son of the deceased. Following the death his father and mother and having successfully petitioned for the grant of letters of administration with regard to the two estates, the defendant has inherited a portion of land parcel **Loc.2/Gacharage/1128** which was initially registered in the name of this deceased mother **Munjiru Harun**. It measures 7 acres. Indeed the defendant got 2 acres, his sister **Njoki Harun** got 3 acres and his other sister **Zilipha Wangechi Harun** also got 2 acres. It is instructive that the plaintiff was not considered in this scheme of inheritance. **Loc.18/Gachocho/56** also registered in their father's name and measuring 2 acres was again inherited by the defendant although it is now occupied by his son. Here again the plaintiff was not considered. Finally land parcel **Loc.2/Gacharage/312** initially registered in their father's name, measuring 11 acres was following successful petition of letters of administration taken over by the defendant. Infact it is on this land that the defendant resides. Going by the above the answer to issue 3 framed is in the affirmative i.e. yes, the defendant is entitled to and has indeed inherited a portion of the estate of his father.

As to what happened to other family land, it would appear that one was given to the plaintiff by his father during his lifetime as already stated. The other one was given to the other daughter **Njoki Harun** by the same father through her son **Njuguna Njoki**. That is **Loc.2/Gacharage/1129**. The parcel of land is still registered in the name of **Njuguna Njoki's** name.

The evidence on record further shows that until 1984, the plaintiff was in exclusive possession of the suit premises. However that possession was interrupted when the defendant in that year came and started cultivating portions of the suit premises. On his part, the defendant claims to have been in possession of the suit premises since demarcation. This cannot be possibly correct as in his own evidence under cross-examination the defendant stated that when his father was registering the land parcels he was not present. He was then in Nairobi. Further is it coincidental that this same year that the plaintiff claims the defendant invaded the suit premises is the same year that the defendant was asked by the plaintiff to sell ½ of the suit premises? I do not think so. Although the defendant claimed that there was a sale agreement to that effect the same was never tendered in evidence. Further the defendant did not consider it worthwhile to call in the evidence of the witnesses to the said sale agreement. If any money was paid by the plaintiff to the defendant, I do not think that it was towards the purchase of ½ of the suit premises from the defendant. The defendant could not have voluntarily purchased what she felt was given to her by her father. It must have been out of coercion and intimidation and so as to make peace with her brother. These holding effectively dispossesses off issue numbers 5 and 6 as framed. Yes, the defendant forcibly entered the suit premises and no, there wasn't an agreement for sale of a ½ of the suit premises, belonging to the defendant between the plaintiff and defendant.

In the result I have come to the inevitable conclusion that the plaintiff has on balance of probability succeeded in her claim. Accordingly I grant prayers (a), (b) and (c) as set out in the plaint. I would dismiss the defence as well as the counterclaim. As the dispute involves siblings I will make no order as to costs both on the plaint, defence and counterclaim. In other words, each party will have to bear her/his costs of the suit.

Dated and delivered at Nyeri this 7th April, 2008.

M.S.A. MAKHANDIA

JUDGE