



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

Civil Case 80 of 2006

NJERU NDWIGA.....1ST PLAINTIFF

MANYANGA NDWIGA.....2ND PLAINTIFF

VERSUS

TARATISIA MARIGU NDWIGA.....1ST DEFENDANT

BASILIO NJIRU.....2ND DEFENDANT

JOHN MUGO.....3RD DEFENDANT

JUDGMENT

The two plaintiffs are sons of their mother Taratisia Marigu Ndwiga (first Defendant). They plead that when they were very young the land parcel No. Kagaari/Kigaa/1759 was registered in the names of:-

1. Njeru son of Ndwiga
2. Manyanga son of Ndwiga in equal shares on 13/10/81.

They cannot tell the facts surrounding their registration as proprietors because they were minors. They have been given information by other persons. By the time the trial took place the two plaintiffs were adults, the first being 40 years. The plaintiffs have offered to give their mother and the brothers 2nd and 3rd Defendants some portion of land but they say Defendants have rejected the same. According to the plaintiff witnesses, PW3 testified of how in 1973 the Runyenjes Court was seized of the issue of Succession of the Plaintiffs father's land. The grandmother then told the court that the owners of land were dead but PW3 said there were survivors and requested for time to check the matter.

PW3 was assistant chief. The home of the deceased was burnt down. PW3 went to the village where the deceased Ndwiga and he eventually took the two young plaintiffs children of Ndwiga the deceased. Then on a day they were required in court the first Defendant took the two plaintiffs to court. After hearing PW3 and first Defendant, the court ordered the land be registered in the name of the two plaintiffs. Then when they grew up there arose a dispute. It was discussed by elders and it was agreed that the plaintiff to get 1.2 acres each and

Mother -0. 6.2 acres

2nd Defendant - 0. 6.2. acres

3rd Defendant - 0.6.2 acres

On cross-examination PW3 said he could not let the mother to take land. She was young and she could sell the land or remarry.

The mother, first Defendant gave evidence she testified that her mother in-law burnt her matrimonial house and informed the court that the family of Ndwiga was deceased. When PW3 visited her parents house he met her mother. She identified the two children of deceased with 2nd Defendant. The 2nd defendant was not present at the home then. Defendant No. 2 gave evidence, one said he was twelve years then and their mother went and said the land be registered in the names of two defendants. The 3rd defendant said he was born on the land and could not leave because he has developed his portion.

DW4 gave evidence he is elder brother of deceased (Ndwiga.) When the brother died he had 3 children with first Defendant who was his wife. This witness confirmed that first Defendant was chased away from by her mother in law and her house burnt so she returned to her parental home. DW5 was another brother of deceased and he was of the view that the parties are not to vacate from the land as they were all entitled. I have considered peculiar facts of this case. It is the customary law that would be applicable since death occurred before the commencement of Succession Act Cap 160. The brothers of the deceased Ndwiga are of the view that the first Respondent and all the children being their two plaintiffs and two Defendants should all share the land equally. There is evidence that this issue has been discussed by elders who are experts in customary law. The elders were of the view that all should share the land. I therefore find that the circumstances surrounding the registration of the land in the names of the plaintiffs, gives rise to a customary trust in favour of the three defendants.

I therefore order that the land Parcel Kagaari/Kigaa/1759 shall be shared by all parties in equal portions but so that each party shall be in the portion already developed by himself.

In the circumstances no order shall be made because these are of same family and each has won some part of suit.

Dated this 20th May, 2008.

J. N. KHAMINWA

JUDGE

20/5/2008

Khaminwa – Judge

Njue – Clerk

Two Plaintiffs are present

Three Defendants are present

Read in open court.

J. N. KHAMINWA

JUDGE