REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 44 of 2003

CHARITY WANGECHI GITAKU…….....……..APPELLANT

VERSUS

VINCENT GATIMU GITAKU……...……1ST RESPONDENT

MBOGO GATARU……2ND RESPONDENT

JUDGMENT

This appeal arises out of the Judgment of Senior Resident Magistrate Kerugoya dated 14/12/1997.

The grounds of appeal are listed on the memo of Appeal that the Trial Magistrate was wrong in holding that parcel No. Baragwi/Kariru/186 was subject to a trust and that the mere act of occupation created a trust and furthermore that Trial Magistrate was wrong in continuing the evidence as disclosing a trust. The grant was confirmed against the law and weight of evidence.

The evidence is that the deceased Ngari Gitaku died in 1969. At the time of death he had a wife petitioner and children listed. He left behind a piece of land known as Baragwi/Kariru/186 which was registered in his name. He also left two brothers living. When grant came up for confirmation these two brothers protested against confirmation claiming to inherit their brother's land claiming that the petitioner held the land under trust for them and for her family.

The succession Act Cap 160 operates in the estate of all people who died after the coming into force of Act while the estates of persons who died before the commencement are subject to written laws and customs applying at the date of death but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with the act. There is evidence that the land was registered n the name of deceased on 13/1/1959 in the name of Ngari Gitaku. The process of Land Registration was after ascertaining the rights of all persons who may claim rights under customary laws such as customary trusts. In the certified copy of the registration there is no indication that the deceased held the land in any trust on behalf of anyone. Taking into consideration of the provisions of Section 143 Registered Land Act the first registration was secured by law. The Respondents raised complaints on in 1997 when the Appellant proceeded to apply for a grant of her husband estate. The appellant applied for confirmation and proposed to distribute the piece of land among her children. The Trial Magistrate heard the protest. The (protester) first Respondent's evidence of protester was that the deceased left his widow (Appellant) in the house of the Respondents and the Respondents were live on the land and the deceased was given land by the clan and deceased was registered to hold the land in trust for Respondent.

I have already said that before the land was registered under Registered Land Act there was a process to ascertain true owners of land. Therefore no trust was recorded herein and the deceased title was absolute. The same evidence was given by the 2nd Respondent and their witnesses. It is upon that evidence that the trial Magistrate reached his decision that the deceased held the land in customary trust.

It is my finding that there was no evidence to show that the land was registered "in the name of deceased because their father was not alive during demarcations". It is not the elders who were requesting the land. There was a process operated by the adjudication officers of Government. The distribution of deceased property is to this wife (wives) and the children. The Trial Magistrate erred in finding that there was a trust and the Respondents ought to inherit. The occupation of land does not create any trust. But in this case the evidence pointed to the fact that the Respondents were defendants were defendants of their brother but had no ownership rights on the land. It is my finding therefore that the grant was confirmed against the law is hereby set aside. The application for confirmation is allowed with the distribution of estate parcel No. Baragwi/Kariru/186 to be distributed as proposed by petitioner among herself and her children only. The appeal is allowed.

The costs of this appeal to be paid by Respondents to the appellant.

Dated this 6th May, 2008.

J. N. KHAMINWA

JUDGE

6/5/2008

Khaminwa – Judge

Njue – Clerk

Representative of Appellant - present

First Respondent (Survivor) –present

Judgment read in open court.

J. N. KHAMINWA

JUDGE