



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

**Civil Case 202 of 1980**

**JOHNSON GITHAIGA KIRAGU ..... PLAINTIFF**

*Versus*

**MACHARIA KIRAGU ..... DEFENDANT**

**JUDGMENT**

The plaintiff's claim against the defendant is that the defendant holds Parcel No. **176/IRIAINI/KIAGUTHU** in trust for both of them and that the plaintiff is entitled to have a share of that property. This claim is denied by the defendant. When the case came up for hearing the plaintiff in evidence stated that that parcel of land originally belonged to their father, since both he and the defendants are brothers. Their father who is now deceased was called **KIRAGU**. The plaintiff said that in 1957 the parcel of land was given to the defendant by their clan. This was at the time of land consolidation and demarcation. By then the plaintiff was 9 years old and was in Standard One. Their mother who is now deceased was then alive. The defendant during that time was not leaving at home but the clan made a decision because he was the older son that the property be registered in his name. From 1957 they both lived on that land until 1978 when the defendant chased him away. His house was demolished and his crops were uprooted. He denied that the defendant had a claim over the land on the basis that he redeemed it. He also denied that their mother had at any one time sold the land. That before their mother passed away her intention was that the land would be inherited in equal portions by the two of them. PW 2 Samwel Maina Wachira is a member of their clan. He said that he had grown up together with the parties in this case. After emergency the family of Kiragu which included the plaintiff and the defendant moved from the emergency village to the parcel of land the subject of this suit. In 1957 during demarcation he said that he was a young boy. As the clan was demarcating the land he assisted by holding the rope for them. This land he said was ancestral land. The clan made a decision to have it registered in the defendant's name. At that time he said that the defendant was living at Kiganjo Railway. That during demarcation registration of land only effected in one persons name. He confirmed that the plaintiff was residing on the suit property with the defendant until the defendant chased him away. In his defence the defendant accepted that the plaintiff was his younger brother. He confirmed that during the land demarcation he was residing at Kiganjo. The plaintiff was by then very young. He said that the suit property comprised of several fragments of pices of land. He confirmed that he did chase away the plaintiff for being a drunkard. He however denied that he destroyed his house. That is the evidence that was adduced by the parties. In submission the plaintiff's case is defeated by limitation. The defendant stated that the 12 years period provided under limitation of actions act had long expired. In response to that argument I refer to **Section 20 (1)(b)** of the limitation of actions act. That section provides:

***“20(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary***

*under a trust, which is an -*

*(a) .....*

*(b) To recover from the trustee trust*

*property or the proceeds thereof in the*

*possession of the trustee or previously*

*received by the trustee and converted*

*to his use”*

The plaintiffs claim is that the defendant holds half of the suit property in trust for him. That being the case his claim is not statute barred by virtue of that section. Although the defendant in his defence denied the plaintiff's claim in evidence the defendant did not rebut his assertion. The only thing that he denied is that he is holding the property for him. He however accepted that the plaintiff is his brother. That they lived on the land with him until he chased him away. He confirmed that they moved away from the emergency village as a family to that land. I find that the plaintiff has established that this land was ancestral land and that it was decision of the clan to have it registered solely in the name of the defendant. I make a finding that the decision to have it registered in the defendants name did not defeat the plaintiffs claim as beneficiary of his late father over that land. The judgment of this court is that:-

- 1. The defendant holds parcel no. 176/TRIANI/ KIAGUTHU half of it in trust for the plaintiff.*
- 2. That the said trust is hereby terminated.*
- 3. That the said property be subdivided into two equal portions to be registered in the names of the plaintiff and the other half in the names of the defendant.*
- 4. The plaintiff is awarded costs of this suit.*

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF JUNE 2008**

**MARY KASANGO**

**JUDGE**