



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 116 of 1994

DAVID MBUGUA MBOGO & 3 OTHERSPLAINTIFFS

VERSUS

JUSTUS MUGWERU MBOGODEFENDANT

JUDGMENT

The 3 plaintiffs herein

1. **David Mubgua Mbogo, now deceased,**
2. **Samson Karanja Mbogo**
3. **Joel Macharia Mbogo** all brothers sued their other brother, one Justus Mugweru Mbogo seeking a declaration that,
 1. **“The defendant holds the entire land parcel No. L.R Loc.2 GACHARAGE/1922 in trust for himself and the plaintiffs in equal shares”.**
 2. **“An order to transfer the plaintiffs respective shares to them”,**
 3. **“Rectification of the land register respectively,”**
 4. **“An order to restrain the defendant his servants and or agents from selling or charging the said land parcel till the determination of this suit”,**
 5. **“Costs of the suit”.**

The plaintiffs cause of action arise from paragraphs 3,4,5 and 6 of the plaint dated 3rd January, 1994.

They claim that being “the only 5 male” children of the late Gideon Mbogo, who was the registered proprietor of all that piece of land known as L.R. LOC 2/GACHARAGE/1922, they were all entitled to share the said piece of land which measures 5.07 hectares or thereabouts. They contended further that during land demarcation in Murang’a in 1963 it was agreed by all the brothers that the land would be registered in the defendant’s name, to hold for himself and in trust for the plaintiffs, who were largely in the Rift Valley during the period. That the said land was and is still registered in the defendant’s name, though the word “trust” is not noted in the register.

The plaintiff's complained that the defendant has refused to recognize their respective proprietorship interest in the said land and has continued to have land registered in his name solely.

The plaintiffs therefore prayer for a **“declaration that the defendant holds the entire land parcel number LOC. 2/GACHARAGE/1922,”** in trust for himself and them in equal shares. They also prayed for an order directed to the defendant to transfer their respective shares to them. They further prayed for rectification of the register accordingly, and a further order to **“restrain the defendant, his servants and or agents from selling, dealing or in any other way alienating or charging the land parcel till the determination of the suit”**.

The plaintiffs also prayed for costs of the suit.

The defendant denied in his defence that the plaintiffs are entitled to the suit premises.

In para 4 of the defence, the defendant stated that the plaintiffs were allocated and registered in their respective portions of land, which they sold. He gave details of who was registered in what portion of land, which they all disposed of and as a result, none of them could lay any claim on the suit premises. He prayed the court to dismiss their suit with costs.

The 1st plaintiff died and was substituted by his wife.

It is the 2nd plaintiff who testified in court that the 1st plaintiff, David Mbugua Mbogo is his elder brother who died and was substituted by his wife, Rosemary Wairimu. The other plaintiff Joel Macharia Mbogo, was said to be very sick at home. His other brother, Gerishon Njoroge Mbogo, did not come to court, and Justus Mugweru the defendant is also his brother.

The dispute was about their father's land, LOC.2/BACHARAGE/1922. The father died in 1954.

He produced a copy of the title to the property. It is in the name of Justus Mugweru Mbogo.

The plaintiff recalled that during land registration, they were not at home except the defendant who caused the land measuring 21.7 acres (5.07 hectares) to be registered in his name solely. This was in 1991, after their father had died.

He also recalled that their father had another piece of land in Mangu, Gitwamba in Kiambu District, but he sold it in 1954. The plaintiff, who was the 2nd born child was born in 1934.

All the plaintiffs have their houses on the piece of land in dispute. He accused the defendant of having sold a portion of their land to a society, without their knowledge.

He recalled further that the issue of this land has been arbitrated before the D.O. and the D.C. with the decision that land be subdivided equally between the brothers. A letter from the chief dated 3.2.2000 was produced as an exhibit.

The plaintiff confirmed that there was no Succession Cause filed when their father died.

The plaintiff complained that the defendant has persistently refused to have the land shared equally between his brothers. That the defendant gave Gerishon Njoroge Mbogo, the 3rd defendant 3 acres to cultivate, but he has no title deed, though he lives there and cultivates the land.

That the defendant gave 5 acres out of this land to his son John Mbogo, who has a title.

The plaintiff was shown two titles to land, and he confirmed that the original title deed in their father's name was No.541, but the defendant subdivided it to his son and remained with title 1922.

Joel Macharia, one of the plaintiffs, lives in Kinangop, Nyandarua and is a farmer. He has a house in the suit premises, so is his other brother Njoroge, as well as Samson. Joel also confirmed that litigation of his land has been before the D.O. and the D.C., who both decided that the land be shared amongst all the brothers but the defendant refused.

Joel denied the assertion by the defendant that this was his land which he bought. Joel said this was their late father's land which they should share.

The 3rd plaintiff, Njuguna Karanja, a farmer, knows PW2 and all his brothers including the defendant. He described the father of the plaintiff and the defendant as his step brother who died during emergency. He recalled that his land was taken by his son Mugweru the defendant, to guard on behalf of the other sons. It was the clan who chose Mugweru to “guard” the land as his other brothers were away working.

Mugweru then built a house on the suit land, and lived there in order to “guard” it. He recalled that the land measured 27 acres, but to date he does not know how many acres are remaining as Mugweru has sold some part of the land.

The witness was emphatic that Mugweru did not buy the land. That the said land belonged to his grandfather Gideon Mbogo, and upon his death, it should have passed over to the plaintiffs and the defendant (his 5 sons).

Of the five sons, he said the 1st plaintiff built a house on the land, but the house collapsed. That again, the 2nd plaintiff, Samson also built a house on the land, but the same was destroyed, so he does not live there. That the defendant too does not live on the land though he has a house in it. That Joel, the 3rd plaintiff too, built a house on the land but does not live there.

It is the 4th plaintiff and the defendant's son who live in the suit premises. They have grown tea and also keep cattle on the land.

The witness who is now aged over 80 years, confirmed that the defendant did not buy the suit premises so he has to share it with his brothers. The witness also confirmed that Mbogo, the father of the plaintiffs and defendant had a house in the suit premises. It is where he lived but his house was burnt during emergency. That Mbogo had another piece of land in Mangu, but his sons sold it. He also confirmed that the defendant sold ¼ of this land to many people, including himself. They were 70 in number, and was paid a total of Kshs.12,000/=. They built a center for selling tea.

This witness also gave evidence before the chief where the plaintiffs and defendant had a case. He told the chief that “these boys should share their father's land”. That from there the case went to the D.O and the D.C. The dispute was not resolved, so it came to the High Court.

The witness said,

“I am defeated by these boys. I know Mugweru is registered together with his son Mbogo”.

The witness was even aware that the defendant took a loan from AFC and charged the land, but in order to save it, his son paid off the loan, and Mugweru then registered part of the land into his son's name.

He was also aware that in 2002, Mugweru sold some 3 acres to Mwangi Komu who in turn sold it to Waweru Ngeru.

To several questions, the witness answered that the grandfather of these 5 boys, Kiragu Mbogo had 3 sons, namely Gideon Mbogo, the father of the plaintiffs and defendant Mugweru and Mwangi. He was not aware whether the other 2 sons of Kiragu Mbogo and their children were supposed to inherit this land, thought they live in Kijabe.

The defendant Justus Mugweru Mbogo lives in Murang'a location 2. He was born in 1930, and has 4 brothers, the plaintiff's herein. Their mother died long ago and then father died in 1956.

Justus explained that their father was living in Kathukuni village, Location 2 Muranga. That he was then "chased" by the government and he moved to Mai Mahiu where he lived for 2 years before he died.

The defendant testified that between 1930 – 1938 he lived in Mangu in his father's land. That when he left Mangu he moved to Muranga, and the land in Mangu measuring 37 acres was later sold by his 2 brothers David Mbugua together with David Macharia, whilst he was in detention. They sold it to one Karotho Wang'ang'a.

Talking about his brothers, Mugweru said his brother Samson Kavana 2nd plaintiff had just been released from detention, and his other brother Gershon Njoroge Mbogo, the 3rd plaintiff was in Tanzania, but now he lives with him in the suit premises, which measures 19.3 acres whilst Samson lives in Kinangop.

The defendant denied any knowledge of one Njuguna Karanja. He also denied the assertion that Njuguna gave him money to clear the loan from Agricultural Finance Corporation of Kenya Ltd. he maintained that he paid of the loan by himself, that is why he said the land now belongs to him solely. He explained further that he gave 3 cows to one Njuguna Matiu as a refund of what his father had taken from him. This was in 1959 after his father had died. That Njuguna in turn gave him 3 acres of land and the rest of the land measuring 8.5 acres he bought from one Gichiri Mwachama whom he paid 16 goats and 2 cows and cash Kshs.3,000/=.

He explained further that this was in 1960, and none of his brothers helped him in the purchase of the various pieces of land.

The defendant bought more land from Joseph Warimwa, about 4 acres, at the cost of Kshs.6,000/= in 1961.

He continued to name more people from whom he had bought land, like Njachai Kaguo, whom he paid 5 goats and Kshs.3,000/=.

The defendant said that all the people who sold him land are dead. That there was a committee, and only one Committee member was alive but he is senile, he cannot talk.

The defendant asserted, "I bought the land where I live, it does not belong to my father except the 3 acres I redeemed by paying 3 cows.....".

To questions put during cross-examination the defendant stated that his father had 2 wives, so all the plaintiffs are his brothers.

He repeated that his 2 brothers Samson and Joel, first sold 8 acres of their father's land, then 15 acres and lastly 4 acres.

The defendant was present during demarcation, but not his brothers. He answered further questioning that there was no land which his brothers could have claimed as their father had only 3 acres which had a debt which he repaid and thereafter took the land in 1964. The defendant would be willing to give back the 3 acres of land if his brothers pay him back the cows.

The defendant called Maria Muturi, as a witness. The witness explained that his land is next to the defendant. She also confirmed that she knows about the 3 cows which the defendant delivered, so as to redeem his father's land.

Another witness Patrick Maguta Macharia is the Assistant Chief of Gacharage sub-location in Kenyona, Kigumu Division in Maragwa District.

He identified the defendant as a subject of his sub-location. He also knows the defendant's piece of land, which is about 5 kilometers from his home.

He confirmed that the defendant has a stone house in the suit premises where he lives, and he has also built a house, covered with iron sheets for his second wife, and there are 2 or 3 other houses for his brother Njoroge.

There was also the evidence of James Maina Githii. He knows all the plaintiffs, as well as the defendant. He is in fact a neighbour of the defendant. He confirmed that John Macharia and Samson both brothers of the defendant do not live in this land.

The witness said that his father had a big piece of land which had bought from various people including the plaintiffs Samson Mbogo and David Mbugua, who sold 21 acres.

The witness testified further that he was present when a tribunal sat on 29th April 1996 to arbitrate about the ownership of this land between the plaintiffs and the defendant their brother. That the verdict reached was that the land belonged to the defendant.

The witness confirmed that there is a tea buying center in the middle of the defendant's land. He testified further that when Samson and John Macharia bought the land only 2 acres remained, and these were given to Njoroge who has built on their land.

On questioning, the witness answered that Mugweru redeemed his father's land by paying 2 cows. Thereafter, he bought more land and in total, he had about 22 acres.

The last witness was one Philip Ngotho Mwangi, aged 67 years old. He knows the plaintiffs and the defendant. He claimed that the suit land belonged to his grandfather. About the 3 acres, he also testified that the defendant redeemed them after paying 3 cows, but he did not witness this.

I considered the oral evidence of the plaintiffs and their witnesses as well as that of the defendant and his witnesses.

I also considered the written submissions which the parties consented to file after the conclusion of the oral evidence. From all this, I first decided to deal with the issue of the allegation by the defendant of **"sale of the portions of land by the plaintiffs given to them by their father"**.

This was the evidence of the defendant and one James Maina who testified that his father bought 21 acres of land from Samson Mbogo and David Mbugua Mbogo, both plaintiffs. However, James Maina stated further that it was his father who told him about the sale of the 21 acres of land to the 2 plaintiffs. His father, did not, however, give evidence in court to confirm this.

The same James Maina also testified that the mode of payment of the 21 acres was by giving goats and cows, but he did not know how many were given as this whole transaction was not recorded anywhere.

Secondly, I wish to consider the evidence of the plaintiffs that the suit premises was family land which was registered in the defendant's name during the period of demarcation. That all the brothers (plaintiffs) were away from home during demarcation except the defendant. The defendant confirmed this fact, that all his brothers (the plaintiffs) were away during demarcation of land, except himself.

The evidence further shows the defendants reason for claiming the suit premises, was that he paid off a loan owed to the Agricultural Finance Corporation of Kenya Ltd, by his late father alone, and that is why the land belongs to him solely. His further assertion was that after all, their late father only had 3 acres of land which was redeemed by one Njuguna Karanja, and he in-turn paid Njuguna 3 cows to redeem the land. According to him, this is the only land he can give away to his brothers if they refund him the cows he paid to redeem it.

When I consider the evidence that the defendant bought land from various people and had the same registered in his name, I found that evidence unreliable and rejected it.

The documentary evidence by way of copies of green card shows that the defendant, Justus Mugweru Mbogo was 1st registered on the piece of land known as Loc. 2 GACHARAGE/541 measuring 8.13 hectares on 10.1.64, and a title, Land Certificate issued on 6.3.74. Later on 13.3.91 the land was subdivided and six different numbers issued, i.e. 1920, 1921, 1922, 1923, 1924, and 1925.

Four out of the six titles are in the defendant's names, as the search certificates show of the remaining 2, one title is registered in the name of Murang'a County Council on behalf of Gathuki-ini-Tea-Buying Centre, and the second in the name of the defendant's son, John Mbogo Mugweru.

The question I pose at this stage is, how did the defendant acquire 8.13 hectares of land which he registered in his name on 10.1.64, when the register was opened. I pose this question because I have already rejected the evidence of the defendant to the effect that he bought the pieces of land from various people. These people did not appear in court to confirm this, apart from one person who gave "**hearsay**" evidence, i.e. what he was told by his own father who did not testify in court.

When I consider this evidence further, I come to the irresistible conclusion that the land in question i.e. LOC.2/GACHARAGE/541, plus the six subdivisions already referred to, was family land which was registered in the defendant's name to "**guard**" for the family, during demarcation. This was the evidence of the plaintiffs as corroborated by that of Njuguna Karanja, the plaintiff's 3rd witness. The defendant also confirmed in his evidence that during land demarcation and registration, he was the only one at home, and not any of his brothers.

I may wish to take Judicial Notice of the fact that during the period of emergency in Kenya, many families especially in the Central Province were affected and were either detained and or ran away from their homes to places of safety and when land demarcation and registration started, those "**sons**" who remained behind were registered to hold land on behalf of those who were not present at home. In this way "**customary trusts**", were created. This point has been the subject of many court decisions. One such decision is the court of Appeal case of PHILICERY NDUKU MUMO V NZUKU MAKAU CIVIL APPEAL NO. 56 OF 2001 (Unreported).

One of the issues to be determined in the above case by the Court of Appeal was, "can a customary trust be recognized by the courts in Kenya? And again, "**Can a declaration of trust be made in respect to a title issued under the registered Land Act, Cap 300 of the Law of Kenya?**"

The Court of Appeal upheld the decision of the High Court which found that the plot of land in dispute No.3013 was held by the plaintiff in trust for the defendant, because evidence showed that Makau had two wives and he died before the land was adjudicated and registered in his name.

The Court of Appeal went further to state,

"On our own consideration of the evidence on record, we agree with the learned Judge that customary law trust had been proved. It is trite law that trust is a question of fact and has to be proved by evidence. This court said so in WAMBUGI V KIMANI (1992)2 KAR 58."

The court went further to find that,

"There is nothing in the Registered Land Act, Cap. 300 which precludes the declaration of trust in respect of registered land even if it is first registration, and section 28 contemplates the holding of land in trust."

From the above finding of the Court of Appeal, I find that the father of the plaintiffs having died before demarcation of land, and his sons (plaintiffs) having been away from home at the time of demarcation except the Defendant, the family land was registered in the defendant's name thus creating a "**customary trust**" as evidence on the record showed. I find further that this was so, despite the fact that registration

in the defendant's name was a 1st registration, as land had never been registered in the name of their late father, before he died, and there is or was **“to preclude the declaration of trust in respect of registered land even if it is a 1st registration ----”**

There was a lot of evidence by the Defendant and his witness on the 3 acre piece of land which he redeemed from a witness who paid off his father's debt, and according to him, that was the only piece of land his father owned and he was willing to give it to his brothers if they refunded him the cows he paid to redeem it.

The question I would pose at this stage is from which portion of land is the 3 acres? I say this because the defendant subdivided the original land, title No. LOC.2 GACHARAGE/541, into six different portions which were given six different numbers; the suit premises No.1922 being only one of them. It is not clear from the defendant's evidence where the 3 acres came from. Despite that, however, I have already found that the entire piece of land No.541, including the 6 subdivisions, was family land, and not just the 3 acres. This to me means that it does not matter whether his brothers refund him or not because if it is true that he redeemed 3 acres, then this would just be a very small portion of his late father's land. It is not the only piece of land he has, so a refund to the defendant would not make any difference to the claim by his brothers the plaintiffs.

A final point to consider is the evidence from the tribunal, gazetted as per the tribunal land dispute act, 1990. The tribunal heard this land dispute when it was referred to it vide a court order dated 28th August, 1995. It was a consent of all parties to this suit, recorded by the Deputy Registrar. The result of the arbitration by the tribunal was filed in this court on 17th July 1998. The Tribunal decided that the land in dispute be sub-divided into five equal portions amongst the 5 brothers namely, Samson Karanja Mbogo, Josel Macharia Mbogo, David Mbugua Mbogo, Justus Mugweru Mbogo and Gerson Njoroge Mbogo.

Despite the award, the case nevertheless proceeded for hearing in court after an application by the defendant to set aside that award was WITHDRAWN on 16th June, 1999.

To turn to the prayers in the plaint, I hereby declare that the defendant holds the entire land parcel No. L.R. LOC.2 GACHARAGE/1922 in trust for himself and the plaintiffs in equal shares. Secondly, I grant an order to transfer the plaintiff's respective shares to them, and thirdly, in order to effect the transfer, I direct that a Rectification of the land register be effected to reflect the names of the plaintiffs, and not just the defendant's and fourthly, I grant an injunction order to restrain the defendant, his servants and or agents from selling or charging the said land parcel till the final determination of this suit, and finally, I award the plaintiffs the costs of this suit.

Dated at Nairobi this 9th day of February, 2007.

JOYCE ALUOCH

JUDGE